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FOREWORD

Exactly one year ago, Vilnius witnessed the opening of a novel phase in the cooperation between the Constitutional Courts of the Republic of Lithuania and three European Union’s Eastern Partnership countries – Georgia, the Republic of Moldova, and Ukraine. On 26 October 2015, the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions was established. The Association was founded in order to institutionalise the long-standing cooperation between the constitutional courts, as well as to promote and strengthen the motivation of the partner countries to participate in joint activities, with hope that the new regional cooperation of constitutional courts would open opportunities for Lithuania and other Member States of the European Union to even more actively contribute to the strengthening of democracy, the rule of law, and respect for human rights in the Eastern Partnership countries. It is expected that such cooperation will help generate new initiatives, which will ensure firm and consistent support for Eastern partners that have chosen the European integration.

In 2016, through the means of the Development Cooperation and Democracy Promotion Programme of the Ministry of Foreign Affairs of the Republic of Lithuania, this institutional partnership gained new – even greater – quality. In the course of the implementation of the project financed under this programme, an international conference of the judges of the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine – the Vilnius Forum – was held in Lithuania in late October 2016. One of its aims was to discuss common problems of the constitutional courts of the partner countries in ensuring compliance with the principles of the rule of law, and respect for international law.

Accordingly, it is with great pleasure that I present to you the results of the final activity carried out within the framework of the project “Assistance to the Constitutional Courts of Georgia, the Republic of Moldova, and Ukraine in Ensuring the Implementation and Protection of the Principles of the Rule of Law” in the form of this compendium. It includes reports and other useful material from the Vilnius Forum. The conference discussed the constitutional principle of respect for international law, the right to a fair trial, and the constitutional principle of the separation of powers, analysed the problems faced by the constitutional justice institutions of the European Union’s Eastern Partnership countries in ensuring respect for the principles of the rule of law, and sought solutions to these problems.

I am convinced that all the activities carried out within the framework of this project fulfil the need of genuine, timely and, therefore, effective cooperation between the Constitutional Courts of the Republic of Lithuania and the Eastern Partnership countries of the European Union. It is more than necessary to endorse such states as Georgia, the Republic of Moldova, and Ukraine, which are close to us in their destinies. We are united not only by the obligation to respect and protect the same European democratic values, but also by similar history and comparable present-day issues.
The implemented project was a successful and much needed continuation of our cooperation, which is closer than is usually the case, as the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine are bound together not only by a working partnership, but also by friendship based on common values. This is also determined by the fact that all constitutional courts participating at the Vilnius Forum are also partners in common initiatives, firstly, the so-called Batumi process, and are, thus, not indifferent to their obligation to foster such mutual values as respect for the independence and territorial integrity of states, democracy, the rule of law, and human rights. I strongly believe that today these joint activities – with the added value of the recently implemented project – lay a solid foundation not only for further meaningful partnership, but also for the more effective implementation and protection of the principles of the rule of law in the Baltic and Black Sea Regions.

Dainius Žalimas
President of the Constitutional Court
of the Republic of Lithuania
Participants of the Vilnius Forum (starting from left): Chairman of the Constitutional Court of Ukraine Yuriy Baulin, President of the Constitutional Court of Georgia Zaza Tavadze, President of the Constitutional Court of the Republic of Lithuania Dainius Žalimas, Justice of the Constitutional Court of the Republic of Moldova Tudor Panțiru, and Justice of the Constitutional Court of the Republic of Lithuania Danutė Jočienė

Justice of the Constitutional Court of the Republic of Moldova Tudor Panțiru and Justice of the Constitutional Court of the Republic of Lithuania Danutė Jočienė
Photos from the Vilnius Forum

Participants of the Vilnius Forum (starting from right): the representatives of the Constitutional Courts of Georgia, the Republic of Moldova, and Ukraine

Participants of the Vilnius Forum (starting from left): Prof. Dr. Rainer Arnold (University of Regensburg) and the representatives of the Constitutional Court of the Republic of Lithuania
Group photo of the participants of the Vilnius Forum

Conference moment (starting from left): Prof. Dr. Rainer Arnold (University of Regensburg) and the justices of the Constitutional Court of the Republic of Lithuania
I. REPORTS DELIVERED AT THE VILNIUS FORUM
The Constitutional Principle of Respect for International Law as an Element of the Principle of the Rule of Law

Dainius Žalimas
President of the Constitutional Court of the Republic of Lithuania

Introduction. Respect for international law is usually not explicitly included in the list of elements making up the content of the rule of law. However, in the Rule of Law Checklist, adopted by the Venice Commission, compliance with international law and, in particular, with human rights law, is enlisted as one of the elements of the principle of legality.1 Besides, according to the generally accepted substantive definition of the rule of law, the compliance of national laws with international human rights standards constitutes an inseparable part of this concept. Taking into account the humanisation of international law and the evolutive development of both substantive and procedural human rights standards, international norms become relevant for the content of the rule of law as a whole.

In this report, the main attention is placed on the constitutional principle of respect for international law to the effect that it provides the basis for the openness of the Constitution to international law. The practical implications of this principle are illustrated by the landmark constitutional justice cases that reveal how the interpretation of the Constitution in line with international law is realised in practice. In parallel, the impact of the openness of the Constitution to international law in strengthening the rule of law is revealed.

The relationship between international law and the national law of the Republic of Lithuania. Lithuanian constitutional provisions and the Lithuanian constitutional doctrine generally follow the monist model of relationship between national law and international treaties. The constitutional provision of Article 138(3), stating that “International treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania”, is interpreted by the Constitutional Court as meaning that international treaties ratified by the Seimas acquire the force of a law.2 This conclusion is based on the fact that the Seimas is the legislative institution and adopts laws, including those on the ratification of international treaties.

Taking into account that, in the Lithuanian legal system, ratified international treaties and laws passed by the Seimas have equal legal force, the Constitutional Court refuses to investigate the compliance of laws with the ratified international treaties. For example, in its decision of 25 April 2002, the Constitutional Court held that, under the Constitution, the Constitutional Court...
Court does not consider the conformity of a law with a legal act that has the force of a law. Thus, the Court refused to investigate the compliance of the challenged law (“On the Procedure of Reorganisation and Liquidation of Establishments of Culture”) with the provisions of the European Charter of Local Self-Government.3

However, even though ratified international treaties and laws have comparable legal force, in view of the constitutional tradition of respect for international law, as reflected in Article 135(1) of the Constitution,4 the Constitutional Court has held that the Republic of Lithuania may not disregard international treaties if its laws contain a different legal regulation.5 According to the interpretation of the Constitutional Court, the Constitution consolidates the principle that, in cases where a national legal act (with the exception of the Constitution itself) establishes a legal regulation that competes with the one established in an international treaty, the international treaty must be applied.6 Thus, a collision between the provisions of a law (or any other national legal act) and a ratified international treaty is an issue of the application of law and needs to be resolved by taking into account the priority of the application of the ratified international treaty.7

Nevertheless, such a monist model, which implies a hierarchical relationship of international law with respect to national law, may be applied inasmuch as it is related to domestic legal acts other than the Constitution of the Republic of Lithuania. That is, ratified international treaties take precedence over all Lithuanian national legal acts except the Constitution.

The constitution-centric concept of the Lithuanian legal system determines that no law or other legal act, including international treaties of the Republic of Lithuania, may be in conflict with the Constitution. The Constitutional Court, in its ruling of 5 September 2012,8 emphasised that, in the course of implementing international obligations in domestic law, it is necessary to take account of the principle of the supremacy of the Constitution. This principle is consolidated in Article 7(1) of the Constitution and prescribes that “Any law or other act that contradicts the Constitution shall be invalid”. The Constitutional Court noted that, by itself, this constitutional provision cannot invalidate an international treaty, but it requires that the provisions of international treaties are not in conflict with the provisions of the Constitution. In this connection, the Constitutional Court concluded that, in cases where a legal regulation consolidated in a ratified international treaty in force competes with a legal regulation established in the Constitution, the provisions of such an international treaty do not take precedence in terms of application.9

Therefore, the relationship between international law and the Constitution is best described by an approach based on a realist (or coordination) theory. This approach recognises certain autonomy of national constitutions and that of the international legal system, as well as the superiority of each of them within the area of their operation. In order to avoid the conflict of the national Constitution with the obligations under international law, such an approach emphasises the necessity of the coordination and alignment of the Constitution with international law.

**The constitutional principle of respect for international law (pacta sunt servanda) as the basis for the openness of the Constitution to international law.** In this context, it is important

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3 The Constitutional Court’s decision of 25 April 2002.
4 Article 135(1) of the Constitution states that, “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 its citizens, and their basic rights and freedoms, and shall contribute to the creation of the international order based on law and justice”.
5 Among others, the Constitutional Court’s ruling of 14 March 2006.
6 Ibid.
7 The Constitutional Court’s decision of 9 May 2016.
8 The Constitutional Court’s ruling of 5 September 2012.
9 Ibid.
to note that the Lithuanian Constitution both explicitly and implicitly consolidates interrelated principles that make it possible to minimise potential tensions between national and international law and lead to the openness of the Constitution towards the influence of the international legal system. The most important principle in this context is that of respect for international law (pacta sunt servanda).

In its ruling of 24 January 2014, the Constitutional Court noted that respect for international law is a constitutional value and an inseparable part of the principle of the rule of law.

The textual basis of the principle of pacta sunt servanda is Article 135(1) of the Constitution. This article refers to international law in the context of Lithuanian foreign policy. It is stated that, “in implementing its foreign policy, the Republic of Lithuania shall follow the universally recognised principles and norms of international law”. However, here it is important to take into account that the Constitution, as supreme law, comprises not only the letter but also the spirit. This position was adopted by the Constitutional Court in its ruling of 9 December 1998 concerning the death penalty. Relying on the overall interpretation of the Constitution and, in particular, on the principles of an open civil society and the rule of law, the Constitutional Court held that, recognising the norms of international law, the State of Lithuania may not apply to the people of this country any such standards that would substantially differ from international ones. In this way, the Constitutional Court not only interpreted the constitutional provision of Article 135(1) in an extended manner, but it also recognised the importance of international law as the minimum constitutional standard for human rights protection under national law. In the subsequent constitutional jurisprudence, Article 135(1) of the Constitution is interpreted as the constitutional provision enshrining the constitutional principle of pacta sunt servanda. The core of this principle is the imperative of fulfilling, in good faith, the obligations assumed by Lithuania under international law, including international treaties and customary international law.

The constitutional principle of pacta sunt servanda is regarded as a legal tradition of the restored independent State of Lithuania. One of the grounds for such status of this principle is indicated in the Constitutional Court’s ruling of 14 March 2006. The Court stated that the adherence of the State of Lithuania to the universally recognised principles of international law was declared in the Act “On the Re-establishment of the State of Lithuania”, adopted by the Supreme Council of the Republic of Lithuania on 11 March 1990. However, the beginnings of this legal tradition can be traced in another constitutionally significant act – the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949. This document, adopted in the circumstances of the occupation of Lithuania by the USSR, is one of the documents that laid down the constitutional foundations for the independent democratic State of Lithuania. Paragraph 22 of this Declaration proclaimed the resolve of the State of Lithuania to contribute to the efforts of other nations to establish global peace founded on justice and freedom and based on the Atlantic Charter, the Universal Declaration of Human Rights, and other international legal acts. In this way, a favourable approach towards international law was clearly expressed.

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10 The Constitutional Court’s ruling of 24 January 2014.
12 The Constitutional Court’s ruling of 14 March 2006.
The principle of *pacta sunt servanda* is closely interrelated with two other constitutional principles, leading to the openness of the Constitution to international law. These principles are the principle of an open, just, and harmonious civil society and the principle of the geopolitical orientation of the state.

The principle of an open, just, and harmonious civil society is enshrined in the Preamble to the Constitution. It has been consistently interpreted by the Constitutional Court as implying openness to universal democratic values and integration into the international community founded on these values. Therefore, society and the state cannot be isolated from international rules and, in particular, human rights standards.

The principle of the geopolitical orientation of the state is grounded in the commonness of values shared between Lithuania and other democratic European and North American states. This principle is expressed in the text of the Constitution both in the negative (or restrictive) and positive (or prescriptive) aspects. The negative aspect of the geopolitical orientation of the State of Lithuania is expressed in the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”, and the positive aspect is embodied in the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”. As the Constitutional Court stated in its ruling of 24 January 2014, the geopolitical orientation of the state means the membership of the Republic of Lithuania in the EU and NATO, as well as the necessity to fulfil international obligations related to the said membership. Since the principle of the geopolitical orientation of the state is closely interrelated with the historical commitment of the State of Lithuania to the principles of real democracy (including respect for human rights), this principle functions as a certain value-based guideline in taking on international obligations and implies the particular importance of European standards for national law.

Both the principle of an open, just, and harmonious civil society and the principle of the geopolitical orientation of the state supplement and reinforce the principle of respect for international law. Jointly, these principles serve as certain bridges between the Constitution and international law and provide the basis for the constitutional presumption of the compatibility of international law with the Constitution. In other words, they lead to the openness of the Constitution towards the international legal system and, in particular, towards the European standards of human rights and European law. At the same time, these principles give rise to the duty of the Constitutional Court, when interpreting the provisions of the Constitution, to pay regard to the international legal context (i.e., the duty of consistent interpretation).

**Landmark cases illustrating the consistent interpretation of the Constitution with international law.** Adherence to international human rights standards is considered to be an inseparable part of the substantive concept of the rule of law. Therefore, further attention is given to three constitutional justice cases demonstrating the importance of the consistent interpretation of the Constitution with international law for protecting human rights on the national level and strengthening the rule of law.

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15 See the Constitutional Court’s ruling of 18 March 2014.
16 The Constitutional Court’s ruling of 24 January 2014.
17 See the Constitutional Court’s rulings of 7 July 2011 and 24 January 2014.
18 The geopolitical orientation of the State of Lithuania, as well as the principle of respect for international law, may also be regarded as part of the constitutional tradition of the State of Lithuania deriving from the same Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949. By expressing the allegiance of Lithuania to the Universal Declaration of Human Rights, adopted only two months before, the Declaration of the Lithuanian Freedom Fight Movement proclaimed the aspiration of integration into the community of Western democratic states. At the same time, it was implied that the State of Lithuania had chosen the way of geopolitical orientation that was different from that of the occupant Soviet Union, which, as is known, rejected the provisions of the Universal Declaration of Human Rights.
The case concerning the constitutionality of the death penalty (ruling of 9 December 1998). The first of the cases at issue was decided in 1998 and concerned the constitutionality of the death penalty. After the politicians referred this sensitive issue to the Constitutional Court, it had to decide on the approach to be followed: the formal one or that based on the perception of the living Constitution. From a formal perspective, the Constitutional Court could have answered that the Constitution does not prohibit the death penalty, since there is no mention of it in the Constitution. Moreover, at that time Lithuania was not yet a party to Protocol 6 of the European Convention on Human Rights concerning the abolition of the death penalty. However, the Constitutional Court took the approach based on the needs of an open society, which must respect innate human rights and may not be isolated from the trends of humanisation of international law.

The Constitutional Court held that the constitutionality of the death penalty must be investigated from various aspects, including the need to consolidate a democratic and humanistic legal order, the trends in the international community regarding the death penalty, and the international obligations of the State of Lithuania.

The reasoning of the Constitutional Court was based on two lines of arguments: firstly, the necessity to protect innate human rights, especially the right to life and the right not to be subjected to cruel or degrading treatment, and, secondly, the clear trends towards the abolition of the death penalty in international law.

With regard to innate human rights, the Constitutional Court held that these rights are values unquestionably recognised by the international community; human life and dignity were distinguished as exceptional values, protection of which and respect for which must be ensured by the Constitution. This reasoning can be linked to the case-law of the European Court of Human Rights, under which the provisions of the Convention on the right to life and the right not to be subjected to torture and cruel or degrading treatment are regarded as the most fundamental provisions enshrining the core values of the democratic societies making up the Council of Europe.19 Further, the Constitutional Court noted that the death penalty leaves no possibility of rectifying a mistake if a person who does not deserve it is sentenced to death. Besides, the death penalty deprives the convict of human dignity, as the state in this case treats the person as a mere object to be eliminated from the human community. Taking into account these arguments, the Constitutional Court held that such a penalty is incompatible with the constitutional provisions establishing the innate nature of human rights (Article 18), the right to life (Article 19), and the prohibition of torture and cruel or degrading treatment (Article 21(3)).

Regarding international law, it should be noted that it was in this case that the Constitutional Court, relying on the integral interpretation of the Constitution, recognised the importance of international law as the minimum constitutional standard for human rights protection under national law. It is important to note that, in this case, the Constitutional Court concentrated not on the formal obligations of the State of Lithuania but placed an emphasis on the evolving international trend towards the abolition of the death penalty. In this regard, the Court invoked both universal and regional documents, including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, and multiple soft-law documents adopted by the UN General Assembly, the Council of Europe, and the European Parliament. The Constitutional Court came to the conclusion that the abolition of the death penalty was increasingly regarded in Europe as a universally recognised norm. In this context, it was noted that, at that time, Lithuania was one of only five states of the Council of

19 Soering v. the United Kingdom [Plenary], application no. 14038/88, Judgment of 7 July 1989, § 88; McCann and Others v. the United Kingdom [GC], application no. 18984/91, Judgment of 27 September 1995, § 147.
Europe that had not yet signed Protocol No. 6. The Court also took into account the “evident trend” in criminal law of European states towards the humanisation of criminal punishments.

All these arguments, associated with increasing acceptance within the international community of the need to abolish the death penalty, had a strong reinforcing, if not decisive, role leading to the conclusion on the unconstitutionality of the penalty that, in the words of the Council of Europe, serves “no purpose in a civilised society governed by the rule of law and respect for human rights”.20 At the same time, this case gives evidence that, already in 1998, the Constitutional Court adhered to the duty to interpret the Constitution consistently with the European Convention on Human Rights. Taking into account the position of the Council of Europe and the trends of Convention law towards the abolition of the death penalty, the Constitutional Court spoke in favour of the application of the constitutional standard of human rights protection that was even higher than required under the formally binding international obligations.

**The case concerning the constitutionality of the State Family Policy Concept (ruling of 28 September 2011).** Another perfect example when the Constitution was interpreted consistently with international law and, in particular, with the European Convention on Human Rights is related to the case concerning the constitutionality of the State Family Policy Concept.

In 2008, the Seimas adopted a resolution approving the State Family Policy Concept. According to this Concept, family was defined as deriving exclusively from marriage. Thus, even natural families (a single parent who has not been married and his/her child) were not considered a family. Also, a man and a woman who are not married but live together and raise children were not regarded as a family. This document, whose provisions had to serve as guidelines for future legislation, generated many discussions as to its discriminative character. For example, according to this Family Policy Concept, only marriage-based families were to be entitled to receive more favourable conditions for gaining access to housing, social assistance, or other support. In principle, this case concerned discrimination, which had to be prevented.

In assessing the compliance of the disputed provisions with the Constitution, the Constitutional Court had to interpret the constitutional meaning of “family”. In this respect, the Court based its argumentation on three main aspects.

Firstly, it was emphasised that, although the institutes of marriage and family are entrenched in the same Article 38 of the Constitution and are closely interrelated, this does not mean that the Constitution does not protect families other than those founded on the basis of marriage. That is, the Court made a distinction between two constitutional notions – the marriage and the family.

Secondly, the Constitutional Court pointed to the obligation of the state to regulate family relations in such a manner that creates no preconditions for discrimination against certain participants of family relations (as, for instance, a man and a woman who live together without having registered their union as a marriage, their children or adopted children, one of the parents who is raising a child, etc.). The Court also noted that, in order to comply with the constitutional principle of a state under the rule of law, the Seimas, when regulating family relations, must observe the requirements stemming from the equality of rights, human dignity, and respect for private life.

Thirdly, the Constitutional Court explicitly acknowledged that the constitutional concept of the family must be interpreted in view of the international obligations of the State of Lithuania under the European Convention on Human Rights. Such a statement by the Constitutional Court testifies not only to the explicit recognition of Convention law as a source of interpretation of the Constitution, but it also implies the duty of the Constitutional Court to interpret the Constitution

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in line with the Convention. In particular, the Constitutional Court took into account that the concept of “family life” in the case-law of the European Court of Human Rights is not confined to the notion of the traditional family founded on the basis of marriage. Other types of the relationship of living together, characterised by the permanence of the relationship between persons, the character of the assumed obligations, common children, etc., are equally defended in the sense of Article 8 of the Convention (respect for private and family life). Principally, the Constitutional Court invoked the cases of *Marckx v. Belgium* (1979), *Kroon and Others v. the Netherlands* (1994), *Keegan v. Ireland* (1994), and *El Boujaidi v. France* (1997).

Based on these three aspects, the Constitutional Court held that “the constitutional concept of the family is based on mutual responsibility between family members, understanding, emotional affection, assistance, and similar relations, as well as on the voluntary determination to take on certain rights and responsibilities, i.e. the content of relationship, whereas the form of the expression of relationship has no essential significance for the constitutional concept of the family”. Actually, the key elements of this concept were in essence “borrowed” from the case-law of the European Court of Human Rights and foreign Constitutional Courts as, for example, the Constitutional Court of the Czech Republic.

Finally, it was held that the Seimas, having narrowed the content of the notion of the family, did not observe the concept of the family as a constitutional value.

Thus, the case-law of the European Court of Human Rights had a decisive impact on the interpretation of the constitutional notion of the family and inspired the Constitutional Court to give priority to the content of family relationship rather than its form. Such an approach allowed the Constitutional Court to create the preconditions for precluding discriminatory regulation in the future and guaranteeing the equal protection of persons living in different types of families.

*The case concerning criminal responsibility for genocide (ruling of 18 March 2014).* The third case in which international law had a weighty significance for interpreting constitutional guarantees concerned responsibility for genocide.

This case originated in the context of the criminal proceedings against persons who were accused of perpetrating genocide in 1951–1965 on the territory of the occupied Republic of Lithuania. Specifically, the defendants were accused of the actions committed with intent to physically destroy the part of Lithuania’s residents who belonged to a separate political group – participants of the armed resistance against the Soviet occupation (Lithuanian partisans). The petitioners – several Lithuanian courts – doubted the constitutionality of criminal responsibility for genocide directed against persons belonging to social or political groups, i.e. groups not included in the definition of genocide according to the universally recognised norms of international law.

In its ruling of 18 March 2014, the Constitutional Court stated that the criminal laws of the Republic of Lithuania that are related to responsibility for international crimes, including genocide, may not establish such standards for the protection of human rights that would be lower than those established under the universally recognised norms of international law. Disregard for the said requirement would be incompatible with the principle of *pacta sunt servanda* and the pursuit for an open, just, and harmonious civil society and a state under the rule of law. Thus, the Constitutional Court further developed the principle stated in the case concerning the death penalty, decided in 1998. Based on the conception of international law as a standard for national law, the Constitutional Court developed two main lines of reasoning.

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21 The Constitutional Court’s ruling of 28 September 2011.
22 The Constitutional Court’s ruling of 28 September 2011.
23 The Constitutional Court’s ruling of 18 March 2014.
The first line of reasoning concerned the constitutionality of the definition of genocide that was broader than that established in international law. After analysing the relevant international treaty law and jurisprudence of international courts and tribunals, the Constitutional Court noted that states are under the international legal obligation to adopt the respective national legislation establishing criminal responsibility for genocide. The practice of more than 20 states, including several European states, revealed that this obligation is perceived as not precluding a certain discretion, based on the concrete historical, political, social, and cultural context, to establish, in national law, a broader definition of the crime of genocide compared to that established under the universally recognised norms of international law. Such a possibility is not prohibited under the Genocide Convention or the Rome Statute, either. Taking into account that the inclusion of social and political groups into the definition of genocide was determined by the Lithuanian historical, political, and legal context, i.e. the legacy of the occupying Soviet totalitarian regime, including massive repressions against Lithuanian residents (persecutions due to political reasons or social status), the Constitutional Court ruled that the impugned provision of the Criminal Code, defining genocide as directed against, among others, social or political groups, was not in conflict with the Constitution.

The second line of reasoning in this case concerned the retroactive application of the broader definition of genocide. When interpreting the content of the constitutional principle of *nullum crimen, nulla poena sine lege*, the Constitutional Court took into account that the universally recognised norms of international law permit an exception to this principle, by providing for the retroactivity of national laws establishing criminal responsibility for international crimes as defined by the universally recognised norms. In addition, the Constitutional Court recalled that, under Article 7 of the European Convention on Human Rights, responsibility for an act constituting a crime under international law at the time when it was committed may also be imposed in cases where the act did not constitute a crime under the national law valid at the time when the crime was committed. Thus, the exception to the principle of non-retroactivity cannot be applied to crimes defined exclusively under national law. Therefore, persons may not be brought to trial for actions committed prior to the entry into force of the broader concept of genocide in cases where such actions do not meet the definition of genocide under international law.

At the same time, this ruling should not be perceived as leading to impunity. The Constitutional Court emphasised that, in cases where the actions committed during the period of the Soviet occupation against particular political or social groups of the Lithuanian population do not meet the definition of genocide under international law, it should be assessed whether such actions qualify as crimes against humanity or war crimes.

Based on this reasoning, the provisions of the Criminal Code establishing that a person could be retroactively brought to trial for genocide directed against persons belonging to a social or political group (i.e., groups not covered by the definition of genocide under the universally recognised norms of international law) were ruled to have been in conflict with the Constitution, including the principle of a state under the rule of law.

Thus, this case demonstrates the fundamental impact of international law in reinforcing the requirement of non-retroactivity, which is an important law-making criterion and an element of the rule of law.

Certainly, these three cases are not the only examples of consistent interpretation of the Constitution with international law. For example, the content of the constitutional right to a fair trial, which is regarded by the Venice Commission as a separate element of the rule of law, was also developed in the jurisprudence of the Constitutional Court on the basis of the case-law of the European Court of Human Rights.24

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Limits on constitutional amendments. As illustrated by the overviewed examples, the jurisprudence of the Lithuanian Constitutional Court reveals a dynamic approach towards the openness of the Constitution to international law. In this context, it is important to mention that interpretation consistent with international law has one more major implication – it leads to certain limitations on constitutional amendments.

The Constitutional Court formulated the doctrine of unconstitutional constitutional amendments in its rulings of 24 January 2014 and 11 July 2014. The essence of this doctrine is the notion of substantive limitations on constitutional amendments. Such limitations stem from the overall constitutional regulation and may be either absolute (“eternal clauses”) or relative (conditional). Some of them are directly linked to international law.

As for absolutely unamendable (or “eternal”) constitutional provisions, the Constitutional Court held that no such amendments to the Constitution may be adopted that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state. Otherwise, the essence of the Constitution itself would be denied. Thus, the values inseparable from the concept of the rule of law – innate human rights and democracy – have been recognised to have absolute protection, as they form the core of the Lithuanian constitutional identity. In addition, the Court took into consideration the progressive development of international law, in particular, as reflected in the Guidelines for Constitutional Referendums at National Level, adopted by the Venice Commission in 2001. According to these Guidelines, a text submitted to a constitutional referendum must not be contrary to international law or the Council of Europe’s statutory principles (democracy, human rights, and the rule of law). In principle, these values are equivalent to those that enjoy absolute protection under the Lithuanian Constitution.

Conditional substantive limitations are aimed at preserving the integrity (or inner unity) of the Constitution. Thus, to the extent that eternal clauses are not affected, certain provisions can be changed only together with the intrinsically related provisions. It is especially at this point that the constitutional principle of respect for international law comes into play.

With regard to international legal obligations undertaken by the State of Lithuania, the Constitutional Court, in its ruling of 24 January 2014, noted that the principle of pacta sunt servanda implies that it is inadmissible to rely on national law, including the Constitution, in order to justify failure to perform international obligations. In view of the necessity to preserve the inner unity of the Constitution, the Court held that the Constitution does not permit any such constitutional amendments that would deny the international obligations of the Republic of Lithuania and, at the same time, the constitutional principle of pacta sunt servanda, as long as the said international obligations are not renounced according to the norms of international law. Thus, the norms of international law are presumed to be compatible with the Constitution, and the prohibition is formulated against the violation of this harmony by means of amendments to the Constitution. This approach also serves as a preventive safeguard against possible conflicts between the Constitution and international law and against attempts to avoid international obligations.

Thus, the doctrine of unconstitutional constitutional amendments not only ensures the highest possible legal protection of democracy and innate human rights, but it also provides special protection for international obligations of the State of Lithuania, thereby reinforcing the concept of international law as a standard of legality.

Limits on openness to international law. It is important to emphasise that the openness of the Constitution to international law should not be understood as denying the supremacy

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25 See the Constitutional Court’s ruling of 11 July 2014.
26 The Constitutional Court’s ruling of 24 January 2014.
of the Constitution in the Lithuanian legal system. Although it is clear from the constitutional jurisprudence that the Constitution is “friendly” to international law, nevertheless, there are limits determined by the supremacy of the Constitution and the system of constitutionally consolidated values. Due to the fact that the Constitution and international law are inherently autonomous and have superiority in their respective spheres, certain incompatibilities may arise between international legal norms and constitutional norms.

So far, there has been only one instance of direct incompatibility between the Constitution and international law, i.e. the European Convention on Human Rights. This case concerned a former President of Lithuania, Rolandas Paksas, who was removed from office after impeachment proceedings in 2004. On 25 May 2004, the Constitutional Court adopted the ruling in which it held that a person who had grossly violated the Constitution and breached his oath and, as a result of this, was removed from office could never again stand in elections for an office requiring an oath to the State of Lithuania. On 6 January 2011, in the case of Paksas v. Lithuania, the Grand Chamber of the European Court of Human Rights held that such a permanent disqualification from standing in parliamentary elections was disproportionate and constituted a violation of Article 3 of Protocol No. 1 to the Convention.

Thus, a divergence occurred between the positions of the Constitutional Court and the European Court of Human Rights, as these courts took different approaches towards the public interest. The Constitutional Court placed more weight on such constitutional values as the security of the state and the loyalty of high-ranking officials to the state, and emphasised the significance of the constitutional institute of an oath; whereas the European Court of Human Rights gave priority to the public interest in ensuring freedom of choice for the people in electing the legislature, even though this would include electing candidates with doubtful loyalty to the state.

This divergence of the jurisprudences led to one more landmark case, in which certain limits to the openness of the Constitution to international law were defined. The Constitutional Court, in its ruling of 5 September 2012, held that, in itself, the judgment of the European Court of Human Rights may not serve as a constitutional basis for the reinterpretation (correction) of the official constitutional doctrine. A reinterpretation is not permitted if, in the absence of relevant amendments to the Constitution, it would substantially change the overall constitutional regulation, distort the system of the values entrenched in the Constitution, or undermine the guarantees for the protection of the supremacy of the Constitution in the legal system. It should be noted that the European Court of Human Rights examined the situation of Rolandas Paksas only in terms of parliamentary elections. Whereas the Constitutional Court had to take into account that the constitutional institute of an oath and the requirement of loyalty to the state are applicable to much broader circle of officials than members of the Parliament and, therefore, have wider implications, including those related to the protection of national security and statehood.

On the other hand, the Constitutional Court emphasised that the constitutional principle of *pacta sunt servanda* implies the duty for the Republic of Lithuania to remove the incompatibility of the provisions of Article 3 of Protocol No. 1 to the Convention with the Constitution, i.e. to adopt appropriate amendment(s) to the Constitution.

The issue of incompatibility was also dealt with in the above-mentioned case concerning criminal responsibility for genocide. In that case, the Constitutional Court held that the incompatibility between an international treaty of the Republic of Lithuania and the provisions

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27 The Constitutional Court’s ruling of 25 May 2004.
29 The Constitutional Court’s ruling of 5 September 2012.
of the Constitution must be removed either by renouncing the international obligations in the manner prescribed by the norms of international law or by making the appropriate amendments to the Constitution.

However, as far as the protection of human rights is concerned, the discretion to choose between the above-mentioned options is limited. In view of the perception of human rights as fundamental constitutional values and the constitutional principle of an open, just, and harmonious civil society, as well as the principle of the geopolitical orientation of the state, renouncing international obligations in the sphere of human rights would not be a constitutionally justified option.

Conclusions. In summarising, it should be emphasised that, supplemented by the principles of an open, just, and harmonious civil society and the geopolitical orientation of the state, which imply the integration of the State of Lithuania into the community of democratic states, the constitutional principle of respect for international law leads to the openness of the Constitution towards international law.

This openness gives rise to certain implications. Firstly, international law is perceived as the minimum necessary constitutional standard for national law. Secondly, the openness of the Constitution to international law provides the basis for the constitutional presumption of the compatibility of international law with the Constitution. Thirdly, it gives rise to the duty of the Constitutional Court, when interpreting the provisions of the Constitution, to pay regard to the international legal context (the duty of consistent interpretation).

Actually, in cases where the official constitutional doctrine on a specific issue is not sufficiently developed, the Lithuanian Constitutional Court internalises the provisions of international law. This means that the provisions of the Constitution are given the same meaning and content as under the corresponding norms of international law. In other words, international law serves as a direct source of inspiration for the Constitutional Court in forming and developing the official constitutional doctrine. At the same time, constitutional law is continuously supplemented with the elements derived from international law. This process helps to strengthen different elements of the rule of law both on the national and international scale.

Though such a favourable approach towards international law by the Constitutional Court might seem unconventional to some constitutionalists, it is necessary in order to align national and international law and to ensure the harmonious development of these legal systems. Finally, the favourable approach taken by Lithuania towards international law can be linked to the historical experience of Lithuania: during the 50 years of the Soviet occupation, due to international law, Lithuania retained the continuity of its statehood and, ultimately, was able to restore its independence.
The Principle of the Rule of Law in the Decisions of the Constitutional Court of Ukraine

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Chairman of the Constitutional Court of Ukraine

(Contribution at the Vilnius Forum for representatives of the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova and Ukraine in the framework of the development cooperation project “Assistance to the Constitutional Courts of Georgia, the Republic of Moldova, and Ukraine in Ensuring the Implementation and Protection of the Principles of the Rule of Law”, Vilnius 24–25 October 2016)

Dear colleagues!

(1).

I would like to start my presentation with words of gratitude to the project organisers that have identified the issues of the implementation and protection of the principle of the rule of law in national legal systems as their key focus. Notably, the project focuses on the practices of such countries of young democracy that have gone or are going through times of bad political crisis, tough economic downturns and, in addition, powerful destructive measures, including forceful intervention, on the side of the Russian Federation, with deplorable consequences for territorial integrity of these countries. They include Georgia, the Republic of Moldova and Ukraine. It is particularly hard under such conditions to uphold constitutional legal order, functioning economy, and social and legal protection of citizens, something that constitutes probably the most significant challenge to state and legal institutions of these countries today, including the constitutional courts.

Political turmoil and the manifestations of crisis in economy, as a rule, lead to the destabilisation of the legislative framework of a state, which is supposed to serve the base for law enforcement and practices of courts. It creates a risk of losing criteria for decisions on disputes and prosecution, which in turn leads to the danger of arbitrary decisions by justice bodies. The legitimate rights and interests of citizens lose the support they need. Under such conditions, preventing the downfall of the legal security of the public is vital. This is where the body of constitutional supervision must weigh in and use its competence to restrict the legislator and to suspend a law that fails to meet basic public values and allows for injustice.

In this context, the principle of the rule of law, with social justice as its only purpose and a range of subprinciples for achieving it, serves as a key legal tool to enable the Constitutional Court to supervise the legislation and as a criterion of the permissibility of legislative changes and innovations.

(2).

Since the very establishment of the Constitutional Court of Ukraine, the principle of the rule of law has operated as the reference point of its activities. The Constitution of Ukraine has
provided the constitutional legal base for it, with a direct indication in its Article 8.1 that “in Ukraine, the principle of the rule of law is recognised and effective”. It is, therefore, challenging to identify key acts of the Court that played a definitive role for implementing and protecting the principle of the rule of law, out of many. One would need a simple and clear criterion for selecting such acts, while criteria might differ.

We have chosen the criterion that reflects the evolution of comprehension in the practice of the Constitutional Court of Ukraine of the principle of the rule of law as a complex entity, which assumes justice as an idea and essential value of legal regulation as well as a range of more applicable principles, such as the primacy of the Constitution, the independence of the justice system, proportionality, etc. which, if implemented comprehensively, enable to uphold justice and to ensure the rule of law.

The following presentation briefly outlines the reflection and implementation of the principle of the rule of law and its components in the acts of the Constitutional Court of Ukraine.

(3).

Concept of the rule of law

The Constitutional Court of Ukraine has expressed its conceptual vision of the principle of the rule of law and undertook an attempt to define it at the conceptual level in the Decision dated 2 November 2004, No. 15-rp/2004, upon the constitutional petition of the Supreme Court of Ukraine on the conformity with the Constitution of Ukraine (constitutionality) of Article 69 of the Criminal Code of Ukraine (the case concerning more lenient punishments sentenced by court).

The Decision says: “The rule of law implies the supremacy of law in a society. The rule of law implies its accomplishment in the sphere of legislation and law enforcement, in particular, in a legislation which by its purpose has to be encouraged by the idea of social justice, freedom and equality. One implication of the rule of law is that law is not restricted to legislation as one of its forms, but rather comprises other social regulatory means such as ethical norms, traditions and customs legitimised on a certain cultural level of society as they have been worked out during its historical development. Found in all of these elements is a characteristic consistent with the justice ideology and the idea of law largely reflected in the Constitution.”

The legal and academic communities of our country displayed quite mixed reactions to the above-quoted attempt by the Constitutional Court of Ukraine to define one of the fundamental concepts behind its own activities. Still, this doctrinal basis has served as a framework for further development by the Court of its vision of the rule of law in subsequent acts; it is also used by ordinary courts. The above-mentioned legal position has limited the still well-established trend in Ukraine to reduce the concept of law to the concept of legislation, as well as seeing the rule of law as merely an absolute priority of state regulatory acts among other sources of law; it has also unambiguously accepted justice as the sense-making origin of law. Even if imperfect, this Decision has yet introduced a model for interpreting the principle of the rule of law.

In its very recent Decision dated 8 September 2016, No. 6-rp/2016, upon the petition of the Ukrainian Parliament Commissioner for Human Rights (Ombudsman) concerning the unconstitutionality of the provisions of the Law of Ukraine “On Freedom of Conscience and Religious Organisations” on authorisation rather than notification procedure of peaceful religious rites, the Constitutional Court of Ukraine has applied a similar understanding of the principle of the rule of law, which, by its nature, protects ideas of social justice, freedom and equality. The court declared these norms of the law contradictory to the requirements of justice and equality, and so incompatible with the fundamentals of the Constitution of Ukraine that provide for notification procedure of any peaceful assembly, both religious and non-religious.
Supremacy of the Constitution

To a certain degree, the principle of the rule of law and that of the supremacy of the Constitution are conceptually identical: both aim at protecting security, freedom and dignity of an individual, and making him/her independent on an arbitrary rule, including by his/her own government; in a purely legal meaning, the Constitution turns the principle of the rule of law, as well as other principles that democratic law-based society is built on, into a regulatory concept out of social philosophy concept. The same article of the Ukrainian Constitution enshrines the principle of its supremacy and that of the rule of law. According to Article 8.2 of the Constitution of Ukraine, “the Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it”.

Decisions adopted by the Constitutional Court of Ukraine have repeatedly upheld the principle of the supremacy of the Constitution. In this context, I would like to quote just one of them, dated 27 March 2000, No. 3-rp. Apart from stressing that the Constitution of Ukraine has the supreme legal force and its norms are directly applicable, something that actually repeated the Constitution itself, Item 4.1.3 of the reasoning part of the Decision also noted that its norms constitute the “primary” and “essential” legal framework for appropriate institutions of electoral law (as the Decision ruled on the case of a national referendum): “It is though obvious that constitutional norms constitute the primary and essential legal framework for the functioning of all state and legal institutions of Ukraine”.

Independence of judiciary

Independent judiciary is crucial for justice and for law as a tool of ensuring it. Therefore, the presence of independent judiciary in society is a natural component of the principle of the rule of law. The principle of the independence of judiciary has been repeatedly reiterated in the international legal instruments of both universal and regional scale. Almost all constitutions contain provisions on independent courts. The Ukrainian Constitution is not an exception, with its provision in Article 129.1 that “in the administration of justice, judges are independent and subject only to the law” of fundamental importance from the point of view of building and running the activities of courts as state institutions and those of judges as public figures in charge of the administration of justice.

A whole range of the decisions of the Constitutional Court of Ukraine touch upon the independence of courts and judges in a certain way. They also interpret this independence as a crucial precondition of respect for human and citizens’ rights and freedoms in Ukraine. Out of many, I would like to point to the Decision dated 8 June 2016, No. 4-rp/2016, in the case of the lifelong monthly monetary allowance of retired judges. This recent Decision by the Court summarizes its consistent position on courts and judges as an indispensable element in “the mechanism of the protection of human and citizens’ rights and freedoms and a natural precondition of the realisation of the right to judicial protection under Article 55.1 of the Fundamental Law”. This was a challenging decision to make, since it touched upon the constitutionality of legislative norms targeting drastic cuts on the welfare expenses of the state budget and significantly limiting the rights of judges to social protection. However, the judges of the Constitutional Court of Ukraine have a very good idea of the importance of economic, organisational, procedural, and other guarantees of the independence of courts and judges for ensuring the protection of citizens’ rights, and implementing the principle of the rule of law in the state.
Proportionality

This is the most important component of the principle of the rule of law, since, from the perspective of justice, proportionality is mandatory when defining the rights and duties of persons at law both at normative level and on case-by-case basis. Rights must not be superfluous or harmful for another person’s rights; duties must not be unbearable, detrimental for constructive innovations or miss the purpose. Obviously, proper respect for this principle is absolutely vital for the effective protection of citizens’ rights and freedoms.

In this context, I would like to refer to some of recent decisions of the Constitutional Court of Ukraine, clearly and consistently outlining this principle. For instance, in its Decision No. 3-rp dated 8 April 2015, in the case upon the constitutional petition of the Ombudsman of the Ukrainian Parliament concerning the constitutionality of the provisions of the Code of Administrative Proceedings of Ukraine, according to which “decisions of a local general court as administrative court in cases concerning decisions, actions or omission of subjects of authority on bringing to administrative liability shall be final and may not be appealed”, the Court noted that “it is allowed to restrict the right to challenge in court the decisions by appeal and cassation […], yet it may not be arbitrary and unfair. This restriction should be established by the Constitution and laws of Ukraine only; shall pursue the legitimate aim; shall be provided by the public need to achieve this aim, proportionate and reasonable. In case of restriction of the right to challenge court decisions, the lawmaker is obliged to introduce a legal regulation that will allow to achieve a legitimate aim optimally with a minimum interference with the implementation of the right to judicial protection and not to violate the substantive content of such right” (Item 2.2.2 of the reasoning part). Based on this, the Court declared unconstitutional the lawmaker’s decision to restrict the right “to challenge in court of appeal the decisions of local general courts as administrative courts in cases concerning rulings of the subjects of authority on imposing administrative penalties that are proportionate to the penalties established by the Criminal Code in terms of their severity”. It considered such a restriction disproportionate and inconsistent in terms of its purpose and measures taken for its achievement. The same viewpoint and a similar reasoning underpinned the Decision dated 1 June 2016, No. 2-rp/2016, in the case upon the constitutional petition of the Ombudsman of the Ukrainian Parliament concerning the unconstitutionality of some provisions of the Law of Ukraine “On Psychiatric Care”. According to these provisions, a person recognised as legally incapable in the manner prescribed by law is hospitalised at a psychiatric institution at the request or upon the consent of his/her guardian without a court’s decision made as a result of the verification of good reasons and a need for such forceful hospitalisation. The Court considered that “such hospitalisation by its nature and consequences is a disproportionate restriction of the constitutional right of incapable persons to freedom and personal inviolability” and confirmed that “it should be carried out […] exclusively upon the court’s decision pursuant to Article 55 of the Fundamental Law” of Ukraine (Items 2.1 and 3 of the reasoning part).

Legal certainty

Uncertainty, ambiguity and blurred legal wordings, especially in legislation, constitute a very dangerous phenomenon in terms of ensuring proper legal regulations and the protection of human rights. Along with confusing citizens and disabling them from seeing the legal implications of their actions they undertake in pursuing their own interests, they also result in different stances taken by courts on the same problems. Because of its long experience in interpreting laws applied differently by courts in similar situations, resulting in violation of rights, the Constitutional Court of Ukraine has a very good understanding of the importance of the principle of legal certainty. Out of its many decisions based on this principle, I will mention just two.
The Decision dated 22 September 2005, No. 5-rp/2005 (case on permanent use of land plots) noted that the constitutional principles of equality and justice imply the requirement of certainty, clarity and unambiguity of a legal norm, since otherwise neither can it ensure uniform application thereof, nor does it exclude unlimited interpretation thereof in enforcement practices, thus resulting in an unavoidable arbitrariness (Item 5.4.2 of the reasoning part). Both the Constitutional Court itself and ordinary courts of different levels repeatedly referred to this position afterwards. In its another Decision (dated 29 June 2010, No. 17-rp/2010) upon the constitutional petition of the Ombudsman of the Verkhovna Rada of Ukraine on the conformity with the Constitution of Ukraine (constitutionality) of paragraph 8 of Article 11.1.5 of the Law of Ukraine “On Militia”, the Court directly pointed to legal certainty as an element of the rule of law, which envisages that “restriction of the fundamental human and citizens’ rights and the implementation of these restrictions are acceptable only on the condition of ensuring the predictability of the application of the legal norms established by these restrictions. In other words, the restriction of any right should be based on the criteria that provide a person with the possibility of distinguishing lawful behaviour from unlawful behaviour, and foreseeing legal consequences of his/her behaviour” (Item 3.1.3 of the reasoning part of the Decision).

Limitation of discretion

The above-mentioned principles of proportionality and legal certainty are also closely linked to the principle of the limitation of discretionary powers of public authorities. This is natural, since authorities can enjoy complete impunity in infringing rights and exaggerating duties of persons at law, if they are empowered implicitly “by default” rather than by explicit legal instruments. Discretion is unavoidable in exercising power, since it is impossible to foresee each situation of life in written powers of authorities; however, understanding the essence of these norms in disputable situations has to be based on the degree in which they are helpful or harmful for citizens’ legitimate expectations.

The Constitutional Court of Ukraine has also elaborated on this thesis in a range of decisions. I will refer to two. In its Decision No. 3-rp/2013 dated 3 June 2013 (case on changing conditions of the pension payment and lifelong monthly monetary allowance of retired judges), the Court, in particular, noted that “the legislator having discretionary authority […] should take into account that legal regulation may not be introduced in a way according to which the person while realising one constitutional right is deprived of the opportunity to realise another right (guarantee)” (Item 6.2.3 of the reasoning part of the Decision). In the recent Decision dated 8 June 2016, No. 3-rp/2016 (case on the termination of childbirth allowance), the Constitutional Court of Ukraine pointed out that “the principle of legal certainty does not preclude the recognition of some discretion of public authorities in decision-making, nevertheless in this case there should be a mechanism to prevent abuse. This mechanism should ensure, on the one hand, the protection of a person against arbitrary interference of public authorities with his/her rights and freedoms, and on the other – the person should have the possibility of foreseeing the actions of these bodies” (Item 2.4.3 of the reasoning part). The Court stated that, by providing such a ground for the termination of childbirth allowance as “in case of other circumstances”, the law established unjustified discretion for authorities in these issues, and declared this norm as non-conforming to Article 8 of the Constitution of Ukraine, which, as mentioned above, declares that “in Ukraine, the principle of the rule of law is recognized and effective”.

(4).

I have consciously omitted some components of the rule of law that the bodies of constitutional and general jurisdiction use as a basis for decisions to make the protection of citizens’ rights more effective and flexible. Indeed, I believe that the principle of the rule of law, just like the concept of law itself, is constantly in the process of creative comprehension, in particular, by courts that have competence to make rulings mandatory for other courts; therefore, more principles may well join the above-mentioned ones that elaborate on the rule of law content.

Still, as you can see from this presentation, in its current degree of elaboration, the principle of the rule of law is not only a doctrinal but also a practical basis for today’s legal system of Ukraine, laid down, inter alia, by the efforts of the Constitutional Court of Ukraine. By today, the Court plays a leading role in the consolidation and further development of this principle and the methodology of its application. In this regard, I find it necessary to note that the methodological and methodic framework of implementing and developing the principle of the rule of law in the activities of the Constitutional Court of Ukraine includes fundamental international legal acts created, in particular, in united Europe, such as the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the practice of the European Court of Human Rights. The practice of other constitutional courts is also significant, primarily that of European ones and those that have experience in solving tasks similar to those faced by the Constitutional Court of Ukraine.
Принцип верховенства права в решениях Конституционного Суда Украины

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(Доклад на Форуме для представителей конституционных судов Грузии, Литовской Республики, Республики Молдова и Украины в рамках проекта сотрудничества в целях развития «Помощь конституционным судам Грузии, Республики Молдова и Украины в обеспечении реализации и защиты принципов верховенства права» (Вильнюс, 24–25 октября 2016 г.).

Уважаемые коллеги!

Свой доклад я бы хотел начать со слов благодарности организаторам проекта, которые основным объектом внимания определили вопросы осуществления и защиты принципа верховенства права в национальных правовых системах. Акцент при этом сделан на соответствующей практике ряда стран молодой демократии, которые пережили (либо переживают сейчас) моменты острого внутриполитического кризиса, жесткого экономического спада и, к тому же, испытали, каждая в свое время и по-своему, мощное деструктивное воздействие (включая силовое) со стороны Российской Федерации, которое весьма пагубно отразилось на территориальной целостности этих стран. Речь идет о Грузии, Республике Молдова, Украине. Поддерживать конституционный правопорядок, функционирование экономики, осуществление социальной и правовой защиты граждан в таких условиях особенно трудно, и это составляет, наверное, самый значительный вызов, который стоит на сегодняшний день перед государственными и правовыми институтами этих стран, в том числе конституционными судами.

Политическая неустроенность, кризисные явления в экономике, как правило, сопровождаются дестабилизацией законодательной базы государства, лежащей в основе правоприменительной деятельности (прежде всего – деятельности судов). В результате возникает риск размывания критериев, на основе которых должны выноситься решения в спорах и в случаях привлечения субъекта к ответственности, и, как следствие – возможность принятия произвольных решений органами юстиции. Законные права и интересы граждан теряют необходимую поддержку. В таких условиях жизненно важно не допустить падения уровня правовой защищенности людей в обществе. И здесь свое веское слово должен сказать именно орган конституционного контроля, который имеет компетенцию ограничить законодателя и «связать» закон, если он не отвечает базовым общественным ценностям и допускает несправедливость.

При этом в качестве основного правового инструмента, который позволяет Конституционному Суду контролировать законодательство, выступает критерием допустимости законодательных изменений и нововведений, служит именно принцип верховенства
права, единственной целью которого является обеспечение социальной справедливости, сопровождаемый рядом субпринципов – средств ее достижения.

(2).
Принцип верховенства права выступал основным ориентиром в деятельности Конституционного Суда Украины практически с самого начала его работы. Конституционно-правовой основой для этого стала сама Конституция Украины, часть первой статьи 8 которой прямо указывает, что «в Украине признается и действует принцип верховенства права». Поэтому определить, какие из многочисленных актов Суда играли определяющую роль с точки зрения реализации и защиты принципа верховенства права очень непросто. Кроме того, необходим простой и понятный критерий отбора таких актов, а критерии эти могут быть различны.

В нашем случае точкой отсчета выступает критерий, отражающий эволюцию осмысления в практике Конституционного Суда Украины принципа верховенства права как сложного образования, которое предполагает справедливость как идею, как сущностной смысл правового регулирования, и ряд принципов более конкретного значения (первенство Конституции, независимость правосудия, пропорциональность и др.), реализация которых в совокупности и позволяет поддерживать справедливость и обеспечивать верховенство права.

Далее – очень коротко о том, как отражены и реализованы принцип верховенства права и его составляющие в актах Конституционного Суда Украины.

(3).
Понятие верховенства права

В Решении от 2 ноября 2004 года № 15-рп/2004 по конституционному представлению Верховного Суда Украины о соответствии Конституции Украины (конституционности) положений статьи 69 Уголовного кодекса Украины (дело о назначении судом более мягкого наказания) Конституционный Суд Украины изложил концептуальное видение принципа верховенства права и сделал попытку определить его на понятийном уровне.

«Верховенство права – это господство права в обществе, – говорится в Решении. – Верховенство права требует от государства его воплощения в законотворческой и правоприменительной деятельности, в частности, в законах, которые по своему содержанию должны быть проникнуты прежде всего идеями социальной справедливости, свободы, равенства и т.д. Одним из проявлений верховенства права есть то, что право не ограничивается одним лишь законодательством как одной из его форм, но включает и иные социальные регуляторы, в частности, нормы морали, традиции, обычаи, легитимизованные обществом и обусловленные исторически достигнутым культурным уровнем общества. Все эти элементы объединены качеством, отвечающим идеологии справедливости, идеи права, в значительной степени отраженной в Конституции Украины».

Данная попытка Конституционного Суда Украины определить одно из фундаментальных понятий, лежащих в основе его деятельности, была воспринята неоднозначно в юридических и научных кругах страны. Но все же именно на этой доктринальной основе Суд развивал свое видение верховенства права в последующих актах; используется она и в практике судов общей юрисдикции. Отмеченные правовая позиция ограничила все еще прочную в Украине тенденцию сведения права к закону, а самого верховенства права – к безусловному приоритету государственного нормативного акта в системе источников права; кроме того, она однозначно признала справедливость смыслообразующим началом права. Благодаря этому Решению в Украине внедрен, пусть не очень совершенный, но все же эталон интерпретации принципа верховенства права.
Подобним видением смысла принципа верховенства права, защищающего по его природе идеи социальной справедливости, свободы, равенства, руководствовался Конституционный Суд Украины, принимая Решение от 8 сентября 2016 года № 6-рп/2016 (совсем свежее) по представлению Уполномоченного Верховной Рады Украины по правам человека о неконституционности положений Закона Украины «О свободе совести и религиозных организациях», которые предусматривали разрешительный, а не дозволительный принцип проведения отдельных мирных религиозных собраний. Суд счел эти нормы закона противоречивыми требованиям справедливости и равенства и не соответствующими принципиальным положениям Конституции Украины, предусматривающим уведомительный способ проведения любых мирных акций (как религиозного, так и нерелигиозного характера).

Верховенство Конституции
В определенном смысле принцип верховенства права и принцип верховенства Конституции – понятия тождественные: как первый, так и второй предполагают конечной целью защитить безопасность, свободу и достоинство человека, сделать его независимым от любого произвола, включая произвол его собственного государства; чисто в юридическом плане Конституция превращает принцип верховенства права (как и другие принципы, на которых построено демократическое, правовое общество) из социально-философской категории в категорию нормативно-правовую. В украинской Конституции принцип ее верховенства закреплен в одной статье с принципом верховенства права; согласно положениям части второй статьи 8 Конституция Украины имеет высшую юридическую силу, законы и иные нормативно-правовые акты принимаются на основе Конституции Украины и должны соответствовать ей.

В Решениях Конституционного Суда Украины принцип верховенства Конституции подтвержден многократно. В данном контексте я упомянул бы лишь об одном Решении – от 27 марта 2000 года № 3-рп. В нем не только подчеркнуто, что Конституция Украины имеет высшую юридическую силу, а ее нормы – прямое действие (т.е. воспроизведены положения самой Конституции), но и отмечено (абзац третий подпункта 4.1 пункта 4 мотивировочной части), что ее нормы составляют «первичную» и «принципиально важную» правовую основу соответствующих институтов избирательного права (в данном случае речь шла о всеукраинском референдуме). Очевидно, однако, что конституционные нормы составляют первичную и принципиально важную правовую основу функционирования всех государственных и правовых институтов Украины.

Независимость правосудия
Без независимого правосудия справедливость невозможна, а право как средство ее обеспечения теряет свое значение, поэтому наличие в обществе независимого правосудия – естественная составляющая принципа верховенства права. Принцип независимости правосудия многократно зафиксирован в базовых международно-правовых документах как общего, так и регионального значения, нормы о независимых судах содержат практически все конституции. Украинская конституция – не исключение; ее положение о том, что «судья, осуществляя правосудие, независим и руководствуется верховенством права» (часть первая статьи 129), имеет основополагающее значение с точки зрения организации и обеспечения деятельности суда как государственного органа и судьи как публичного деятеля, отправляющего правосудие.

Существует целый ряд решений Конституционного Суда Украины, таких как решения, касающиеся независимости деятельности судов и судей и трактующих эту независимость как необходимую предпосылку реализации прав и свобод человека и гражданина в Укра-
ине. Из множества решений я обратил бы внимание на Решение от 8 июня 2016 года № 4-рп/2016 (дело о ежемесячном пожизненном денежном содержании судей в отставке). Это – одно из последних Решений, принятых Судом, в котором резюмируется его стабильная позиция касательно суда и судей как незаменимого элемента в механизме защиты прав и свобод человека и гражданина, естественной предпосылки реализации права на судебную защиту, предусмотренной в части первой статьи 55 основного Закона Украины.

Принять это решение было очень непросто, ибо оно касалось конституционности законодательных норм, направленных на радикальное ограничение расходов государственного бюджета на социальные нужды и существенно ограничивающих при этом права судей на их социальную защиту. Однако в Конституционном Суде Украины очень хорошо представляют себе значение экономических, организационных, процессуальных и иных гарантий независимости суда и судьи для обеспечения защиты прав граждан и реализации принципа верховенства права в государстве.

Пропорциональность

Речь идет о важнейшей составляющей принципа верховенства права; ведь в любом случае установления прав и обязанностей субъектов права (как на нормативном, так и на казуальном уровне) необходима их соразмерность с точки зрения той же справедливости. Права не должны быть избыточны и вредоносны для прав другого субъекта, обязанности не должны быть непосильны, губительны для конструктивных новаций и отклоняться от цели, для достижения которой они устанавливаются. Очевидно, что без тщательного соблюдения этого принципа эффективно защитить права и свободы граждан просто невозможно.

В этом плане я хотел бы сослаться на некоторые из последних решений Конституционного Суда Украины, в которых этот принцип проводится четко и последовательно. Так, в Решении № 3-рп от 8 апреля 2015 года по представлению Уполномоченного Верховной Рады Украины по правам человека о конституционности положений Кодекса Украины об административных правонарушениях, согласно которым решения местного суда общей юрисдикции как административного суда об ответственности субъектов властных полномочий за их решения, действия, бездействие являются окончательными и не подлежат обжалованию, Суд отметил, что ограничение права на апелляционное и кассационное обжалование решения суда по Конституции Украины допустимо, но оно не может быть произвольным и несправедливым. Оно должно определяться Конституцией и законами Украины, преследовать легитимную цель, соответствовать общественной необходимости достижения этой цели, быть пропорциональным и обоснованным. В случае же ограничения права на обжалование законодатель должен установить правовое регулирование, которое дало бы возможность оптимально достигнуть легитимной цели с минимальным вмешательством в реализацию права на судебную защиту и без искажения смысла этого права в его сущности (см. абзац второй подпункта 2.2. пункта 2 мотивированной части). На этом основании Суд признал неконституционным ограничение законодателем права на обжалование в суд апелляционной инстанции решений местных судов общей юрисдикции как административных судов в делах по поводу применения субъектами властных полномочий административных взысканий, соразмерных по степени их суровости с уголовно-правовыми санкциями. Подобное ограничение он счел непропорциональным и несоответствующим с целью, которую преследователь законодатель, и избранными для ее достижения мерами. Такая же позиция и примерно подобная мотивация лежат в основе Решения от 1 июня 2016 года № 2-рп/2016 в деле по представлению Уполномоченного Верховной Рады по правам человека о неконституционности положений Закона Украины «О психиатрической помощи», согласно которым лицо, признанное в установленном порядке недееспо-
собным, госпитализируется в психиатрическое учреждение по просьбе или с согласия его опекуна без наличия судебного решения, принятого в результате проверки обоснованности такой госпитализации в принудительном порядке. Суд счел подобную госпитализацию по ее природе и последствиям непропорциональным ограничением конституционного права недееспособного лица на свободу и личную неприкосновенность и подтвердил, что она должна осуществляться исключительно по решению суда в соответствии с требованиями статьи 55 Основного Закона Украины (см. подпункт 2.1 пункта 2, пункт 3 мотивировочной части).

Правовая определенность
Неоднозначность, неясность, размытость юридических формулировок, особенно законодательных, – явление весьма опасное с точки зрения обеспечения справедливого правового регулирования и надлежащей защиты прав человека, и не только потому, что вносит путаницу и не позволяет гражданам видеть правовую перспективу их действий, которые они осуществляют в своих интересах, но и потому, что провоцирует разные позиции судов по одному и тем же проблемам. Конституционный Суд Украины очень хорошо ощутил значимость принципа правовой определенности, ибо долгие годы толковал законы на основании того, что суды в сходных ситуациях по-разному применяли их нормы, в результате чего физические и юридические лица часто оказывались ущемленными в своих правах. На этот принцип опираются многие его решения, я же упомяну только о двух из них.

В Решении от 22 сентября 2005 года № 5-рп/2005 (дело о постоянном пользовании земельными участками) было отмечено, что из конституционных принципов равенства и справедливости вытекает требование определенности, ясности и недвусмысленности правовой нормы, поскольку иное не может обеспечить ее единообразное применение, не исключает неограниченности трактовки в правоприменительной практике и неизбежно приводит к произволу (абзац второй подпункта 5.4 пункта 5 мотивировочной части). Этой позицией Суда впоследствии весьма часто руководствовались при принятии решений не только сам Конституционный Суд, но и суды общей юрисдикции разных инстанций. В другом Решении (от 29 июня 2010 года № 17-рп/2010) по конституционному представлению Уполномоченного Верховной Рады Украины по правам человека относительно соответствия Конституции Украины (конституционности) абзаца восьмого пункта 5 части первой статьи 11 Закона Украины «О милиции» Суд прямо указал на правовую определенность как на элемент верховенства права, который предусматривает, что «ограничения основных прав человека и гражданина и воплощение этих ограничений на практике допустимо только при условии обеспечения предсказуемости применения правовых норм, устанавливаемых такими ограничениями. То есть ограничение любого права должно базироваться на критериях, которые позволяют себе отделять правомерное поведение от противоправного, предвидеть юридические последствия своего поведения» (абзац третьей подпункта 3.1 пункта 3 мотивировочной части Решения).

Ограничение дискреции
С упомянутыми выше принципами пропорциональности и правовой определенности тесно связан принцип ограничения дискрепционных полномочий субъектов, осуществляющих публичную власть, что естественно: реализуя властные полномочия, которые признаны не в юридическом тексте, а «по умолчанию», их носители могут безнаказанно ужимать права и умножать обязанности субъектов права. Дискреция при осуществлении власти неустранима (ибо невозможно в нормах о полномочиях прописать все до малей-
ших деталей), но понимание смысла этих норм в спорных случаях должно определяться на основе того, насколько они помогают гражданам в их правомерных ожиданиях и действиях либо препятствуют им.

Этот тезис Конституционный Суд Украины также раскрыл в целом ряде решений. Сошлюсь в качестве примера на два из них. В Решении от 3 июня 2013 года № 3-рп/2013 (дело об изменениях условий выплаты пенсий и ежемесячного пожизненного денежного содержания судей в отставке) Суд, в частности, отметил, что законодатель, имея соответствующие дискретционные полномочия, не может, однако, вводить правовое регулирование, при котором лицо, реализуя одно конституционное право, лишается возможности реализовывать другое право (гарантию) (абзац третий подпункта 6.2 пункта 6 мотивировочной части решения). А в совсем недавно принятом Решении от 8 июня 2016 года № 3-рп/2016 (дело о прекращении выплаты помощи при рождении ребенка) Конституционный Суд Украины указал, что принцип правовой определенности не исключает признания за органом государственной власти определенных дискретционных полномочий в принятии решений. Но в таком случае должен существовать механизм предупреждения злоупотребления ими, который призван обеспечить, с одной стороны, защиту лица от произвольного вмешательства органа государственной власти в ее права и свободы, а с другой – наличие возможности предвидеть действия этих органов (см. абзац третий подпункта 2.4 пункта 2 мотивировочной части). Суд констатировал, что, предусмотрев «возникновение иных обстоятельств» основанием прекращения выплаты помощи при рождении ребенка, закон установил неоправданную дискрецию органа государственной власти в этих вопросах и признал соответствующую норму противоречащей статье 8 Конституции Украины (которая, напомню, гласит, что в Украине признается и действует принцип верховенства права).

(4).

Я упомянул не обо всех составляющих верховенства права, опираясь на которые органы конституционной и общей юрисдикции принимают на сегодняшний день решения, позволяющие эффективнее и гибче защищать права граждан. Более того, я полагаю, что принцип верховенства права, как и сама категория «право», постоянно находится в состоянии творческого осмысления, в частности, судами, имеющими компетенцию принимать решения, обязательные для других судов; так что к обозначенным принципам, которые раскрывают его содержание, могут вскорости добавиться и другие.

Но и в нынешнем состоянии разработанности принцип верховенства права, как можно видеть из доклада, является не только доктринальной, но и практической основой современной правовой системы Украины, заложенной, в том числе, и усилиями Конституционного Суда Украины. На сегодняшний день Суд играет ведущую роль в утверждении и дальнейшем развитии содержания этого принципа и методики его применения. В данном контексте считаю обязательным отметить, что методологическую и методическую базу деятельности Конституционного Суда Украины, в пределах которой он реализует и развивает принцип верховенства права, составляют базовые международно-правовые акты, в частности, созданные в объединенной Европе (Конвенция о защите прав человека и основных свобод), а также практика Европейского суда по правам человека. Существенное значение имеет также практика других конституционных судов, прежде всего, европейских и, прежде всего, тех, которые решали и решают задачи, подобные тем, которые решает Конституционный Суд Украины.
THE RIGHT TO A FAIR TRIAL

Elvyra Baltutytė
Justice of the Constitutional Court of the Republic of Lithuania

It should be stated, and it has been more than once referred to in the jurisprudence of the Constitutional Court of the Republic of Lithuania, that the protection of the rights and freedoms of individuals is one of the essential features of a state under the rule of law, whereas one of the main guarantees of the protection of any person’s rights is the right to apply to a court (the right of access to a court or just the right to a court) when his/her rights or freedoms are violated. So, this imperative arises from the constitutional principle of a state under the rule of law. The right to a court comprises just one, although very important element of the right to a fair trial. It should be noted that the said right is expressis verbis formulated in the text of the Constitution of the Republic of Lithuania. Paragraph 1 of Article 30 of the Constitution provides:

“A person whose constitutional rights or freedoms are violated shall have the right to apply to a court.”

Therefore, the right to a court is an explicit right provided for in Article 30 of the Constitution. There are numerous statements in the jurisprudence of the Constitutional Court that the interpretation of the said right includes not just one element – access to a court, but also the whole concept of the right to a fair trial. This means that the said article provides for the implicit right to a fair trial. It should also be noted that the elements of the right to a fair trial comprising procedural guarantees in criminal proceedings are explicitly envisaged in Article 31 of the Constitution:

“Article 31
A person shall be presumed innocent until proved guilty according to the procedure established by law and declared guilty by an effective court judgment.
A person charged with committing a crime shall have the right to a public and fair hearing of his case by an independent and impartial court.
It shall be prohibited to compel anyone to give evidence against himself, or his family members or close relatives.
Punishment may be imposed or applied only on the grounds established by law.
No one may be punished twice for the same offence.
A person suspected of committing a crime, as well as the accused, shall be guaranteed, from the moment of his apprehension or first interrogation, the right to defence, as well as the right to an advocate.”

It has to be noted that the guarantee, formulated in Paragraph 2 of this Article, explicitly indicates very important elements of the right to a fair trial.

There is no common, all-inclusive, and general definition of the right to a fair trial. It is enshrined in international and European Union law, as well as in the national legislation. The meaning of the said right has to be identified referring to specific aspects that constitute part of it. The right to a fair trial generally comprises the following basic rights: the right of access to a court
and, consequently, to be heard by a competent, independent, and impartial tribunal; the right to “equality of arms”; the right to a public hearing; the right to be heard within a reasonable time; the right to counsel; and the right to interpretation. It should also be noted that there are some rights that apply only to criminal proceedings (as mentioned above, Article 31 of the Constitution provides for the specific elements thereof) such as the right to be presumed innocent, the right to be told as early as possible about the accusation, the right to remain silent, the right to have enough time to prepare a case for defence, the right to access all the relevant information, the right to put forward arguments in order to defend himself/herself at a trial, the right to question the main witness and call other witnesses, etc.

As it has already been pointed out in this conference, international law, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms, its Protocols, and the related case-law of the European Court of Human Rights have a considerable impact on the interpretation of the content of different constitutional rights, and the right to a fair trial in particular. Therefore, Article 6 of the Convention “The right to a fair trial” and the relevant case-law have had a substantial impact on the interpretation of the content of the constitutional right to a fair trial. The interpretation of this constitutional right was developed on the basis of the Convention law in such contexts as the independence of courts, the use of conduct simulating criminal activities as a method to investigate crimes, the right of persons charged with a criminal offence to have an advocate, the use of classified information as evidence in a court, the application of the requirements of criminal procedure in the consideration of cases concerning administrative violations of law, etc.

The task of this brief presentation is not, of course, to carry out a comprehensive analysis covering all the possible aspects of the right to a fair trial; let me deal just with several aspects of this right – the already mentioned right of access to a court and the possibility for a court to adopt a just decision, which is a very important precondition for a fair trial.

**The right of access to a court**

The Constitutional Court has formulated in its jurisprudence an extensive official constitutional doctrine of the right of access to a court and has revealed the constitutional imperatives that should be complied with in regulating the respective relations.

The Constitutional Court, while interpreting Paragraph 1 of Article 30 of the Constitution, quite strictly stated that the right to apply to a court is absolute. This right may not be limited or denied. Each person who thinks that his/her rights or freedoms are violated has the absolute right to an independent and impartial court – an arbiter that would solve a dispute; everyone is entitled to this right; the defence of violated rights is guaranteed to persons regardless of their legal status; the violated rights and legitimate interests of a person must be protected regardless of whether they are expressly consolidated in the Constitution or not. According to the Constitution, the legislature has the constitutional duty to establish the legal regulation so that it could be possible to settle all disputes concerning violations of the constitutional rights and freedoms, as well as the acquired rights of the person, in a court. It should be noted that the definition of the right to a court as an absolute one in the jurisprudence of the Constitutional Court could be understood first of all as the obligatory constitutional guarantee to defend the rights in a court; it could be presumed that such understanding (as a guarantee, not just a right) seems to be prevailing over the well-known division of human rights into absolute and non-absolute ones.

Therefore, the Constitutional Court has clearly noted in its jurisprudence that the rights of a person must be protected not formally, but in reality and effectively, against unlawful actions of private persons, as well as those of state institutions or officials. The legal regulation of the right
to judicial protection must conform to the constitutional requirement of legal clarity. Moreover, the legislature must clearly establish in laws in what manner and to which court persons can apply so that they would implement their right in reality to apply to a court.

One of the constitutional imperatives that should be complied with in regulating the right of access to a court is that legal acts can establish a procedure of out-of-court settlement of disputes; however, it is not permitted to establish any such legal regulation that would deny the right of a person who thinks that his/her rights or freedoms have been violated to defend his/her rights or freedoms in a court (rulings of 2 July 2002 and 4 March 2003).

For example, in its ruling of 2 July 2002, the Constitutional Court declared as unconstitutional the provision of the Republic of Lithuania’s Law on the Organisation of the National Defence System and Military Service according to which an appeal could be lodged with a court regarding the violation of only the procedure for dismissal from professional military service, but persons were prohibited from appealing to a court as regards the reasonableness of their dismissal from military service.

In its ruling of 10 December 2012, the Constitutional Court declared as unconstitutional the provision of the same law, insofar as it prescribed that the courts do not try disputes regarding admission into military service, removal from office, transfer to another position, awarding military ranks, imposing disciplinary penalties, and extending a contract on military service. The disputed legal regulation established a non-judicial procedure for examining these disputes.

In the ruling of the Constitutional Court of 17 August 2004, the Constitutional Court held that the preliminary extra-judicial procedure for settlement of disputes established by the Government was such that subjects, having lodged a complaint against the decision of the county chief with the Government or a ministry, would lose the right to the judicial protection of their interests. The Constitutional Court recognised that this provision was in conflict with the Constitution.

On the relation of the right to a court with the right to apply to the Constitutional Court

As the participants of this conference are probably aware, there is no right to individual constitutional complaint provided for in Lithuania. But it should be pointed out that there is a constitutional imperative that a party to a case has a right to request the court that considers a case to apply to the Constitutional Court. The Constitutional Court has also pointed out that if a court considering a particular case is facing a doubt about the compliance of a legal act applicable in that case with the Constitution, such a court must apply to the Constitutional Court and the consideration of the case by that court must be suspended until the Constitutional Court has decided this issue.

This constitutional imperative could be illustrated, inter alia, by the decision of the Constitutional Court of 28 June 2016 on the interpretation of the provision of the Constitutional Court’s ruling of 26 January 2006 that is related to the right of petition. By the said provision, the Constitutional Court declared unconstitutional the stipulation of the Law on Petitions, whereby it was not allowed to challenge before a court the decision of the Seimas on refusing to grant a complaint filed against the decision of the Seimas Petitions Commission not to deem an application to be a petition or to refuse to accept a petition for consideration where such a decision of the Seimas was not based on the grounds laid down in laws.

The Constitutional Court interpreted this provision as meaning that, under the Constitution, a citizen has the right to apply to a court under procedure established by law against the decision of the Seimas on refusing to grant a complaint filed against the decision of the Seimas Petitions Commission not to deem an application to be a petition or to refuse to accept a petition for consideration where such a decision of the Seimas is not based on the grounds established in the Law on Petitions or other laws, or is based on grounds that are not laid down in the Law on
Petitions or other laws; if a court (judge) considering the relevant case faces doubts about the legality of such a decision of the Seimas, the said court (judge) must suspend the consideration of the case and apply to the Constitutional Court in order that such doubts may be removed.

In this decision, the Constitutional Court held that, under Article 106 of the Constitution, individuals do not have the right to directly address the Constitutional Court for determining the legality of the acts of the Seimas, the President, or the Government even when the constitutional review of such acts falls under the competence of the Constitutional Court and they could violate the rights or freedoms of those persons. However, when interpreting the Constitution, the Constitutional Court noted that the right of every person to defend his/her rights on the basis of the Constitution and the right of a person whose constitutional rights or freedoms are violated to apply to a court also imply that each party in a court case which has doubts over the compliance of the law or other legal act (part thereof) that may be applied in that case with the Constitution (or another higher-ranking legal act), where the investigation into the compliance of the said law or other legal act (part thereof) with the Constitution (or another higher-ranking legal act) falls under the jurisdiction of the Constitutional Court, has the right to apply to the court of general jurisdiction or the respective specialised court, which considers the said case, requesting that the court in question suspend the consideration of the case and apply to the Constitutional Court. Thus, the fact that the constitutional right of persons has been violated by a legal act (i.e., by a certain act of the Seimas, the President, or the Government) the investigation into the legality of which falls, under the Constitution, under the exclusive competence of the Constitutional Court, where those persons, under the Constitution, have no powers to directly initiate a constitutional justice case in the Constitutional Court for determining the legality of such an act, does not mean that such persons are not allowed in general to defend their violated rights or freedoms, i.e. such persons are allowed to defend them before a court as well.

In the ruling of the Constitutional Court of 13 May 2010, the Constitutional Court examined the constitutionality of the provision of the Law on the Proceedings of Administrative Cases, according to which the activities of the President of the Republic and the Government as a collegial body are outside the jurisdiction of administrative courts. The Constitutional Court explained that if there are grounds to believe that an act of the President of the Republic or the Government that is applicable in a concrete case is in conflict with laws or the Constitution, administrative courts must suspend the consideration of the case and apply to the Constitutional Court with a petition. This means that administrative courts can investigate the activities of the President of the Republic and the Government inasmuch as such investigation is necessary to substantiate the doubts of these courts as regards the compliance of an act of the President of the Republic or the Government with the Constitution and laws. The Constitutional Court also held that the subject matter of an administrative dispute under consideration in an administrative court may not be such activities of the President of the Republic or the Government, whereby state power is implemented.

The Constitutional Court noted that, in addition to the performance of state functions assigned to them, the institutions implementing state power also carry out other activities connected with the fulfilment of the functions of internal administration in cases where such activities can cause a violation of the rights or freedoms of a person or cause damage. Therefore, administrative courts may consider cases concerning the result or consequence of the activities (failure to act) of the President of the Republic or the Government, whereby the rights or freedoms of a person have been (could be) violated, inter alia, concerning compensation for damage.
The possibility for a court to adopt a just decision

The possibility for a court to adopt a just decision is a very important criterion that allows assessing a trial in terms of fairness. In some situations, laws are formulated in the way that makes it impossible for a court to adopt a just decision. Without this possibility, the right to a fair trial is not feasible.

For example, in the ruling of 15 May 2007 on the compliance of the Law on State Secrets and Official Secrets with the Constitution, the Constitutional Court stated that laws must define the opportunities of the parties of a case considered by a court to become familiarised with information that constitutes a state secret (as well as with other classified information) if the said court decides that such information may be regarded as evidence in a corresponding case. No court decision can be entirely substantiated by information constituting a state secret (or by other classified information), which is unknown to the parties to a case. The Constitutional Court emphasised that a duty arises for courts to consider cases justly and objectively, therefore, there cannot be any such legal situation where a court would not be able to become familiarised with the case material that contains information constituting a state secret (or which is other classified information). On the one hand, the necessity to protect information constituting a state secret is, of course, an important public interest, but, on the other hand, it is necessary to ensure the right of a person to judicial defence, i.e. the right to a fair trial.

In the rulings of 21 January 2008 and 17 September 2008, the Constitutional Court examined the constitutionality of the norms of the Law on Alcohol Control and the Law on Tobacco Control respectively, according to which courts had to apply the sanctions – the repeal of the validity of the licences to engage in the wholesale or retail trade in alcoholic beverages and tobacco products – even if they were obviously disproportionate (inadequate) to a committed violation of law.

The Constitutional Court recognised that the disputed laws were unconstitutional to the extent that they did not provide for the possibility for a court, taking account of the nature of the violation of law, its extent, the circumstances mitigating the liability and other significant circumstances and following the principles of justice and reasonableness, to decide that these sanctions – the repeal of the validity of the licences to engage in the wholesale or retail trade in alcoholic beverages and tobacco products – did not have to be applied to enterprises, because due to certain very important circumstances was obviously disproportionate (inadequate) to the committed violation of law, thus, unfair.

In the ruling of 31 January 2011, the Constitutional Court examined the constitutionality of the norms of the Civil Code and the Law on Construction related to the legal consequences of construction violating requirements of legal acts.

The Constitutional Court found that the impugned provisions had been formulated in an imperative manner: in all situations, while deciding regarding construction violating the requirements of legal acts, a court had been obliged to take one of the two decisions – to demolish or rebuild the structure – and had no possibility of adopting any other decision regarding the civil legal consequences of illegal construction. The Constitutional Court found that the legal regulation encompassed two essentially different situations: the situations where a structure had been built in the place where that structure had not been allowed at all, and the established violations could objectively be removed only by demolishing or rebuilding the structure, as well as the situations where a structure had been built in the place where that structure had been in substance allowed, and the established violations could objectively be rectified without demolishing or rebuilding the structure.
The legal regulation under which a court was obliged to adopt the decision imposing on the builder the obligation to demolish the structure under construction or to properly remodel it in the cases where the construction works had been performed in the place where they had not been allowed at all, while the established violations could be objectively removed only by demolishing or rebuilding the structure, was found by the Constitutional Court to be proportionate to the committed violation, in line with the lawful and universally important objectives sought in order to defend the violated rights of the persons concerned, to maintain a fair balance between the interests of society and those of a person, and to ensure the protection of the environment, protected territories, places of value, and other objects of nature, as well as a proper and rational use of territories, and was, thus, assessed as constitutionally justified.

In such cases, however, where a structure that had been built or other construction works had been performed in the place where that structure or works had been in substance allowed, and the established violations could objectively be eliminated without demolishing or rebuilding the structure, a court could not adopt any decision other than that obliging the builder within a fixed period of time to properly remodel the structure or to demolish it. Such a legal regulation had created the preconditions for the emergence of the legal situations where the opportunity of a court to administer justice was limited. The Constitutional Court held that the Constitution gives rise to the duty of the legislature, when it regulates the relations connected to the removal of the legal consequences of construction violating the requirements of legal acts, to establish the criteria under which a court, deciding regarding the legal consequences of construction violating the requirements of legal acts, after assessing all the circumstances of a case and while following the principles of justice, reasonableness, and proportionality, could adopt a just decision and, thus, administer justice. Therefore, the disputed legal regulation was ruled in conflict with Constitution.

In the ruling of 25 September 2012, the Constitutional Court examined the constitutionality of the legal regulation consolidated in the Code of Administrative Offences, under which a court was not able to impose a smaller penalty than the minimal one provided for in the sanction, impose a softer penalty than provided for in the sanction, or not to impose an administrative penalty at all upon persons who committed an administrative violation of law, depending on the particular circumstances of a case.

In the opinion of the petitioners that were examining administrative cases related to the confiscation of a vehicle, in order to ensure a fair court process and an efficient defence of the rights of the owner of a vehicle, a possibility should have been created to prove that the owner was not responsible for the use of his/her property when a violation was committed. However, even if the owner could prove that he/she was not responsible for the use of his/her vehicle while committing the violation, a court was not allowed not to follow the challenged provision and not to confiscate such a vehicle. Thus, the court that had to adopt the respective decision was not granted the right to take account of the circumstances significant to a case and, following the criteria of justice and reasonableness, to decide that the established administrative penalty did not have to be applied. Due to this reason, the administration of justice becomes formal.

The Constitutional Court found a violation of the Constitution. The Court argued that, under the Constitution, the law by which the administrative legal liability of persons is established may not be such so that a court would not be allowed, while taking account of all the circumstances significant to a case and by following law, without violating the imperatives of justice and reasonableness that arise from the Constitution, to adopt a just decision and, thus, to administer justice. Otherwise, the powers of a court to administer justice would be violated, and there would be a deviation from the constitutional concept of a court as the institution that administers
justice in the name of the Republic of Lithuania, as well as from the constitutional principle of
a state under the rule of law. By means of a legal regulation, the legislature must create the legal
preconditions for a court to investigate all circumstances significant to a case and to adopt a just
decision.

The Constitutional Court also stated that, while individualising the penalties imposed on
infringers, courts must thoroughly assess the dangerousness of a violation of law for human
rights and freedoms, the interests of society and the state in concrete situations. The situations
where it is possible to impose a smaller penalty for administrative violations of law than the
minimal one provided for in the sanction, or impose a softer penalty than provided for in the
sanction, or not to impose an administrative penalty at all, must be exceptional and related to the
statement of the existence of exceptional circumstances.

In the ruling of **15 November 2013**, the Constitutional Court investigated whether the
provision of the Code of Criminal Procedure according to which a court does not have the
right to change, on its own initiative, the factual circumstances specified in an indictment to
circumstances that are different in substance, were not in conflict with the Constitution. The
Constitutional Court declared this provision unconstitutional, insofar as it had not established
that a court may, on its own initiative, change the factual circumstances of a criminal action
to circumstances different in substance. The Constitutional Court held that, according to the
disputed provision, a court of first instance was bound by the data collected during a pretrial
investigation, it was unable to use all opportunities to establish the truth in a criminal case, to
establish the actual circumstances in the case, and to adopt a just decision regarding the guilt of
a person accused of the commission of a criminal action. Thus, the preconditions were created
for the fact that the decision in a case, as well as the administration of justice, was determined
not by the court assessment of significant data (evidence), but, rather, by an opinion of the
participants of a court trial; thus, the preconditions were created for acquiting a person guilty
of a criminal action, or for imposing an unjust punishment upon him/her. Therefore, under the
Constitution, the opportunities must be created for a court considering a criminal case to change,
on its own initiative, the factual circumstances specified in an indictment to circumstances that
are different in substance. While implementing this right, a court must inform the accused and
other participants of a court trial about such a possibility, must ensure the right to be informed
about the accusation, the right to defence, and the implementation of the other constitutional
principles of the due process of law.

In another ruling of **27 June 2016** related to criminal law issues, the Constitutional Court
declared the provisions of the Code of Criminal Procedure that regulated the dismissal of a
case upon the expiry of a statutory limitation period for criminal liability to be in conflict with the
Constitution, insofar as it had not established that a court may, on its own initiative, change the factual circumstances specified in an indictment to circumstances that are different in substance. While implementing this right, a court must inform the accused and other participants of a court trial about such a possibility, must ensure the right to be informed about the accusation, the right to defence, and the implementation of the other constitutional principles of the due process of law.
The Constitutional Court also drew attention to the fact that situations where statutory limitation periods for criminal liability expire at the time of a pretrial investigation differ from situations where these periods expire after charges have been made and the case has been referred to a court for consideration. During a pretrial investigation, justice is not administered; a pretrial investigation involves collecting and assessing information that is necessary for deciding whether public charges must be brought against the person and the criminal case must be referred to a court. Consequently, the termination of a pretrial investigation upon the expiry of statutory limitation periods for criminal liability means that, within the prescribed periods, no necessary data has been collected to bring charges against the person and that there are no grounds for believing that the accused has committed a crime.

On impeachment proceedings

It has to be noted, and it has been clearly stated by the European Court of Human Rights in the case Paksas v. Lithuania (Grand Chamber judgment of 6 January 2011), that the impeachment procedure did not fall under the scope of Article 6 of the European Convention on Human Rights. Nevertheless, already in its ruling of 11 May 1999 on the compliance of the provision of the Statute of the Seimas with the Constitution, the Constitutional Court formulated the fairness requirement for impeachment proceedings. The Constitutional Court concluded that such proceedings are in line with the principles of a state under the rule of law only when they are fair: individuals must have the right to be heard and must have the legally guaranteed opportunity to defend their rights during impeachment proceedings. The failure to follow the principles of the fair judicial process in the course of impeachment proceedings would mean that the requirements of a state under the rule of law are deviated from.
The Constitutional Right to a Fair Hearing in Georgia: Evidentiary Standards in Criminal Proceedings

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The right to a fair trial combines a set of procedural and substantive guarantees, which serve as a requisite for the realisation of entire human rights law. The Constitution of Georgia explicitly provides for the fair trial rights and the Constitutional Court has been consistent in reaffirming an indispensable character of the due process of law in its practice.

The fair trial rights gain particular importance in criminal cases when the State acts as a prosecutor and there is a growing risk for a defendant to have his/her rights restricted. In order to exclude arbitrary and wrongful conviction in criminal cases, all the procedures need to be regulated in detail and the applicable law must be formulated with sufficient clarity. The question that must be answered is whether the proceedings as a whole, including the way in which evidence is obtained, are fair. The Constitutional Court of Georgia noted in its recent judgement:

“The principle of the Rule of Law obliges the state to create an evidentiary rule, which will ensure the incontrovertible establishment of facts relevant for a case and a fair trial for an individual based on evidence obtained in accordance with Georgian law and the international standards of human rights protection.”

The problem of the admissibility of evidence gains even more importance in the light of the European Court of Human Rights (ECtHR) case-law, according to which, “While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law” and the national courts. However, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called “sole or decisive rule”).

The question in each case with absent witnesses is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in a case.

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3 Hümmer v. Germany, ECtHR, 19 July 2012, § 40; see T. v. the United Kingdom [GC], no. 24724/94, § 83, 16 December 1999 and Stanford v. the United Kingdom, 23 February 1994, § 26, Series A No. 282-A.
4 Hümmer v. Germany, ECtHR, 19 July 2012, p. 42.
5 Ibid, p. 45; Al-Khawaja and Tahery, § 147.
It is not the role of the ECtHR to determine, as a matter of principle, whether particular types of evidence [...] may be admissible.6 But regard must be given, in particular, to whether the applicant had the opportunity of challenging the authenticity of the evidence and of opposing its use. The quality of evidence is also taken into account, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy.7

I intend to discuss two most recent cases before the Constitutional Court of Georgia, in which the court had to deal with the standards of proof in criminal proceedings and, by interpreting the constitutional provisions, it was able to establish important guarantees that proved to be an effective remedy in practice as it affected a lot of people in real life.

**The admissibility of evidence gained under violation of a law**

The Constitution of Georgia, in a similar manner as in international human rights law, declares that evidence obtained unlawfully is inadmissible in a court.8 This principle is reflected in national criminal legislation. Namely, according to the Criminal Procedure Code (the CPC), “evidence obtained as a result of an essential breach of this Code as well as other evidence legally obtained but based on such evidence is inadmissible and has no legal force if it deteriorates the legal condition of an accused”.9 The complainant in a recent case10 argued that the above-mentioned provision is unconstitutional since it declares inadmissible only the evidence that is obtained through violation of the CPC and does not regard as inadmissible evidence obtained through violation of the rules prescribed by other normative acts (e.g., the Criminal Code, the Law on Police, the Operative-Investigative Act, the Law on Personal Data, etc.). The Constitutional Court went on to assess the disputed law by examining the substantive rules of criminal procedure.

According to the CPC, any item containing information might be presented before a court if it is characterised by relevance, admissibility, and incontrovertibility. Evidence might exist as testimony (also hearsay), physical evidence, or/and a document. However, its contents and forms of material expression are different (for example, it could be a photo, a computer file, an audio/video tape, a trace, an item, or an object).

The Georgian legislation on criminal procedure applies, e.g., negative enumeration regarding the admissibility of evidence and defines conditions under which evidence is not admissible. Legislation is not capable of defining which evidence is admissible or not, nor can it indicate which type or the number of pieces of evidence is needed on a particular stage of a certain criminal case. Such a regulation would cause formalising the process of proving evidence.

As admissibility is a feature that is related to the source of information, the lawfulness of its receipt and fixation, it would make more sense if there were such a mechanism in place for a judge that could give him/her the possibility of examining all evidence at hand in some detail and exclude evidence deemed to be inadmissible. The admissibility procedure should act as a barrier for excluding such information from a criminal case the incontrovertibility of which cannot be established.11

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6 Nechiporuk and Yonkalo v. Ukraine, ECtHR, 21.04.2011, p. 273; see Allan v. the United Kingdom, no. 48539/99, § 42, ECtHR 2002-IX.
7 Nechiporuk and Yonkalo v. Ukraine, ECtHR, 21.04.2011, p. 274; see Jalloh v. Germany [GC], no. 54810/00, § 96, ECtHR 2006-IX; Khan, § 36; 37.
8 Constitution of Georgia, Article 42.7.
9 CPC of Georgia, Article 72.1.
After a careful analysis, the court concluded that there were several legal documents apart from the CPC that set forth the way in which evidence in criminal cases may be produced, as well as established qualitative requirements for the proof to be admitted in court. Such legal acts among others, include the European Convention on Human Rights (the ECHR), which with its vast case-law defines the evidentiary standards that are, to a larger extent, transposed into national legislation. At the same time, the criminal procedure and operative-investigative activities are subject to different legal regulation yet there is a genuine link between the two as both represent a means of achieving the same objective, etc.

Based on the second section of Article 25 of the CPC, gathering and presenting evidence are the competence of the parties. However, the CPC does not prohibit gathering and presenting information relevant for establishing the respective circumstances by a person who does not have the status of a party and acts on his/her own initiative before a court. Therefore, information that is obtained by a participant of proceedings in an essential violation of the requirement of another law, but was transferred to a party in accordance to the procedural rules, constitutes admissible evidence based on the disputed version of the first section of Article 72. Similarly, in cases where evidentiary information was obtained by law-enforcing agencies in violation of another law, but its procedural fixation was conducted in accordance with the requirements of the CPC, such information also constitutes admissible evidence based on the disputed provision. Even more, if evidence is formally compatible to the requirement determined by the CPC, but is obtained in a significant violation of another normative act, there is no ground for declaring it inadmissible based on Article 72 of the CPC; thus, it is presented before the jury.

The imposition of responsibility on an individual who illegally obtained evidence is not a sufficient mechanism for ensuring the right to a fair trial for the accused. “It is not relevant whether a private person was prosecuted or not for a violation of the law, for instance, for violating the privacy of communication, the secrecy of adoption, for coercion and/or blackmail if it is allowed to use the information relevant for a criminal case collected by him/her through unlawful means as evidence against the accused. The situation is different in cases where investigative agencies conduct evidence gathering through private individuals. If the law makes it possible to use information collected through violation of fundamental human rights as evidence during criminal proceedings it will promote violation of legal requirements by private individuals and create the opportunity for the parties of the proceeding to manipulate with the above-mentioned possibility. […] The legitimacy of a court judgment or/and any other summarising decision substantially depends on the admissibility and reliability of the evidence used by the body responsible for the administration of criminal proceedings for reasoning the decision. Therefore, in cases where admitting information unlawfully obtained by private individuals as evidence would substantially harm the rights of the accused, the use of such information as evidence is intolerable.”

Although the CPC does not prescribe a direct prohibition, evidence gathering through a severe violation of fundamental human rights is incompatible with the essence of the state based on the Rule of Law, including but not limited to the cases where the collection of information is conducted by a private individual as a result of encouragement from state representatives.

The Constitutional Court emphasised that the requirements for evidence in criminal cases were regulated not only by the CPC, but also by other national laws and international human rights law. However, the legislator is not obliged to exhaustively prescribe every method and tool employed for gathering information relevant for a criminal case solely by the Criminal Procedure Code.

12 Paragraphs 27, 29.
Therefore, the provision in question was found unconstitutional. The court declared: “The constitutional restriction on the use of unlawfully obtained evidence aims at the establishment of the objective truth in criminal cases, the protection of the rights/liberties of the participants of proceedings, the increase of the trust of the public and the participants of proceedings in justice and the responsibility of the agencies authorised to conduct criminal prosecution. In the end, the above-mentioned ensures the fairness of process and the exercise of the right to a fair trial by the accused”.

The Court further stated that the unlawful gathering of evidence is not justified even by difficulties related to the prosecution of individuals who committed the most serious crimes and/or to the investigation of organised crimes. Otherwise, the administration of justice will exceed legal boundaries and become the tool of unlimited power, which would be in conflict with the constitutional standard of personal liberty of an individual.

Under the N579 decision of the Constitutional Court of Georgia, all unlawfully obtained evidence is deemed inadmissible and has no legal effect regardless of its significance or weight.

The admissibility of hearsay

One of the most difficult and perplexing issues arising under the sixth amendment is the relationship between the confrontation clause and the law of hearsay.

Despite the fact that the proof should be developed on the basis of original, primary evidence, the ignorance of any other derivative evidence is not permissible. In numerous cases, derivative evidence is the only source of information giving a full and clear account of facts relevant to an issue. Hearsay may be used to confirm, correct or evaluate primary evidence [by hearsay evidence, doubts regarding primary evidence may be dispelled or raised further]; to complement primary evidence; or to obtain primary evidence. Thus, the application of hearsay evidence is particularly important when it is impossible to obtain primary evidence, e.g., due to the death of a source or his/her unconscious condition, or when his/her whereabouts is unknown, he/she is missing, his/her health has been damaged by physical or mental stress insofar as he/she is not able to evoke memory and regain fact, or in cases where the original document is lost and it is not possible to receive information from the person who created/obtained/kept that document or from an eyewitness [due to death, the identification of his/her whereabouts, if he/she invokes the right to silence, etc., and so on and so forth.

It can be said that there is no universally predominant model for states how the application of hearsay evidence must be regulated. Legal systems worldwide consider the said institute differently, by regulating in a varied manner its admissibility in a court hearing or the exclusion thereof. In some states, minimum requirements are sufficient for the admissibility of hearsay evidence, whereas under the general rule, hearsay evidence is inadmissible save for the specific circumstances defined by law. In addition, exclusionary circumstances are different among states. In general, hearsay evidence is regarded as less credible evidence and adequate mechanisms are needed in order to ensure the verification of its reliability so as to avoid possible damage in the course of establishing the truth in a particular case.

The fact that hearsay evidence is regulated differently from other types of evidence is a new development and is related to the introduction of the new Criminal Procedure Code. According to the law, “hearsay evidence constitutes a witness testimony that is based on information

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13 Paragraph 4.
14 Paragraph II-7.
given by another person”. It seems clear from the said provision that hearsay evidence implies information given either verbally or in any other form outside the courtroom by one person, which is then testified by another person in a trial.

According to the claimant, Article 76 of the CPC [“During a court trial, hearsay is admissible as evidence if it is corroborated by other evidence, which is not hearsay itself”] allowed hearsay to be admissible as evidence if it was corroborated by other evidence, which is not hearsay itself. Therefore, the combination of hearsay and other indirect corroborated evidence might be the grounds for the delivery of a convicting judgment. The above-mentioned interpretation of the law is possible, which gives a judge the liberty to substantiate a conviction solely with two indirect pieces of evidence. Therefore, presenting an accusation and delivering a convicting judgment may be conducted on the basis of combined evidence that not only includes hearsay, but is also substantially based on it. Also, referencing the source of information by a witness giving hearsay does not exclude the possibility that even the source of information was not an eyewitness of the facts the confirmation of which is intended by giving the said hearsay. At the same time, an assumption and an expectation are created that hearsay is generally tolerable, reliable, and valid evidence, similar to the other types of evidence (testimony given by an eyewitness or a victim, physical evidence, etc.) that are submitted for proving the guilt.

The Criminal Procedure Code of Georgia sets out two requirements with respect to the application of hearsay evidence: 1. A witness has to name the original source to ensure he/she is interrogated if necessary; 2. The indicated information has to be verified by any other evidence existent in the relevant criminal case that is not hearsay evidence – the said hearsay evidence might be verified by any other evidence, the scope of which is not defined. There is only one exception: hearsay evidence must not be verified by other hearsay evidence. Such a prohibition is based on the principle that any obtained information in the course of criminal proceedings has to be subject to admissibility check. If the original source is unknown, then it is practically impossible to prove how objective the evaluation of facts may be.

That said, it is unclear to what extent hearsay evidence must be verified; is it necessary to verify all the factual circumstances individually by other evidence (which need not to be hearsay evidence) or is it enough to substantiate the general substance of testimony for hearsay evidence to be deemed appropriate? Is a judge allowed to decide on this issue on his/her own or the motion of a party is needed, appealing for the admissibility of such evidence? Moreover, it seems uncertain what happens when part of the facts in hearsay evidence is substantiated by other evidence, whereas some other facts are not. Would such a case cause the inadmissibility of a part of hearsay evidence or all of it?

It can be argued that hearsay evidence implies numerous risks. “A person giving hearsay evidence is not able to prove the reliability of the information that has been disseminated by another person. Naming the original source by a person giving hearsay evidence does not necessarily exclude the possibility that the person on whose information hearsay evidence is based is not an eyewitness of the fact the verification of which is the purpose of the said hearsay evidence.” It is thus follows that hearsay, in a similar way as in any other derivative evidence, is characterised by a lower degree of credibility and has less evidentiary power than primary evidence, because subjective and objective threats of distorting concomitant information with hearsay evidence increases. More specifically, it is argued that information given in hearsay evidence is subject to being “damaged” twice, since, initially, the original source may add

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17 CPC, Article 76.3.
subjective factors to the information, then the author of hearsay evidence may subconsciously modify the information.19

The complainant argued that a person might be charged with a crime and be convicted not as a result of incontrovertible evidence as required by the Constitution, but based on two pieces of hearsay evidence as the totality of corroborated evidence. It was disputed in the claim that, at both stages of criminal proceedings, an indictment or a final conviction could be based on hearsay evidence, which goes against the constitutional principle in dubio pro reo. As regards the bill of indictment, a high degree of probability is needed, whereas a judgement on final conviction must meet the level of beyond a reasonable doubt.

Under the law in question, the Constitutional Court examined the criteria set out by the CPC for evidence, whether direct or indirect, that is applied in practice. In particular, evidence must be corroborated, clear, and convincing and the totality of evidence must be presented before a court.20

The main question before the Constitutional Court was to assess how hearsay evidence met the incontrovertibility requisite of the Constitution and also if the degree of likelihood was high enough for a criminal court to apply such evidence as the only and decisive proof against the accused.

After a careful consideration of the disputed legislation and the practice of the ECtHR, the Constitutional Court concluded that “generally, evidence has to adequately reflect the factual circumstances for the confirmation of which it is presented. Evidence cannot be considered incontrovertible if it has more influence on the administration of justice than is should have based on its nature”.21 The court further noted that hearsay in general is less reliable evidence, its use involves risks for forming a false assumption about the guilt of an individual; therefore, hearsay might be allowed only in exceptional cases, based on clear rules prescribed by the law and when constitutional guarantees are ensured. Declaring evidence that is based on the statement of another person or information disseminated by him/her admissible in a court involves multiple risks. Among others, it is hard to assess how reliable or trustworthy such information is, because a court is denied the opportunity to check the attitude of the respective source towards the events related to a criminal case. It is also hard to foresee what testimony such a person would give if he/she were summoned before a court.

According to the Constitutional Court, the criteria set out in Article 76 of the Criminal Procedure Code for the admissibility of hearsay evidence are not sufficient, since the provision does not clearly define the obligation to ensure the check of the source identified by a witness.

The Court emphasised that “in certain cases the application of hearsay evidence is necessary in the interests of justice, e.g., a witness or a victim is threatened or there is a need to ensure his/her safety as a witness. […] Such a necessity may also be the case in other scenarios, e.g., when the author of the information is not able or willing to give testimony and an important reason exists for that”.22

Specifically, hearsay can be used: to verify other evidence and investigative information in a criminal case, to instigate producing additional evidence, to impeach witness testimony, to apply coercive measures, to place a person in a medical institution, for search and seizure, as well as for conducting any other investigative action.

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19 See Commentary of the Criminal Procedure Code of Georgia, Article 75.
20 The CPC of Georgia, Article 82.
21 Paragraph 52.
22 Citizen of Georgia Zurab Mikadze v. Parliament of Georgia, Decision No. 1/1/548, 36, 41, 52 of the Constitutional Court of Georgia, 22.01.2015.
According to the Court, a criminal penalty for giving false evidence is a less effective measure to ensure the reliability of hearsay evidence, because a person giving hearsay evidence cannot verify the incontrovertibility of the information given by another person.\textsuperscript{23}

“The amount of hearsay evidence \textit{per se} does not have to make the information based on that evidence credible. Verification by other evidence does not change the nature of hearsay evidence, only the degree of a possible conviction is changed by this type of evidence.”\textsuperscript{24}

The Constitutional Court of Georgia stated that legislation should prescribe minimal guarantees that would preclude the use of possibly false, dubious evidence against an accused person. Therefore, the law should clearly determine when the use of hearsay is allowed; the conditions of its admissibility should be strict and thoroughly precise. The more significant the information received from hearsay for proving the guilt, the more important become the rules that enable its use.

In \textit{Citizen of Georgia Zurab Mikadze v. Parliament of Georgia},\textsuperscript{25} the Constitutional Court assessed the applicability of hearsay evidence in criminal cases. Taking into account the prevalent practice of criminal courts as well as a systemic analysis of the CPC, the Constitutional Court stated that the disputed law allowed the application of hearsay evidence as the only reliable proof for either an indictment or a conviction. It thus was found to contradict \textit{in dubio pro reo} principle and was declared unconstitutional. As a result of the said decision, the Constitutional Court invalidated the normative content of the respective provisions (Article 13.2: “A judgement of conviction shall be based only on a body of consistent, clear and convincing evidence that, beyond reasonable doubt, proves the culpability of a person”, and of Article 169.1: “The grounds for the indictment of a person shall be the body of evidence that is sufficient to establish probable cause that the person has committed a crime.”) of the Criminal Procedure Code that stipulated the possibility of an indictment, as well as the possibility of a conviction, based on hearsay evidence.

As a result of the decision of the Constitutional Court, the application of hearsay evidence is prohibited for the purpose of proving an indictment and a conviction. However, hearsay evidence can be used: to verify other evidence and investigative information in a criminal case, to instigate producing additional evidence, to impeach witness testimony, to apply coercive measures, to make the seizure of property, to place a person in a medical institution, for search and seizure, and for conducting any other investigative action.

Subsequent to this decision, numerous cases were re-opened all across the country and the approach of common courts when assessing the indirect proof of evidence started to change.\textsuperscript{26} Many people have successfully endured retrial proceedings and were found innocent.

In conclusion, let me emphasise that, in determining whether the criminal proceedings as a whole are fair, regard must be had to whether the accused is given an opportunity to challenge the authenticity of evidence and to oppose its use. In addition, the quality of evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. The Constitutional Court of Georgia has elaborated upon this approach and produced guiding standards for criminal courts to follow, as well as shaping legislative framework on evidentiary rules that the parliament may want to pursue in order to resolve possible uncertainties and clarify some of the key notions concerning the applicability of indirect evidence.

\textsuperscript{23}\textit{Citizen of Georgia Zurab Mikadze v. Parliament of Georgia}, Decision No. 1/1/548, 36, 41, 52 of the Constitutional Court of Georgia, 22.01.2015.

\textsuperscript{24}\textit{Ibid}, 33.

\textsuperscript{25}\textit{Citizen of Georgia Zurab Mikadze v. Parliament of Georgia}, Decision No. 1/1/548, 36, 41, 52 of the Constitutional Court of Georgia, 22.01.2015.

In a modern democratic system, the constitutional court plays a major role in the separation of powers by ensuring that a balance is maintained between the prevailing political interest and inherent liberal values within the framework of the basic law. In Georgia, where democracy lacks experience and maturity, the realisation of the said premise is a challenge. Since constitutional review was introduced in the country 20 years ago, the Constitutional Court has often encountered obstacles, and its path of development has never been easy. Yet, it still managed to perform its duties and made a tangible contribution to Georgia’s evolution towards the rule of law and democracy.

When I joined the Constitutional Court in 2006, there has been limited constitutional jurisprudence and little experience and understanding in society – among practicing lawyers, NGOs, and politicians – about the role of the Constitutional Court. Thus, it proved to be a challenge at the outset to reinforce the role of constitutional review and, by producing high-quality case-law, to solidify the authority of the Constitutional Court. Looking back from now, it can be said that, with gallant effort made by all the judges, the Constitutional Court has emerged as one of the most successful state bodies in Georgia, which proved to be an effective mechanism for the protection of human rights and freedoms.

As the topic of our discussion today is the right to a fair trial, I would like to refer to some of the developments, as well as to a few landmark cases, which were decided during my tenure in the Constitutional Court and are crucial in reinvigorating the right to a fair trial and judicial independence as a whole.

Let me begin by discussing the constitutional submission mechanism, whereby common courts may refer a case to the Constitutional Court if it is deemed that the law that a court in question is about to apply contradicts the Constitution. This allows the judiciary, namely, common courts, with the participation of the Constitutional Court, to discard unconstitutional laws and, thus, to ensure the supremacy of the Constitution and enhance its independence. In a recently decided case, the Constitutional Court indicated:

“[…] constitutional submission represents an essential guarantee for the constitutional supremacy in the state, which allows common courts to avoid the application of allegedly unconstitutional normative acts… [It] also gives vigour to constitutional values in practice […]”.

It has to be noted that, despite constitutional submission is an important legal mechanism for ensuring the supremacy of the basic law, yet it may also be problematic in practice. In particular, if common courts are not sufficiently aware of the constitutional jurisprudence, it

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1 Decision of the Constitutional Court of Georgia on the Constitutional Submission of the Supreme Court of Georgia, No. 3/1/608, 609, 05.10.2015.
might discourage them to rely on this mechanism when necessary. Such a development could be dangerous for the whole system of constitutional review, as it might allow unconstitutional norms to exist and operate in practice. The only legitimate solution in this regard seems to be a genuine dialogue between the constitutional court and common courts, which would enable both institutions to exchange ideas and information.

In the context of the protection of human rights and freedoms, the individual constitutional complaint is a major mechanism that grants every person, natural and legal, the right to petition to the Constitutional Court in cases where there is a violation of their constitutional rights and freedoms, or where there is an imminent risk that they may well be potentially violated in future. This mechanism has been in place from the very beginning of the Constitutional Court’s establishment. Individuals are allowed to bring a case on the violation of their constitutional rights and freedoms only if they are directly affected. As regards the said requirement, whereby the complainant has to prove he/she is a “victim” of the law in question, the Constitutional Court has come across with a legal matter when it had to assess possible effects of the disputed provision on, inter alia, individual person. The issue at hand was whether the authority of law enforcement agencies to intercept internet communications without a court order or urgent necessity directly affected the complainant’s constitutional right to private life. The Constitutional Court eventually considered the case on the merits, based on the same reasoning that the power of governmental agencies, prescribed by the impugned provision, to control internet communications is so overwhelming and undertaken in such a covert manner that it is not quite possible for the complainant to present plausible evidence to the court on any existing or future violations.

Let me now refer to the landmark case concerning access to court, which is one of the most important aspects of the right to a fair trial. The Constitutional Court was asked to recognise the unconstitutionality of the norm of the “Organic Law on the Constitutional Court of Georgia” that defined the subjects who were entitled to apply to a court. It excluded foreigners and stateless persons from the list of potential petitioners. The case was particularly complicated by the fact that the Respondent, the representative of the Parliament of Georgia, was arguing that the norm of the Constitution that sets forth the competences of the Constitutional Court did not grant the right to apply to the Constitutional Court to foreigners and stateless persons. The Constitutional Court declared that everyone despite their citizenship has the right of access to the Constitutional Court. The Constitution expresses the will of citizens that individuals shall have the remedy to protect their rights and this aim may not be achieved through the approach differentiating between citizens and foreigners. Moreover, the Constitutional Court of Georgia held that the norm describing the competences of the Court shall not diminish the right to apply to the Court. Accordingly, the norm of the Constitution that omitted foreigners and stateless persons in the list of potential petitioners could not restrict their fundamental right to have access to a court. Hence, the Court rectified the legislative deficiency and, in accordance with international standards, affirmed the constitutional protection universally.

With this decision, the Constitutional Court has greatly extended the scope of the constitutional protection to foreign citizens and stateless persons. The Court clearly stated that the constitutional right to a fair trial is essential to guarantee an individual’s access to a court and not the law itself.

More recently, the Constitutional Court invalidated the provision of the law on constitutional proceedings, which defined the 30-day time frame for the Constitutional Court to adopt its final decision in cases where it suspended the effect of a disputed provision on the admissibility stage.

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In other words, if the Constitutional Court provisionally suspended a law in question, it had to speed up the proceedings and adopt its final decision in 30 days’ time.

The complainant argued that such a short period of time was not reasonable enough for the Constitutional Court to thoroughly examine the case and adopt a reasoned decision. The Constitutional Court indicated that, given the specificity of a constitutional claim and its proceedings, abstract constitutional review requires the comprehensive examination of a case. Namely, experts, specialists, and witnesses, as well as other potentially interested parties, may be involved in the constitutional adjudication. Hence, the assessment of facts at hand and of the evidence presented may well require more time than 30 days. The Court concluded that the blanket restriction by the law presented the interference with the judiciary and did not meet constitutional standards of the right to a fair trial as it allowed for the possibility of the adoption of an unreasoned judgment.

I would like to underscore that, over the years, the constitutional complaint mechanism in Georgia has proven to be an efficient means of human rights protection. Apart from the regulatory framework, the major credit for this goes to the Constitutional Court itself on the account of being able to maintain the independence and impartiality throughout years, despite attempts of oppression and undue influence by various groups. This is basically one of the reasons that encouraged the Public Defender to propose the constitutional reform to expand the powers of the Constitutional Court.\(^4\) The draft law offers to examine the constitutionality of individual judicial acts and judgments passed by common courts that have entered into legal force with this view. According to the draft law, the powers of the Constitutional Court of Georgia leave behind the norm-controlling model and establish constitutional control on the basis of a real claim. A similar model is effectively enforced in the Federal Constitutional Court of Germany.

This initiative is still being debated among politicians and society groups. Yet, let me say that, despite its positive side of acknowledging the efficiency of the Constitutional Court by giving it larger powers of judicial review, the flip side of this initiative presents a significant challenge for the entire constitutional adjudication. Giving the Constitutional Court real-claim powers is much likely to result in heavy caseload, with the Court struggling to cope with numerous individual applications at the same time. It may well damage the efficacy and viability of constitutional adjudication unless series of legislative, administrative, and/or material arrangements are made beforehand. As good as this initiative seems in terms of introducing wider human rights protection guarantees, it requires a substantive analysis not to allow huge backlog of cases and, thus, inefficient constitutional decision-making. Thus, it needs to be dealt with great care by everyone in charge because, if not implemented appropriately, it may imperil the proper functioning of constitutional justice as a whole.

In conclusion, let me say that Georgian legislation along with the help of the Court’s case-law have significantly broadened the guarantees of individual accessibility to justice. It had also paved the way for greater public involvement and increased the awareness of the constitutional adjudication process. Over the years, the efficiency of the Court has served well for the persons affected, which is a testament of the Constitutional Court’s continuous effort to broaden access to justice and improve the quality of constitutional decision-making. As of now, the Constitutional Court in Georgia is again put to the test, as it has to re-emerge strong and resilient from undue outside influence and get back to business of genuinely administering constitutional justice.

To begin with, there are obviously many different forms of governance in modern states. Such a variety of forms of governance reflects the multitude of the modes of the implementation of the doctrine of the separation of powers. Although, obviously enough, the mentioned two – the form of governance and the doctrine of the separation of powers – are not identical phenomena, they are closely related. Accordingly, it is agreed that a proper analysis of the concept of the separation of powers is, *inter alia*, requisite for understanding the reason for the existing abundance of the forms of governance.¹

The principle of the separation of powers is a prerequisite for a modern state. Although it is nowadays, generally, consolidated (explicitly or implicitly) in the constitution, it is, first of all, a *philosophical-political category*, i.e. the separation of state powers is a direct outcome of the political and philosophical development. In other words, first of all, namely the mentioned philosophical-political discourse substantiates the need for the separation of powers within the state governance. It is, therefore, precisely the mentioned nature of this category that predetermined the respective concept. Accordingly, primarily within the mentioned discourse (although definitely without denying the existence of other discourses) a particular model for the implementation of the principle of the separation of powers, i.e. a particular model of the separation of powers between institutions exercising state power, is established. Therefore, a comprehensive analysis of the concept of the separation of powers, as well as a particular model of the separation of powers, always has, among other things, a philosophical-political aspect.

On the whole, the principle of the separation of powers implies the necessity of the partition of state functions, i.e. the division of state functions between different branches of state power (legislative, executive, and judicial). This necessity may be illustrated by quoting the words of the so-called “Father of the Constitution”, James Madison: “The accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny”.² Hence, the separation of powers represents a particular concept, the core idea of which is that of the balancing of power between different bodies so that no power can act without cooperation with the others, and each checks the others.³ It is, in the most general sense, seen as the division

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¹ For more, see Mesonis, G. *Valstybės valdymo forma konstitucinėje teisėje: Lietuvos Respublika Vidurio ir Rytų Europos kontekste*. Vilnius, 2003.
³ Mesonis, G. *Valstybės valdymo forma konstitucinėje teisėje: Lietuvos Respublika Vidurio ir Rytų Europos kontekste*. Vilnius, 2003, p. 188.
of the mentioned functions among separate and independent bodies and is considered to limit the possibility of arbitrary excesses by government. Accordingly, the doctrine of the separation of powers may obviously be associated solely with a democratic legal political regime.

However, the contemporary understanding of the separation of powers could not be properly depicted without reference to the development of the concept itself. Several stages in the development of the theory of the separation of powers may be identified. Actually, each of these stages constituted a certain novella and became, in a sense, a source and even, in a certain way, incentive for further development of the doctrine of scientific thought.

The first stage of the development of the theory of the separation of powers is the naissance of the theory. It is, obviously, related to the scientific thought of John Locke. In his work “Two Treatises of Government” (1690), Locke elaborated the concept of the contractual origin of the state and attempted to formulate the theory of the division (not the separation) of state powers into the legislative, executive, and judicial branches, with priority to and emphasis on the legislative branch (as the legislative power was considered to be directly delegated from the people), i.e. at the starting point of this doctrine, the free powers were not equal.

Further development is linked to the works of the XVIII century authors – Montesquieu and Jean-Jacques Rousseau. These works constitute another step towards the democratic revolution and a new state, and mark the second stage of the development of the theory of the separation of powers. However, the most significant conception in this respect is the one elaborated by Montesquieu. In his work “The Spirit of the Laws” (1748), Montesquieu set out a theory that had remarkable importance for the whole western constitutional idea: it envisaged the classical division of power into legislative, executive, and judicial, while stating that each of them should be given into different hands and each of them should limit the other. It is this theory that has now become the classical concept of the separation of powers, i.e. Montesquieu’s theory, despite some major corrections, remains relevant until nowadays.

The formulation of the theory of checks and balances, which implied that separate branches of the government should be empowered to prevent actions by other branches and are induced to share power, is the third stage of the development of the theory of the separation of powers. This theory was developed during the era of the American Revolution. The idea was that the constitutional frames for defining the powers of every state power are insufficient; therefore, there is the need for a mechanism that would guarantee the permanent self-regulation and mutual control of the branches of state power; such mechanisms that were aimed at cooperation and control were called checks and balances. This theory, which is very relevant nowadays, actually served for filling in the gaps that existed in the doctrine of the separation of powers.

The fourth stage of the development of the theory of the separation of powers was in the

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5 It is emphasised that the notion and the need to separate powers was born and developed in particular circumstances of the Civil War in England and, even if French and American legal-political ideas had significant influence on the doctrine of the separation of powers, the idea itself originally comes from England. According to Mesonis, G. Valstybės valdymo forma konstitucinėje teisėje: Lietuvos Respublika Vidurio ir Rytų Europos kontekste. Vilnius, 2003, p. 187.

6 It should be noted, however, that the very beginnings of the contemporary theory of the separation of powers could be, according to some authors, traced back to Antiquity and, primarily, to the works of Aristotle, who emphasised the existence of three parts within every structure: the one that decides general affairs, another that is related to government responsibilities, and the third that is judicial one. According to Šinkūnas, H. Valdžių padalijimo principas ir teisminės valdžios vieta valdžių padalijimo sistemoje. Teisė. 2003, 49, pp. 112–123: 114–115.


XX century and could be referred to as revisionist. It is characterised by two main aspects: (I) the reassessment and re-evaluation of the heritage of the theory of the separation of powers and its functioning in practice, and (II) the inability of the proposed modern conceptions of the separation of powers (despite their multitude) to refute the basic principles of the already existing conception.

As we can see, the long history of the doctrine of the separation of powers reflects the developing aspiration of men over the centuries for a system of government in which the exercise of governmental power is subject to control. Ultimately, the so-called contemporary understanding of the separation of powers combined all the essential aspects of the theory of the separation of powers gained during the development of the respective doctrine. Some legal authors also refer to the modern separation of powers doctrine, envisaging formalism and functionalism approaches at the core of it; though, at the same time, it is also agreed that the both commonly refer to the freestanding separation of powers only by taking different approaches to the constitutional provisions, essentially, in achieving checks and balances among the state powers.10

Most generally, the separation of powers is considered to be an essential characteristic or a prerequisite for a democratic state and the result of compromise, expressing the idea of sharing state power between the branches of government (traditionally, legislative, executive, and judicial), which, though generally considered separate and independent, are provided with certain means to check and balance the powers among each other. Thereby, the principle of the separation of powers envisages creating such an organisation of state institutions exercising state powers that would serve as a guarantee of human rights and freedoms and would ensure the effectiveness of the performance of state functions. In other words, the separation of powers is, inter alia, indispensable for ensuring human rights and freedoms in a democratic state and the effective functioning of state governance.

However, the doctrine of the separation of powers, as almost every theoretical conception, obtains different forms when applied in practice. Hence, though the doctrine of the separation of powers is universally recognised, there is no commonly agreed upon model of its implementation. As the theory of the separation of powers seeks to substantiate the need to grant powers to different institutions, the question remains as to which institutions are those that participate in the governance of the state. The response here may vary, since, as mentioned before, the form of governance, as, in a sense, an expression of the separation of powers in a particular legal system, has diverse shapes in different states. Accordingly, an approach to limiting possible arbitrariness in respect of state power, i.e. guaranteeing both separateness and the balance of powers, as well as a particular means of checking and balancing power, may differ as well. Therefore, theoretical reflections and practical aspects of the constitutional principle of the separation of powers should further be analysed in respect of a particular model of the separation of powers.

Referring to the model of the implementation of the separation of powers in the Republic of Lithuania, it should, primarily, be noted that the main principles of the organisation and activities of the authorities of the State of Lithuania are determined by the fundamental provision “The State of Lithuania shall be an independent and democratic republic” of Article

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1 of the Constitution and the aspiration for a state under the rule of law, as entrenched in the preamble to the Constitution.\textsuperscript{11} The Constitutional Court has concluded that Article 1 of the Constitution consolidates the fundamental constitutional values – the independence of the state, democracy, and the republic; they are inseparably interrelated and form the foundation of the State of Lithuania, as the common good of the entire society consolidated in the Constitution; therefore, they must not be negated under any circumstances.\textsuperscript{12}

The constitutional principle of the separation of powers is established in Article 5 (Paragraphs 1 and 2) and other articles of the Constitution (which is an integral act) that establish the powers of the state institutions exercising state power.

Article 5 of the Constitution of the Republic of Lithuania states:

“In Lithuania, state power shall be executed by the Seimas, the President of the Republic and the Government, and the Judiciary.

The scope of power shall be limited by the Constitution.
State institutions shall serve the people.”

In this article of the Constitution, the principle of the separation, interdependence, and balance of the branches of state power is established.\textsuperscript{13} Namely the provision of Paragraph 1 of Article 5 of the Constitution provides for the grounds for the separation and balance of state powers.\textsuperscript{14} The constitutional doctrine also acknowledges the undisputable relationship between the separation of powers and the protection of human rights and freedoms: the Constitutional Court has stressed that, when actually implementing the principle of the separation of powers, it is possible to reinforce human rights guarantees.\textsuperscript{15}

As mentioned before, the model of the implementation of the separation of powers in a particular country is, \textit{inter alia}, related to and, in a sense, reflected by means of the existing form of governance.\textsuperscript{16} State power, as mentioned, in the Republic of Lithuania is executed by the Seimas (legislative branch), the President of the Republic and the Government (executive branch), and the Judiciary (judicial branch), i.e. the Constitution entrenches the traditional model of the separation of powers among three branches of state power. It is agreed upon in the legal doctrine that a more comprehensive legal analysis of the constitutional provisions in the light of the main and auxiliary criteria of the government form allows drawing the conclusion that the \textit{parliamentary form of governance} is entrenched in Lithuania (actually, like in other Baltic States).\textsuperscript{17} The existing model is commonly considered to include a broad range of checks and balances necessary to guarantee that no power would be vested in one hands, i.e. to ensure the separation of powers.\textsuperscript{18}

\textsuperscript{11} The Constitutional Court’s ruling of 21 April 1998.
\textsuperscript{12} The Constitutional Court’s decision of 19 December 2012 and ruling of 24 January 2014. It should be noted that, even where regard is paid to the limitations on the alteration of the Constitution, which stem from the Constitution itself, it is not permitted to adopt any such amendments to the Constitution that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state. The Constitutional Court’s ruling of 11 July 2014.
\textsuperscript{13} The Constitutional Court’s ruling of 6 December 2000.
\textsuperscript{14} \textit{Inter alia}, the Constitutional Court’s rulings of 20 April 1999 and 13 May 2010.
\textsuperscript{15} The Constitutional Court’s ruling of 19 December 1996.
\textsuperscript{16} Generally, when the government is accountable to the representative institution of the people, i.e. the parliament, the government form should be considered as parliamentary; in contrast, unaccountability of the executive power to the parliament is a typical trait of the presidential form of government; whereas accountability of the government to the head of state and to the parliament is typical of the mixed (semi-presidential) model.
\textsuperscript{17} Mesonis, G. \textit{Valstybės valdymo forma konstitucinėje teisėje: Lietuvos Respublika Vidurio ir Rytų Europos kontekste}. Vilnius, 2003, pp. 69–71. It is noteworthy in this respect that the parliamentarian model of governance in the legal doctrine is considered to be suitable (sometimes even as the most suitable) one to tackle the key challenges, which should be dealt with in every model of the implementation of the separation of powers.
\textsuperscript{18} According to Kūris, E. Koordinaciniai ir determinaciniai konstituciniai principai (2). \textit{Jurisprudencija}, 2002, vol. 27(19); pp. 59–74; 63–64.
Nonetheless, there are the preconditions to assert that, under the Constitution, the Seimas is, in a sense, the branch with the biggest powers (due to its legislative function, functions related to forming governmental institutions, inter alia, appointing their chief officials, also to establishing ministries, appointing the justices of the Constitutional Court and the Supreme Court of Lithuania, removing the President of the Republic through the impeachment procedure, etc.). Meanwhile, the implication of this so-called dominance of the Seimas within the system of state governance, from time to time, continues to induce the polemic in respect of the need to alter the Constitution in order to maintain the balance of powers between state institutions that exercise state power.

It should be noted in this respect that the stability of the Constitution is a great constitutional value; the Constitution is one of the preconditions for securing the continuity of the state and respect for the constitutional order and law, as well as for ensuring the implementation of the objectives that have been declared in the Constitution by the Lithuanian nation and upon which the Constitution itself is founded. Accordingly, the stability of the model of the separation of powers, as ensuring the main principles of the organisation and activities of the authorities of the State of Lithuania, should also be seen as a legal value. Therefore, the constantly identified need to redistribute powers between state institutions is questionable. In addition, the following aspects prove that the modification of the existing model of the implementation of the separation of powers is unnecessary. Firstly, the existent form of governance has proven itself as functioning in practice and realising the set goals. Secondly, any correction of the form of governance could not guarantee that the new model would meet the objectives and would be successfully functioning; a consequent failure could even result in social and political instability. Thirdly, the Constitutional Court may influence certain corrections of the form of governance even now by interpreting the Constitution; whereas the correction of the model of governance by amending the Constitution itself would require the formulation of a new constitutional doctrine. Fourthly, the constitutional customs may emerge within the practice of the constitutional legal relations, i.e. the customs that could, in a sense, de facto mitigate power asymmetries between institutions.

Summing up, the parliamentary model of governance, which exists in the Republic of Lithuania, contains a number of checks and balances that envisage, in a sense, the restriction of parliamentary powers. Therefore, the assertion that the so-called domination of the Parliament within the system of state governance should be seen as the negation of the doctrine of the separation of powers and, therefore, requires intervention in the text of the Constitution with the aim of restoring the damaged balance between institutional powers should be assessed critically and dismissed.

However, all that has been said above is not intended to state that the model of the separation of powers that exists in Lithuania should be considered as unquestionable and not containing any deficiencies (at least with respect to its functioning). On the contrary, the state governance practice proves that the existing model of governance, as well as any other respective model, in the course of implementing state power, instigates various conflicting situations. Meanwhile, although, as mentioned before, the modification of the model of state governance is not to be encouraged, certain corrections of the mentioned deficiencies of its functioning are inevitable due to the changing circumstances.

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19 The Constitutional Court’s rulings of 28 March 2006 and 24 January 2014.
The so-called “corrections” in respect of the functioning of the existing model of governance (accordingly, in the context of the functioning of the model of the separation of powers) are effectuated namely within the means of constitutional justice, i.e. inter alia, in the course of interpreting the constitutional provisions that envisage the separation of powers. It is actually here that the Constitutional Court is considered to have the obligation to protect the scope of the constitutional regulation concerning the basis of the organisation and functioning of institutions implementing state power, their legal status, functions, and relations.\textsuperscript{21} Therefore, the mentioned possible conflicting situations related to the implementation of state power (which are, accordingly, relevant to the constitutional principle of the separation of powers) are often dealt with while exercising constitutional justice. In fact, particular constitutional justice cases are sometimes titled as the disputes of institutions implementing state power; meanwhile, all constitutional justice cases are referred to by some legal authors as the ones that concern limiting the authority of institutions implementing state power.\textsuperscript{22}

Accordingly, although, the concept of the constitutional principle of the separation of state powers (which, under the Constitution, forms the basis for the organisation and functioning of state governance in Lithuania) has been disclosed in the official constitutional doctrine, the practical aspects of the organisation and functioning of state governance (i.e., the elements that reflect the implementation of this principle) constantly continue to be revealed and interpreted in the constitutional jurisprudence. Therefore, the constitutional doctrine of the separation of powers is respectively constantly developed, as well.

For example, the Constitutional Court, in its ruling of 30 December 2015, stressed that the constitutional separation and interaction of state powers, as well as the function of parliamentary control and budgetary function implemented by the Seimas, imply the possibilities of the legislature to regulate information, inter alia, an annual activity report submitted by a state institution to the Seimas, as the representation of the Nation, in order to have access to and consider information submitted under the appropriate procedure not only by the heads of the Government and other executive authorities but also by the heads of those institutions that, under Paragraph 1 of Article 5 of the Constitution, are not classified as either the executive or legislative powers. When doing so, the legislature is bound by the Constitution. The principle of the separation of powers, as consolidated in Article 5 (Paragraphs 1 and 2) and other articles of the Constitution, and the functions of the Seimas, as reflected in the entirety of the powers conferred on the Seimas under Article 67, do not imply, inter alia, with regard to information, including annual activity reports submitted by state institutions to the Seimas, any such legal regulation under which, after the head of a state institution submits the appropriate information in the form of a report, the procedure of accounting to the Seimas by the institution (or its head) would be considered not completed until the Seimas approves the submitted report, i.e. under which it would be required that the Seimas not only must become acquainted with and consider the information provided in the report, but that it must also adopt a special resolution on approving the submitted report. Whereas if the Seimas were vested with the powers to adopt a resolution on giving or not giving its approval to annual activity reports submitted by the heads of state institutions, these heads would be not protected against the possible pressure or unjustified interference with their activities, despite the fact that they would perform their functions in observance of the Constitution and law and in the interests of the Nation and the State of Lithuania; such a legal regulation would be incompatible with the Constitution; and the establishment of such a legal regulation would unreasonably expand the constitutional powers of the Seimas.

\textsuperscript{21}Jarašiūnas, E. Valstybės valdžios institucijų santykiai ir Konstitucinis Teismas. Vilnius, 2003, pp. 44.
\textsuperscript{22}Ibid., pp. 57–59.
Additionally, in the course of the development of the official constitutional doctrine, novel aspects relevant to other principles inextricably linked to the constitutional principle of the separation of powers are revealed (for example, aspects of the constitutional principle of a state under the rule of law, the principle of the supremacy of the Constitution, the imperative obliging state institutions to serve the people, etc.). Suchlike development of the constitutional doctrine also has certain impact on the constitutional doctrine of the separation of powers, as well as on its implementation.

An example of the mentioned “related” development of the official constitutional doctrine could be the ruling of the Constitutional Court of 11 July 2014. In this ruling, the Constitutional Court emphasised that the Constitution equally binds the national community – the civil nation itself, as well as all other legal subjects (inter alia, law-making subjects, institutions organising elections (referendums), initiative groups for referendums, as well as other groups of citizens); the Constitutional Court also underlined the constitutional requirements (which arise, inter alia, from the principle of the supremacy of the Constitution) for the direct execution of the supreme sovereign power by the nation, i.e. by referendum, as well as certain requirements for the legislature, inter alia, the requirement for regulating questions related to calling and conducting referendums (including the rights and duties of the participants of legal relations related to organising referendums). Meanwhile, in its ruling of 8 July 2016, the Constitutional Court disclosed, inter alia, the requirements of publicity and transparency of law-making procedures, deriving from the constitutional principle of responsible governance, which is to be interpreted in conjunction with the imperative obliging state institutions to serve the people, as consolidated in Paragraph 3 of Article 5 of the Constitution, which must be followed, inter alia, by all institutions exercising state power; in the same ruling, the Constitutional Court also disclosed the content of the duty of the Government to observe the established procedure for adopting legal acts (inter alia, the necessity arising from the Constitution to adopt legal acts consistently according to the procedure established in laws).

Thus, the constant development of the official constitutional doctrine, in a certain way, inevitably concerns the constitutional principle of the separation of powers and, accordingly, also the existing model of its implementation. Therefore, in spite of the fact that it is already clearly and comprehensively determined, the constitutional principle of the separation of powers and, especially, its manifestation in practice still can, on certain occasion, become (and actually, does become) a polemic aspect.

To sum up, in the Republic of Lithuania, the principle of the separation of powers, as the fundamental principle of the organisation and functioning of a democratic state under the rule of law, is grounded both systemically and by the constitutional doctrine. However, although the official constitutional doctrine of the separation of powers is rather extensive, it is still constantly evolving and reflecting those aspects of the concept of this constitutional principle that have yet been less emphasised. Even more so, most of the constitutional justice cases, to a greater or lesser extent, may be linked to the issues related to the separation of powers: the majority of constitutional issues are, in a certain way, related to the implementation of legislative, executive, and/or judicial powers. Therefore, certain aspects of the concept of the constitutional principle of the separation of powers are reflected in the greater part of constitutional justice cases. Accordingly, further development of the official constitutional doctrine on the separation of state powers is virtually inevitable.
The Constitutional Principle of the Separation of Powers

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1. General Considerations on the Separation and Balance of Powers

The sovereignty of a state can be maintained only if there exist fundamental legal safeguards in the forms established by the Constitution. One of these forms, which is also an important component of the rule of law, is constitutional justice carried out by the Constitutional Court – a political-jurisdictional public authority, which is placed outside the scope of the legislative, executive, or judicial powers and has the role of ensuring the supremacy of the Constitution as the Basic Law of a state governed by the rule of law.

Given the particular competences of constitutional jurisdiction, it is located at the very border between law and politics, being impregnated by an element of public law. Taking into account the expedient changes of social, economic and political realities, the Constitutional Court also plays a prevailing role in assuring and maintaining that the legal framework is as close to the constitutional values as possible, as well as in observing the requirements of the principle of legal security and in pursuing the goal of “quality of regulations”.¹

Considering the good organisation of state authorities, the constitutional court has a primary and defining role, as it represents a veritable pillar endorsing the state and democracy and guaranteeing equality before the law, human rights, and fundamental freedoms. Moreover, constitutional courts contribute to the good functioning of public authorities within constitutional relationship regarding separation, balance, collaboration and mutual control of state powers.

The fundamental principle underlying the organisation and functioning of any state is the separation of legislative, executive, and judiciary powers. Their harmonious functioning implies that each of these authorities oversees a separate and special domain of the public power, vested with defensive means in relation to the other powers. Each of these authorities is attributed strictly determined competences, and none of them has the power to usurp the competences of the others.²

The separation of state power into legislative, executive, and judiciary implies the creation of a system of guarantees, restrictions, and balances that would exclude any possibility of domination by either of them, would ensure the autonomous functioning of each branch of state power, as well as their collaboration.3

The establishment of a principle regarding the separation of state powers pursues the goal of creating a system of governance that would allow ceasing any abuse from any of the powers. It is important to note that one component of state power having a more powerful potential to exercise influence can subordinate another power at any time. Taking into account the fact that, in the event of any abuses while exercising state power, a social power can be blocked only by another power that is equivalent in competences and possibilities, the Constitutional Court of the Republic of Moldova, in its case-law, has developed the principle of the separation and collaboration of state powers provided for in Article 6 of the Constitution, and concluded that balance between the branches of state power is an inalienable component of this principle.4

In its case-law, the Court continuously emphasised that compliance with the principle of the separation of powers implies not only that none of the branches of power may interfere with the powers of other branches, but that none of these branches neglects its duties that are mandatory for the proper performance of activities in a particular field – especially, when such an obligation is stated in the Supreme Law or has been imposed by a judgment of the Constitutional Court, which, under Article 134 of the Constitution, ascertains the enforcement of the principle of the separation of state powers.5

Having ascertained the principle of the separation of powers as a mechanism employed by the powers to mutually control each other and to ensure balance between them, the Constitutional Court concluded in its case-law that the rationale behind this balance is the hindering in displaying the hegemony either of a constitutional power or of a political party, of a trade union or of a social class against others, as well as avoidance in breaching the constitutional order established by the non-vitiated will of the people.6

The principle of institutional balance, now known as the system of “checks and balances”, constitutes the basis of democracy and implies mutual balance and control between powers, so that state powers have approximately the same weighting, i.e. are balanced in order to limit each other and, thus, to avoid any abusive use of state power. This system of checks and balances is a sine qua non condition for the existence of modern democracy, as it prevents the omnipotence of the legislative, executive, or judiciary power.7

Thus, the Constitutional Court as a guarantor for the realisation of the principle of the separation of powers and of the responsibility of the state before the citizen, through its competence to carry out the review of constitutionality, intervenes into the system of the checks and balances of state powers and, in this way, ensures dialogue between the powers of the state.

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5 Judgment of the Constitutional Court no. 33 of 10.10.2013 on the interpretation of Article 140 of the Constitution.


7 Judgment of the Constitutional Court no. 23 of 09.11.2013 on the interpretation of art. 116 para. (4) of the Constitution.
2. The Constitutional Court as a “mediator” in resolving the conflicts between state powers

2.1. Relations between the Constitutional Court and the Parliament

a) Interfering in the legislative process through the review of constitutionality

The separation of state powers is the quintessence of the rule of law, democracy and human rights. While assuming that the fundamental rights are guaranteed mainly through constitutional provisions, the separation of powers is an instrument called to ensure the protection thereof. As a matter of fact, politics is the domain that should create the legal framework to consolidate this construction as a whole. For these reasons, carrying out constitutional jurisdiction has a particular impact given its intervention into the state power through the restoration of fundamental rights.

Such a normative balance, dynamic in its essence, cannot be maintained by a simple literal-static referral to the Fundamental Law, rather by the institution of a form of fluid verification of secondary legislation.

In this context, when the Court performs the review of the constitutionality of laws and ascertains the non-compliance of legal provisions with constitutional rules, it acquires the status of a “negative legislator” within the law-making process.

According to Article 135 of the Constitution, the Constitutional Court, upon referral, exercises the review of the constitutionality of laws and Parliament decisions, of decrees of the President and Government decisions. It is worth mentioning with reference to the review of the constitutionality of “laws” that the Constitution does not make a distinction between “laws enacted, published in the Official Gazette and entered into force” or “laws that have been adopted but have not yet been published and have not yet entered into force”. The Constitutional Court of the Republic of Moldova has developed a consistent case-law referring to the form of review performed and stated its competence to examine laws both before and after their entry into force. This conclusion is based on the evolutionary interpretation of the powers of the Constitutional Court to enable the use of broader mechanisms to fulfil its constitutional goals of guaranteeing the rule of law. 8

The supremacy of the Constitution should be preserved from any further legislative interference. It is by way of the review of constitutionality of the laws that the Constitutional Court intervenes in the legislative process under which the Parliament assumes the powers to suppress constitutional norms. On the other hand, the Parliament, by the laws adopted, regulates relations both within the executive power and within the judiciary.

b) Establishing the limits of functionality for the Parliament

In its case-law, the Constitutional Court ruled on the elements of parliamentary mandate and set out some limits of functionality for the Parliament.

Thus, when addressing the issue of free representation, the Court pointed out that the parliamentary mandate is irrevocable: the voters cannot influence its premature termination and any blank resignations are prohibited. These aspects confer special protection on the member of the Parliament against the pressures exercised by the voters, as well as by the party supporting him/her in his/her way to the Parliament. Thus, once elected, the member of the Parliament turns into the representative of all the people, and the content of his/her mandate is determined by the interests of the people he/she represents and not only of those who have voted for him/her; the member of the Parliament is free to adopt attitudes that in his/her conscientious vision serve the public good, while the irrevocability of the mandate is a means to protect the MP’s freedom and independence.

Moreover, when the Constitutional Court examined parliamentary immunity, it noted that the requirements of the rule of law provide that parliamentary immunity cannot be effectively applied unless a referral to the legitimacy of the aims pursued, namely preserving the integrity of the Parliament and protecting the opposition, is made. Given this rationale of parliamentary

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immunity, any unnecessary and uncritical extension thereof with regard to the issues that have nothing to do with the given public position merely affects the degree of public confidence in the system of parliamentary democracy.

Thus, through its case-law, the Court held that, in the case of conviction for offences committed intentionally and/or in the case of sentencing to prison (jail) by a final and irrevocable judgment, irrespective whether arising before or after the validation of mandate, the member of the Parliament is considered to be in a situation of ineligibility and, thus, is incompatible with the position of a member of Parliament, and its mandate shall terminate by the law.9

Referring to the parliamentary control over the executive and the judiciary, the Constitutional Court stated that the supreme representative body of the people of the Republic of Moldova and the sole legislative authority of the state is the Parliament (Article 60 of the Constitution).

As the representative of the people, the Parliament is empowered with competences related to control over and information about the accomplishment of prerogatives of the power of the people. Parliamentary control is a pressing need helping to evaluate the process of turning a political option into a regulatory decision, which shall be immediately or gradually applied to social realities.

Appearing as an expression of a parliamentary function within constitutional democracy, parliamentary control is carried out by various means. The aim of any parliamentary control is to verify the acts and the actions performed by the exponents of the executive in terms of their compliance with the law, respect for human rights and freedoms, as well as compliance with the general interest of society.

The Parliament is not entitled to transform itself into a court when it gives appreciations to the issues that are verified during judicial proceedings by an independent and impartial court established by the law that shall deliver a judgment referring either to the violation of rights and duties of civil nature or on the grounds of any charges of criminal nature. Likewise, politicians (MPs) should refrain from giving orders to the representatives of the judiciary or from creating the impression that it is possible to give such orders, to criticise the magistrates, and not to obey court judgments. They are obliged to protect the independence of the judiciary and to contribute to the strengthening of public confidence in the judiciary. It is unacceptable for politicians (MPs) to use justice as a stake in political conflicts.

The Court noted that any statutory provision involving the possibility of summoning a judge or a prosecutor before a parliamentary investigation commission obviously violates the constitutional dispositions providing for the separation of powers, the independence of judges and prosecutors, and their subordination only to the law.

Testifying before parliamentary investigation commissions is the discretionary right of the exponents of the judiciary. By exception, they may participate as invitees to the parliamentary commissions when it is necessary to clarify certain issues of technical nature or particular information of public interest that do not imply elucidation of procedural issues relating to the examination of pending cases.

The Court pointed out that parliamentary investigation commissions are not entitled either constitutionally or statutorily to decide on the guilt or innocence of a person, due to the fact that these commissions are the expression of parliamentary control. The conclusions formulated by these investigation commissions cannot provide any statements that could possibly lead to the acknowledgment of a person’s culpability in criminal matters.

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9 Judgment of the Constitutional Court no. 2 of 20.01.2015 on the interpretation of art. 1 para. (3) combined with art. 69 and 70 of the Constitution of the Republic of Moldova (immunity and termination of the mandate of the member of Parliament).
At the same time, the Court noted that any public (or otherwise made) statements that charge concrete persons with serious allegations are inadmissible as long as these statements are not substantiated within strictly regulated legal proceedings.10

2.2. Resolving the dispute between the Parliament and the Government

The Constitutional Court played a key role in diagnosing the aspect of democratic legitimacy in exercising executive power. In this respect, the Court interfered by reviewing the constitutionality of the acts that maintained in the position of the Prime Minister a person who was previously dismissed from this position by a motion of no confidence for suspicions of corruption, and this conclusion influenced the rationale on the constitutionality of the act appointing the candidate for the position of the Prime Minister.

In this case, the Court held as a principle that the rule of law is not a fiction of a declaratory nature only. The efficient functioning of the rule of law must be demonstrated through practical actions. In order to respect the constitutional principle of the rule of law and the general interest of citizens it is imperious to take necessary steps with a view to ensuring the prompt application of such measures as suspension or resignation of ministers and other high-ranking officials in respect of which there exist reasonable doubts on their integrity.

The Court considered that keeping the Prime Minister who had been dismissed from this position for reprehensible acts was a disregard of the rule of law and of the principles related to integrity and endangered the stability of democratic institutions. In the Court’s view, it is unacceptable that a decision of the Parliament that expressed lack of confidence in a government for the reasons of corruption is disregarded and ignored, at least as long as evidence to the contrary has not been submitted and the groundlessness of suspicions has not been proved. A Prime Minister who presided the Cabinet of ministers suspected of corruption and against which prosecution was initiated disregards the rule of law and shows a clear lack of integrity, thus becoming incompatible with this position. The Court, thus, held that the Prime Minister heading a government dismissed by vote of no confidence for suspected corruption was incompatible with the office and was unable to continue exercising the mandate.11

Referring to the powers of a resigned Government, the Constitutional Court of the Republic of Moldova stated that, according to constitutional procedures, the Government, as a representative of the executive power is the common work of the legislator, as the supreme representative authority. Thus, only upon receiving the mandate from the Parliament, the Government may exercise its competences as the executive power, which are ultimately reduced to the process of the enforcement of the laws adopted by the same Parliament.

In the same context, a resigned Government continues to administer public affairs until a new, plenipotentiary Government is formed. This means that the resigned Government exercises only a limited amount of power, it “administers”, not “governs”. The administration of public affairs refers to the daily, current decisions of the Government, which are necessary for the uninterrupted functioning of public service. This activity is meant to avoid the complete lack of executive power and shall be resumed to operational activities which are vital for society needs.

10 Judgment of the Constitutional Court no. 29 of 23.09.2013 on the control of constitutionality of certain acts referring to the investigation committee in the case “Pădurea Domnească”.
11 Judgment of the Constitutional Court no. 4 of 22.04.2013 on the control of constitutionality of Decrees of the President of Moldova no. 534-VII of 8 March 2013 on the resignation of the Government, as regards keeping the position of the Prime Minister dismissed by motion of censure (for suspected corruption) on 8 March 2013, before the new government is appointed, and no. 584 VII of 10 April 2013 on the appointment of the candidate for the office of the Prime Minister.
The Government administering public affairs may not take major policy initiatives *fortiori* on issues that have caused problems before its dismissal or have ultimately caused this dismissal. In particular, decisions that could subsequently sustainably employ the policy line of the future Government are excluded. Granting excessive powers to a resigned Government implies an obvious danger to the exercise of democracy.\(^\text{12}\)

2.3. *Relations between the Constitutional Court and the judiciary*

Given the absence of the direct individual complaint to the Constitutional Court, the legislation of the Republic of Moldova does not provide for direct dialogue between the constitutional court and the judiciary. A constitutional judge is directly involved with the judiciary only when *addressing the exception of unconstitutionality* and the *review of the constitutionality of legal provisions regulating the system of the judiciary*.

The Constitutional Court only addresses the exceptions of the unconstitutionality of normative acts upon referral by the courts of law of any level. The Court instituted this rule following the interpretation of the constitutional provisions that provided this competence solely to the Supreme Court.\(^\text{13}\) Thus, according to procedural law, in the event that there are stated any inconsistencies of legal provisions to be applied or that have already been applied during the trial process within an ordinary court with the Constitution, the court shall refer this inconsistency to the competence of the Constitutional Court. The exception of unconstitutionality may be raised directly by the court during the trial process or by the parties to the process.

This competence of the Constitutional Court is an important means to protect the rights of persons who are not empowered by the law to notify the Constitutional Court but whose rights might have been violated by the challenged legal provisions or by the results of such application.

Referring to the aspect of the independence of the judiciary, in a relatively large number of its decisions, the Constitutional Court found as unconstitutional the legal provisions altering judicial independence. The Court emphasised that judicial independence is a prerequisite for the rule of law and a fundamental guarantee of a fair trial. The instance of constitutional jurisdiction treated the independence of a judge in terms of both *functional* and *personal independence*.

Meanwhile, in its case-law, the Constitutional Court noted that judicial independence does not exclude assuming responsibility due to the fact that, in a democratic society, the judge cannot be placed in the shelter of absolute immunity.

3. *Conclusion*

The Constitution is the only sovereign in a veritable rule of law and everyone, including the state power, should obey it. The role of the Constitutional Court within the institutional structure of the state is a major one due to the fact that the Court represents the guarantor of the Constitution, appearing as a genuine arbitrator while resolving situations of institutional disputes.

When the Constitutional Court declares certain legal provisions as unconstitutional, it exercises an infringement into the legal framework not merely by cancelling the problematic ruling; it rather contributes to the restoration of the balance between state powers.

The review of the constitutionality of normative acts is crucially important for the proper functioning of the rule of law and for respect for the separation of powers and their real balancing,

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\(^{12}\) Judgment of the Constitutional Court no. 7 of 18.05.2013 *on the control of constitutionality of some provisions of Law no. 64-XII of 31 May 1990 on the Government, as amended by Laws no. 107 and no. 110 of 3 May 2013, and Decrees of the President of the Republic of Moldova no. 635-VII and no. 635- VII of 16 May 2013 and the Government Decision no. 364 of 16 May 2013.*

\(^{13}\) Judgment of the Constitutional Court no. 9 of 14.02.2014 *on the interpretation of Article 135.1.a of the Constitution.*
so that when the issue of the impairment of values and constitutional principles is at stake, beyond the political conflicts inherent in relations between the majority and the opposition, the court might be called upon to observe respect for these democratic values and principles as the unique political model compatible with the Basic Law. In this respect, we support the opinion expressed by Professor Bertrand Mathieu stating that the constitutional judge is an actor in the construction ensuring the principle of legal security where a number of national jurisdiction are involved.\textsuperscript{14}

\textsuperscript{14}Bertrand Mathieu. Réflections en guise de conclusion sur le principe de sécurité juridique // Les Cahiers du Conseil Constitutionnel, no. 11, 2001, p. 106
Conference moment (starting from left): Prof. Dr. Rainer Arnold (University of Regensburg), Secretary General of the Constitutional Court of the Republic of Lithuania Ingrida Danėlienė, and Justice of the Constitutional Court of the Republic of Lithuania Elvyra Baltutytė

The participants and guests of the Vilnius Forum (starting from left): Chairman of the Constitutional Court of Ukraine Yuriy Baulin, President of the Constitutional Court of Georgia Zaza Tavadze, President of the Constitutional Court of the Republic of Lithuania Dainius Žalimas, President of the Constitutional Court of the Republic of Moldova (Acting President of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions) Alexandru Tănase, President of the Constitutional Tribunal of the Republic of Poland Andrzej Rzepliński, Justice of the Constitutional Court of the Republic of Lithuania Gediminas Mesonis
Conference moment

Participants and organisers of the Vilnius Forum
Guests of the Vilnius Forum at the official ceremony of the celebration of the Day of the Constitution at Vilnius City Hall (Vilnius, 25 October 2016)

H. E. President of the Republic of Lithuania Dalia Grybauskaitė attending the official ceremony of the Day of the Constitution

Moment from the official ceremony
Opening speech by President of the Constitutional Court of the Republic of Lithuania Dainius Žalimas at the official ceremony of the Day of the Constitution

Keynote speech by Prof. Dr. Rainer Arnold “Common Principles of Constitutional Law in Europe”
II. RELEVANT DOCTRINE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA
ON THE PRINCIPLE OF A STATE UNDER THE RULE OF LAW

Justice as one of basic moral values and as the foundation of a state under the rule of law

*The Constitutional Court’s ruling of 22 December 1995*

One of the main objectives of law as a means of regulating social life is justice. Justice is one of the most important moral values and is the foundation of a state under the rule of law. The striving for justice and a state under the rule of law is consolidated in the Preamble to the Constitution. Justice may be implemented by ensuring a certain balance of interests and by escaping fortuity and arbitrariness, the instability of social life, and clashes of interests. It is impossible to attain justice by recognising the interests of only one group or one person and by denying the interests of others at the same time.

The principles of a state under the rule of law in the sphere of the legal regulation governing the activity and liability of state officials

*The Constitutional Court’s ruling of 11 May 1999*

In the area of the legal regulation of the activities of state institutions and officials, the principles of a state under the rule of law are implemented, among other things, by combining trust in state officials with the public control over their activities and with their responsibility to the public.

In a democratic state, the officials and institutions must follow law. When carrying out the functions that are important to society and the state, officials must not be subject to any threats if they perform their duties without violating laws. […]

The responsibility of the authorities to society is a principle found in a state under the rule of law. The principle of the responsibility of the authorities to society is constitutionally consolidated by providing that state institutions serve the people, that citizens have the right to govern the country either directly or through democratically elected representatives, that citizens have the right to criticise the work of state institutions or that of their officials, and to lodge complaints against their decisions; the said principle is constitutionally consolidated by guaranteeing the opportunity for citizens to defend their rights in a court, the right of criticism, the right of petition, by regulating the procedure for considering requests and complaints of citizens, etc. (the Constitutional Court’s ruling of 11 May 1999).

Impeachment is one of the instruments of the self-protection of civil society. In the constitutions of democratic states, impeachment is considered a special procedure when the question of the constitutional liability of an official is decided. Providing for a special procedure for dismissing the top-ranking officials from office or that for the revocation of their mandate, public and democratic control over their activities is ensured; at the same time, such officials are granted additional guarantees in other that they would perform their duties on the basis of law. […]

One of the essential features of a state under the rule of law is the protection of the rights and freedoms of individuals. The norms regulating impeachment must not only create the
opportunity to remove a person from office or to revoke his/her mandate, but also to ensure the rights of impeached persons. It is possible to recognise impeachment proceedings to be in line with the principles of a state under the rule of law when they are fair. This means that individuals must be equal before both the law and the institutions carrying out impeachment, they must have the right to be heard and the opportunity that must be legally guaranteed in order to defend their rights. If the principles of fair legal proceedings were not observed in the course of impeachment, this would indicate the failure to meet the requirements of a state under the rule of law.

[...] the Seimas, exercising its discretion to establish a differentiated procedure for impeachment proceedings, is bound by the constitutional concept of impeachment. This concept implies fair legal proceedings, in which priority is given to the protection of the rights of a person. When guaranteeing the protection of the rights of individuals, it is necessary to pay regard to the fundamental principles of a state under the rule of law; such principles require that jurisdictional and other institutions that apply law be impartial and independent, that they seek to establish the objective truth, and that they adopt their decisions only on the grounds of law. This is possible only if the proceedings are public, the parties to the proceedings have equal rights, and the legal disputes, in particular those regarding the rights of a person, are decided by ensuring that a particular person has the right and opportunity to defend those rights. In a state under the rule of law, the right of individuals to defend their rights is unquestionable. Since the Seimas, deciding the question of removing a person from office or that of revoking his/her mandate, acts as a jurisdictional institution, impeachment proceedings are subject to the same requirements.

When the question of constitutional or any other liability is decided, the aforesaid principles of a state under the rule of law are implemented both through the procedural rights of the person against whom this sanction is applied and through the guarantees of such rights. The recognition of the rights of an individual is a necessary element of the rule of law.

[...] the procedural rights must be ensured when the question of criminal or that of constitutional liability is decided. In the course of impeachment at the Seimas, it is necessary to ensure the right of the person whose constitutional liability is decided to take part in the proceedings and to defend himself/herself. Before adopting its decision, the Seimas must also hear the other party (audi alteram partem).

The principle of a state under the rule of law (in the sphere of state governance, it is allowed to give instructions only to a subordinate subject)

_The Constitutional Court’s ruling of 23 November 1999_

[...] [the principle of a state under the rule of law] also means that it is possible, in the sphere of state governance, to stipulate in a law or another legal act that a certain subject has the right to give instructions to another subject only if the relations of subordination between them are present. In other words, instructions may only be given to a subordinate.

The principle of a state under the rule of law

_The Constitutional Court’s ruling of 23 February 2000_

The Preamble to the Constitution consolidates the striving for an open, just, and harmonious civil society and a state under the rule of law. It needs to be noted that the constitutional principle of a state under the rule of law is a universal principle on which the entire legal system of Lithuania and the Constitution of the Republic of Lithuania itself are based, that the content of the principle of a state under the rule of law can be disclosed in various provisions of the Constitution, and that this principle should be interpreted inseparably from the striving for an open, just, and harmonious civil society and a state under the rule of law declared in the Preamble.
to the Constitution. The principle of a state under the rule of law, which is consolidated in the
Constitution, also implies, among other requirements, that human rights and freedoms must be
ensured, that all the institutions exercising state power and other state institutions must act on
the basis of law and in compliance with law, that the Constitution is the supreme legal act,
and that the laws, government resolutions, and other legal acts must be in compliance with the
Constitution.

**The duty of the participants of the legislation process to bring in line with the
Constitution all the legal acts that they draft and adopt**

*The Constitutional Court’s ruling of 18 October 2000*

The Seimas and other participants of the legislation process must bring in line with the
Constitution all the legal acts that they draft and adopt. This is one of the main measures ensuring
the constitutional order and one of the fundamental requirements of a state under the rule of law.

**The principles of justice and a state under the rule of law (the proportionality of legal
liability)**

*The Constitutional Court’s ruling of 2 October 2001*

[...] The entire legal system must be based on the constitutional principle of a state under
the rule of law; the said principle also implies the proportionality of established legal liability.

[...] The constitutional principles of justice and a state under the rule of law also mean that
“there must be a fair balance (proportion) between the objective sought and the means to attain
this objective, as well as between the violations of law and the penalties established for these
violations. These principles preclude imposing such penalties for violations of law and such
sizes of fines that would evidently be disproportionate (inadequate) to the violation of law and
the objective sought” (the Constitutional Court’s ruling of 6 December 2000).

**The force of legal acts is prospective; law may not be not public**

*The Constitutional Court’s ruling of 29 November 2001*

The principle of a state under the rule of law is consolidated in the Constitution. One of
the elements of the principle of a state under the rule of law is that the force of legal acts is
prospective. In its ruling of 16 March 1994, the Constitutional Court held the following: “The
force of a law or another legal act is prospective. It is not allowed to require that a certain
person obey such rules that did not exist at the time when he/she performed the relevant actions;
therefore, such a person was unable to know requirements that could be imposed in the future.”
The fact that only published legal acts are effective is also an essential element of the principle
of a state under the rule of law. Law may not be not public. The constitutional requirements
that only published legal acts are effective and that they must be prospective are an important
precondition for legal certainty. [..]

[..]

[..] The norms established in legal acts are applied to the facts and effects occurring after
such legal acts come into force. The requirement that published legal acts must be prospective is
an essential element of the principle of a state under the rule of law and an important precondition
for legal certainty.

**The principle of the protection of legitimate expectations**

*The Constitutional Court’s ruling of 18 December 2001*

The principle of the protection of legitimate expectations is linked with the duty of all
the state institutions to observe the undertaken obligations. The said principle also means the
On the principle of a state under the rule of law

Protection of acquired rights, i.e. persons have the right to reasonably expect that they will retain their rights, acquired under effective legal acts, for the established period of time and will be able to implement these rights in reality. In its ruling of 12 July 2001, the Constitutional Court held that, under this principle, a legal regulation may be changed only by following the procedure established in advance and without violating the principles and norms of the Constitution; when changing a legal regulation, it is necessary, inter alia, to comply with the principle of lex retro non agit and it is not permitted to deny the legitimate interests and legitimate expectations of persons by means of amendments to a legal regulation.

The balance among the values consolidated in the Constitution

The Constitutional Court’s ruling of 4 March 2003

[…] the values consolidated in the Constitution constitute a harmonious system, there is a balance among them. When deciding the issues of the balance among the values protected by the Constitution, it is necessary to reach such decisions that would ensure that not a single of the said values is denied or unreasonably limited. Otherwise, the balance among the values protected by the Constitution, the constitutional imperative of a harmonious and civil society, as well as the constitutional principle of the state under the rule of law, would be denied (the Constitutional Court’s ruling of 23 October 2002).

Legal certainty and legal clarity

The Constitutional Court’s ruling of 30 May 2003

Legal certainty and legal clarity are among the essential elements of the principle of a state under the rule of law, which is consolidated in the Constitution. The imperative of legal certainty and legal clarity implies that any legal regulation must meet certain additional obligatory requirements. A legal regulation must be clear and harmonious, legal norms must be formulated precisely, they may not contain ambiguities. Legal acts must be published in accordance with the established procedure; all the subjects of legal relations should have the opportunity to familiarise themselves with such acts.

The principle of a state under the rule of law also means that a legal regulation may be amended only in pursuance with a procedure established in advance and without violating the principles and norms of the Constitution; when amending a legal regulation, it is necessary, inter alia, to follow the principle of lex retro non agit (the Constitutional Court’s ruling of 12 July 2001).

It has been held in the Constitutional Court’s ruling of 29 November 2001 that the fact that only published legal acts are effective is also an essential element of the principle of a state under the rule of law. Law may not be not public. The constitutional requirements that only published legal acts are effective and that they must be prospective are an important precondition for legal certainty.

The hierarchy of legal acts

The Constitutional Court’s ruling of 30 December 2003

[…] the constitutional principle of a state under the rule of law also implies the hierarchy of legal acts, inter alia, it implies that substatutory legal acts may not be in conflict with laws, with constitutional laws, and with the Constitution, that substatutory legal acts must be adopted on the basis of laws, that a substatutory legal act is an act of the application of the norms of a law irrespective of whether that act has one-off (ad hoc) application or permanent validity.
The framework of state institutions and the procedure for forming state institutions in a state under the rule of law

*The Constitutional Court’s ruling of 25 May 2004*

Justice, an open and harmonious civil society, and a state under the rule of law would never be possible if all state power is held by a certain single state institution. The Constitution consolidates such a framework of institutions exercising state power and such a procedure of their formation where a balance among the institutions of state power is ensured, where the powers of certain state institutions are balanced by the powers of other state institutions, where all the institutions exercising state power act in harmony and carry out their constitutional duty to serve the people, where the Constitutional Court resolves disputes related to the powers vested by the Constitution in the institutions of state power, where all the institutions exercising state power – the Seimas, the President of the Republic, the Government, the Judiciary – as well as other state institutions are formed only from such citizens who without reservations obey the Constitution adopted by the Nation and who, while in office, unconditionally observe the Constitution and law, and act in the interests of the Nation and the State of Lithuania.

The principle of a state under the rule of law

*The Constitutional Court’s ruling of 13 December 2004*

The striving for an open, just, and harmonious civil society and a state under the rule of law is declared in the Preamble to the Constitution. The aforementioned striving is one of the strivings of the Nation who adopted the Constitution of the Republic of Lithuania by the referendum of 25 October 1992; in order to implement the said strivings, the Constitution was adopted. In its ruling of 11 July 2002, the Constitutional Court held that the striving for an open, just, and harmonious civil society and a state under the rule of law declared in the Preamble to the Constitution is enshrined in various aspects and in various provisions of the Constitution, that the striving for a state under the rule of law, enshrined in the Constitution, should be interpreted inseparably from the other provisions of the Constitution, in which the principle of a state under the rule of law is consolidated, and that the striving for a state under the rule of law is expressed by the constitutional principle of a state under the rule of law.

When interpreting the content of the constitutional principle of a state under the rule of law, the Constitutional Court has held more than once in its rulings that the constitutional principle of a state under the rule of law is a universal principle on which the entire legal system of Lithuania and the Constitution of the Republic of Lithuania itself are based, that the constitutional principle of a state under the rule of law should be interpreted inseparably from the striving for an open, just, and harmonious civil society and a state under the rule of law, as declared in the Preamble to the Constitution, and that the content of the said constitutional principle may be disclosed in various provisions of the Constitution.

The essence of the constitutional principle of a state under the rule of law is the rule of law. The constitutional imperative of the rule of law means that freedom of state power is limited by means of law that must be obeyed by all the subjects of legal relations, including the law-making subjects. It should be stressed that the discretion of all the law-making subjects is limited by the supreme law – the Constitution. All the legal acts as well as the decisions of all the state and municipal institutions and officials must comply with and not contradict the Constitution.

The Constitutional Court has held that the constitutional principle of a state under the rule of law must be followed both in making and in implementing law (the Constitutional Court’s ruling of 6 December 2000). The compliance of each institute of law with the Constitution must be evaluated according to how such an institute is in compliance with the constitutional principles of a state under the rule of law (the Constitutional Court’s ruling of 11 May 1999).
The constitutional principle of a state under the rule of law is an especially broad constitutional principle and comprises a wide range of various interrelated imperatives. Thus, it should be stressed that the content of the constitutional principle of a state under the rule of law is to be disclosed by taking account of various provisions of the Constitution and by assessing all the values consolidated in and defended and protected by the Constitution, and by taking account of the content of various other constitutional principles, such as the principle of the supremacy of the Constitution, its integrity and direct application, the sovereignty of the Nation, democracy, responsible governance, the restriction of the scope of powers and the fact that state institutions serve the people, publicity of law, justice (comprising, inter alia, natural justice), the separation of powers, civic consciousness, the equality of persons before the law, courts, state institutions and officials, respect for and the protection of human rights and freedoms (comprising, inter alia, the recognition that human rights and freedoms are innate), the balancing of interests of a person and society, the secularity of the state and its neutrality in world-view matters, the social orientation of the state, social solidarity (combined with the responsibility of everyone for their own fate), and other constitutional principles of no less importance. The constitutional principle of a state under the rule of law is consolidated not only by the striving for an open, just, and harmonious civil society and a state under the rule of law, as declared in the Preamble to the Constitution, but, in various aspects, by all the other provisions of the Constitution as well. In its ruling of 19 September 2002, the Constitutional Court held that the constitutional principle of a state under the rule of law also embodies the striving for an open, just, and harmonious civil society and a state under the rule of law, as enshrined in the Preamble to the Constitution. The constitutional principle of a state under the rule of law integrates various values enshrined in and protected and defended by the Constitution, including those that are expressed by the aforementioned striving.

Thus, the constitutional principle of a state under the rule of law may not be interpreted as the one that is consolidated only in the Preamble to the Constitution, nor may it be identified only with the declared therein striving for an open, just, and harmonious civil society and a state under the rule of law. On the other hand, since the content of the constitutional principle of a state under the rule of law should be interpreted without denying any single provision of the Constitution, none of the provisions of the Constitution – not a single constitutional principle or constitutional norm – may be interpreted so that such an interpretation would deviate from the requirements of a state under the rule of law that arise from the Constitution, since the content of the constitutional principle of a state under the rule of law, as well as the constitutional concept of a state under the rule of law, would also be distorted or even denied. All the provisions of the Constitution should be interpreted in the context of both the constitutional principle of a state under the rule of law and the concept of a state under the rule of law; the said concept is consolidated in the Constitution. The function of the constitutional doctrine is to disclose the content of the concept of a state under the rule of law (the Constitutional Court’s ruling of 11 May 1999).

[...] an investigation into the compliance of legal acts (parts thereof) with the striving for an open, just, and harmonious civil society and a state under the rule of law, as enshrined in the Preamble to the Constitution, implies an investigation into their compliance with the constitutional principle of a state under the rule of law. It should also be noted that the non-compliance of a legal act (part thereof) with any imperative (with an element of the constitutional principle of a state under the rule of law) dictated by the constitutional principle of a state under the rule of law – a universal constitutional principle in which various values enshrined in and protected and defended by the Constitution are integrated – means that the constitutional principle of a state under the rule of law is violated as well.
Legal certainty, legal security, and the protection of legitimate expectations
The Constitutional Court’s ruling of 13 December 2004

[...] Legal certainty, legal security, and the protection of legitimate expectations are inseparable elements of the principle of a state under the rule of law. The principle of legal security is one of the basic elements of the principle of a state under the rule of law, which is consolidated in the Constitution; the said principle means the obligation of the state to ensure the certainty and stability of a legal regulation, to protect the rights of the subjects of legal relations, including acquired rights, as well as to respect legitimate interests and legitimate expectations. If legal certainty, legal security, and the protection of legitimate expectations are not ensured, the trust of persons in the state and law will not be ensured, either. The state must fulfil its obligations undertaken to a person.

In its rulings of 4 July 2003 and 3 December 2003, the Constitutional Court held that one of the elements of the principle of legitimate expectations is the protection of such rights that were acquired under the Constitution and under those laws and other legal acts that were not in conflict with the Constitution. It should be noted that, under the Constitution, in the relations of a person with the state only those expectations of a person are protected and defended that arise from the Constitution itself or from the laws and other legal acts that are not in conflict with the Constitution. Only such expectations of a person in relationships with the state are considered legitimate.

The constitutional protection of legitimate interests of a person should be interpreted inseparably from the principle of justice, which is consolidated in the Constitution, from the protection of acquired rights, which is consolidated in the Constitution as well, and from the necessity to ensure the trust of a person who obeys law and follows the requirements of laws in the state and law. The trust of a person in the state and law as well as the protection of legitimate interests, as constitutional values, are inseparable from the constitutionality of legal acts and the presumption of the legitimacy of such acts. Legal acts (parts thereof) are considered to be in compliance with the Constitution and legitimate until the moment when, according to the procedure established by the Constitution and the Law on the Constitutional Court, they are ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal acts are substatutory). Thus, until the moment when legal acts (parts thereof), according to the procedure established by the Law on the Constitutional Court, are ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal acts are substatutory) or until the moment when, according to the established procedure, they are declared as no longer effective, the legal regulation established therein is binding on the respective subjects of legal relations. The Constitution protects and defends a person who obeys law and follows the requirements of laws. A failure to pay regard to this provision would also mean a derogation from the principle of justice, which is consolidated in the Constitution.

It should be stressed that there may be such factual situations where a person who meets the conditions established in legal acts, under the said legal acts acquired particular rights and, therefore, gained expectations that could be considered by this person to be reasonably legitimate during the period of the validity of the said legal acts; therefore, such a person could reasonably expect that, if he/she obeys law and fulfils the requirements of laws, his/her expectations will be held legitimate by the state and will be defended and protected. Such expectations may arise even from such legal acts that, on the basis and according to the procedure established in the Constitution and laws, are later ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal acts are substatutory). In this context, it should be noted that there may also be such factual situations where a person has already implemented his/her rights and fulfilled his/her obligations arising from a legal act that was later ruled to be in
conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal act is substatutory) in regard to other persons and after that, due to this, the aforementioned other persons gained appropriate expectations; the said persons could reasonably expect that the state will defend and protect such expectations as well. It should be especially stressed that, in certain cases, quite a long period of time may pass from the moment when such expectations emerge until the respective legal acts are ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal acts are substatutory). The imperative of a balance among constitutional values, the constitutional requirements of legal certainty and legal security, the protection of acquired rights, which is enshrined in the Constitution, and the presumption of the constitutionality and legitimacy of legal acts determines, inter alia, the fact that the Constitution generally does not preclude protecting and defending in certain special cases also such acquired rights of a person that arise from the legal acts that are later ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal acts are substatutory), because the failure to defend or protect such acquired rights would result in greater harm to such a person, other persons, society or the state than the harm sustained by such a person, other persons, society or the state [if the aforesaid rights were completely or partially protected and defended]. When deciding whether the acquired rights gained by the person during the period of the validity of a legal act that was later ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal act was substatutory) should be protected and defended (and if so, to what extent such acquired rights should be protected and defended), it is necessary to find out in each case whether, in case of a failure to protect and defend such acquired rights, the other values protected by the Constitution would be violated, and whether the balance among the values consolidated in and protected and defended by the Constitution would be disturbed. After certain legal acts are ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal acts are substatutory) where, due to this, certain persons who obeyed law, followed laws, and trusted the state and its law may suffer negative consequences, the legislature bears the constitutional duty to evaluate all the related circumstances and, if necessary, to establish such a legal regulation that would create an opportunity in the aforementioned special cases to fully or partially protect and defend the acquired rights of the persons who obeyed law and followed the requirements of laws, where such acquired rights arose from legal acts that were later ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if the said legal acts were substatutory), in order that the principle of justice enshrined in the Constitution would not be derogated from as well.

At the same time, it should be emphasised that the Constitution does not protect and does not defend any such rights acquired by a person that are privileges in terms of their content; the defence and protection of privileges would mean the violation of the constitutional principles of the equality of the rights of persons and justice, as well as of the imperative of harmonious society, consolidated in the Constitution, and thus also the violation of the constitutional principle of a state under the rule of law.

The right to judicial protection as an element of the principle of a state under the rule of law

The Constitutional Court’s ruling of 13 December 2004

The jurisprudence of the Constitutional Court has pointed out on more than one occasion the imperative arising from the constitutional principle of a state under the rule of law and from other provisions of the Constitution, according to which a person who believes that his/her rights and freedoms are violated has an absolute right to access an independent and impartial court that
would settle the respective dispute. The right of a person to apply to a court also implies his/her right to the due process of law; the latter right is a necessary condition for the administration of justice. It should be emphasised that the constitutional right of a person to apply to a court may not be artificially restricted and the implementation of this right may not be unreasonably burdened.

The requirements stemming from the principle of a state under the rule of law for law-making subjects

The Constitutional Court’s ruling of 13 December 2004

The constitutional principle of a state under the rule of law implies that the legislature and other law-making subjects are subject to various requirements: law-making subjects are allowed to pass legal acts only without exceeding their powers; the requirements established in legal acts must be grounded on the provisions of a general character (i.e., on certain legal norms and principles) where such provisions could be applied to all provided subjects of certain legal relations; any differentiated legal regulation must be based only on objective differences of the situation of the subjects of certain public relations regulated by the respective legal acts; in order to ensure that the subjects of legal relations are aware of the requirements put forward to them by law, legal norms must be established in advance, legal acts must be published officially, and such acts must be public and accessible; the legal regulation established in laws and other legal acts must be clear, comprehensible, and coherent, the formulations in legal acts must be precise, the consistency and internal harmony of the legal system must be ensured, and legal acts may not contain provisions simultaneously regulating the same public relations in a different manner; in order that the subjects of legal relations could act in accordance with the requirements of law, a legal regulation must be relatively stable; legal acts may not demand impossible things (lex non cogit ad impossibilia); the effect of legal acts is prospective, whereas the retroactive effect of laws and other legal acts is not permitted (lex retro non agit), unless the situation of a subject of legal relations would be alleviated without prejudice to other subjects of legal relations (lex benignior retro agit); those violations of law for which liability is established in legal acts must be clearly defined; when imposing legal restrictions and liability for violations of law, regard must be paid to the requirement of reasonableness and the principle of proportionality; according to the said principle, the established legal measures must be necessary in a democratic society and suitable for achieving legitimate and universally important objectives (there must be a balance between such objectives and measures); the said measures may not restrict the rights of persons more than necessary in order to achieve the said objectives and, if those legal measures are related to the sanctions for a violation of law, in such a case the aforementioned sanctions must be proportionate to a committed violation of law; when legally regulating certain public relations, it is obligatory to pay regard to the requirements of natural justice, comprising, inter alia, the necessity to ensure the equality of persons before the law, the court, state institutions, or officials; legal acts must be passed in accordance with the established procedural law-making requirements, including the requirements established by the law-making subject itself; etc.

The requirement stemming from the principle of a state under the rule of law for law-making subjects to respect the hierarchy of legal acts

The Constitutional Court’s ruling of 13 December 2004

The constitutional principle of a state under the rule of law and other constitutional imperatives give rise to the requirement for the legislature to pay regard to the hierarchy of legal acts that originates from the Constitution. This requirement means, inter alia, that lower-ranking legal acts are prohibited from regulating such social relations that may be regulated only by
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means of higher-ranking legal acts, also that lower-ranking legal acts are prohibited from laying down such a legal regulation that could compete with that established in higher-ranking legal acts. […] through a substatutory legal act the norms of a law are concretised; therefore, such a substatutory legal act may not replace the law itself or create any new legal norms of a general character that would compete with the norms of the law, because the supremacy of laws over substatutory legal acts, which is consolidated in the Constitution, would thus be violated (the Constitutional Court’s ruling of 21 August 2002); it should also be stressed that substatutory legal acts may not be in conflict with laws, with constitutional laws, and with the Constitution, that substatutory legal acts must be adopted on the basis of laws, that a substatutory legal act is an act of the application of the norms of a law irrespective of whether such a substatutory legal act has one-off (ad hoc) application or permanent validity (the Constitutional Court’s ruling of 30 December 2003).

There is no delegated legislation in Lithuania (the Constitutional Court’s rulings of 26 October 1995, 19 December 1996, 3 June 1999, and 5 March 2004); therefore, the Seimas – the legislature – cannot commission the Government or other institutions to regulate, by means of substatutory legal acts, the legal relations that should be regulated, as demanded by the Constitution, by means of laws, while the Government may not accept such powers. These relations may not be regulated by means of substatutory acts of the Seimas, either.

[…] according to the Constitution, the legal regulation related to defining the content of human rights and freedoms or consolidating the guarantees of their implementation may be established only by law. On the other hand, in cases where the Constitution does not require that particular relations linked with the rights of a person and with their exercise be regulated by law, such relations may also be regulated by means of substatutory acts – acts that regulate the process (procedural) relations of implementing the rights of a person, the procedure of implementing individual rights of a person, etc.

It should also be stressed that such a failure to adhere to the form of a legal act, where the Constitution requires that certain relations should be regulated by law, but they are still regulated by means of a substatutory act (irrespective of the fact whether such relations are in any aspect additionally regulated in a law the legal regulation established in which is challenged by the legal regulation laid down in a substatutory act, or irrespective of the fact that no law regulates such relations at all), may become sufficient grounds for pronouncing such a substatutory act unconstitutional. Under the Constitution, it is the Constitutional Court that decides whether substatutory legal acts of the Seimas, the President of the Republic, or the Government, according to their form, are in conflict with the Constitution. When making such a decision, the Constitutional Court evaluates in each case all the circumstances of the case, inter alia, the place of the investigated legal regulation in the entire legal system, its objective, as well as the intentions of a law-making subject, the development in the legal regulation of respective relations and its changes before the investigated legal act was passed (legislative history), etc.

It should also be stressed that, in cases where substatutory legal acts are ruled to be in conflict with the Constitution according to their form (due to the fact that they regulated the relations that may only be regulated by law) and may no longer be applied, it is necessary to pay regard to the requirement arising from the Constitution to evaluate whether other values protected by the Constitution will be violated, or whether the balance among the values enshrined in and protected and defended by the Constitution will be disturbed in case of a failure to protect and defend those rights of persons that were acquired during the period of the validity of the said substatutory legal acts. In these special cases, the legislature, having evaluated all the circumstances and having found that this is necessary, is under the constitutional obligation to establish such a legal regulation that would provide for the possibility of protecting and defending, fully or partially,
the rights of the persons who obeyed law, followed the requirements of laws, and trusted in the state and its law, where the said rights arise from the legal acts that were later ruled to be in conflict with the Constitution according to their form (due to the fact that they regulated the relations that may only be regulated by law); such a legal regulation established by the legislature must ensure that the principle of justice enshrined in the Constitution will not be derogated from.

The requirements stemming from the principle of a state under the rule of law for subjects law-applying

*The Constitutional Court’s ruling of 13 December 2004*

The constitutional principle of a state under the rule of law must also be followed in applying law. When law is applied, *inter alia*, it is necessary to pay regard to the following requirements arising under the constitutional principle of a state under the rule of law, as, for instance: the institutions that apply law must comply with the requirement of the equality of the rights of persons; it is not permitted to punish anyone twice for the same violation of law (*non bis in idem*); liability (sanction, punishment) for any violations of law must be established in advance (*nulla poena sine lege*); no act is criminal unless it is defined as such by law (*nullum crimen sine lege*), etc. In this context, mention should be made of the fact that the constitutional principle of a state under the rule of law requires that the jurisdictional and other institutions that apply law be impartial and independent, that they seek to establish the objective truth, and that they adopt their decisions only on the grounds of law (the Constitutional Court’s rulings of 11 May 1999, 19 September 2000, and 24 January 2003).

Article 110 of the Constitution provides that judges may not apply any laws that are in conflict with the Constitution. When account is taken of the hierarchy of legal acts that originates from the Constitution, this provision of the Constitution also means that judges may not apply any such substatutory legal acts that are in conflict with the Constitution. Moreover, judges may not apply any such substatutory legal acts that are in conflict with a law. On the other hand, the aforementioned provision of the Constitution reflects the constitutional principle – one of the basic elements of the principle of a state under the rule of law, which is enshrined in the Constitution – that a legal act that is in conflict with a higher-ranking legal act may not be applied.

It should be noted that laws must be executed until the moment when they are changed or repealed or, according to the procedure established by the Law on the Constitutional Court, ruled to be in conflict with the Constitution (or in conflict with the Constitution and/or laws if acts declared unconstitutional are substatutory). In the context of the constitutional justice case at issue, it should be especially emphasised that until the moment when the laws are changed or, according to the procedure established by the Law on the Constitutional Court, are ruled to be in conflict with the Constitution, all the subjects of legal relations, consequently, including the Government, must execute and apply such laws within their competence; it is not allowed that the Government, which must itself apply laws and/or ensure that other state and municipal institutions and officials apply them, instead of performing the duties imposed on it by law and/or ensuring that other state and municipal institutions and officials perform the duties established by law, by means of its substatutory legal acts establish such a legal regulation that would compete with the one established in laws, where the said legal regulation would totally or partially exempt the Government and/or other state and municipal institutions and officials from the performance of the aforementioned duties.

[…]

One of the numerous aspects of the constitutional principle of state under the rule of law (directly related with the constitutional principle of the equality of the rights of persons) is that similar cases must be decided in a similar manner. Therefore, the discretion of jurisdictional
On the principle of a state under the rule of law, when resolving disputes and applying law, is limited. In its rulings of 21 July 2001 and 30 May 2003, as well as in its decision of 13 February 2004, the Constitutional Court held that the principle of a state under the rule of law, which is enshrined in the Constitution, implies, _inter alia_, the continuity of jurisprudence.

**The proportionality of liability for violations of law**  
*The Constitutional Court’s ruling of 3 November 2005*

While interpreting the constitutional principle of a state under the rule of law, the Constitutional Court has held that this principle implies various requirements for the legislature and other subjects of law-making, _inter alia_: those violations of law for which liability is established in legal acts must be clearly defined; when imposing legal restrictions and liability for violations of law, regard must be paid to the requirement of reasonableness and the principle of proportionality; according to the said principle, the established legal measures must be necessary in a democratic society and suitable for achieving legitimate and universally important objectives (there must be a balance between such objectives and measures); the said measures may not restrict the rights of persons more than necessary in order to achieve the said objectives and, if those legal measures are related to the sanctions for a violation of law, in such a case the aforementioned sanctions must be proportionate to a committed violation of law; when legally regulating certain public relations, it is obligatory to pay regard to the requirements of natural justice, comprising, _inter alia_, the necessity to ensure the equality of persons before the law, the court, state institutions, or officials (the Constitutional Court’s ruling of 13 December 2004).

Thus, the constitutional principles of justice and a state under the rule of law also mean that there must be a fair balance (proportion) between, on the one hand, the pursued objective to punish the violators of law and to ensure the prevention of violations of law and, on the other hand, the chosen means to achieve this objective; the sanctions (penalties, punishments) that are established for violations of law must be proportionate to such violations. The constitutional principles of justice and of a state under the rule of law do not permit establishing such penalties for violations of law and such amounts of fines that would clearly be disproportionate (inadequate) to the violation of law and the objective sought (the Constitutional Court’s rulings of 6 December 2000, 2 October 2001, and 26 January 2004). The amount of fines established for violations of laws must be such that is necessary for the pursued legitimate and generally important objective – to ensure that laws are observed and the established duties are carried out (the Constitutional Court’s ruling of 26 January 2004).

**The principle of bona fides**  
*The Constitutional Court’s ruling of 27 June 2007*

Under the Constitution, the subjects of legal relations are under the duty to behave in good faith and without violating law. They have the duty to try to find out by themselves the requirements of law. This is required by the general legal principle of _bona fides_, which is inseparable from the constitutional principle of a state under the rule of law.

**The principle of the protection of legitimate expectations**  
*The Constitutional Court’s ruling of 5 July 2007*

The protection of legitimate expectations is one of the elements of the principle of a state under the rule of law, which is consolidated in the Constitution. The said protection implies, _inter alia_, that the state is under the duty to ensure the certainty and stability of a legal regulation, to protect the rights of the subjects of legal relations, including acquired rights, and to respect legitimate interests. […]
The principle of the protection of legitimate expectations implies the duty of the state, as well as of the institutions implementing state power and other state institutions, to observe the obligations assumed by the state. The said principle also means the protection of acquired rights, i.e. the persons have the right to reasonably expect that they will retain their rights, acquired under effective laws or other legal acts that are not in conflict with the Constitution, for the established period of time and will be able to implement these rights in reality.

**Trusting in the state and in law (state and municipal institutions must fulfil their obligations)**

*The Constitutional Court’s decision of 13 November 2007*

[...] state and municipal institutions should fulfil their obligations. If state and municipal institutions could decide not to fulfil their obligations, for instance, by justifying such a decision by the fact that the entire state was facing particularly strong economic and financial difficulties, even after the said difficulties are dealt with, it would have to be stated that those institutions are likely to ignore the legitimate expectations of various persons where such expectations arise from the obligations undertaken by the said institutions, and that the same institutions are likely to violate the rights of the said persons. Thus, the trust of people in the state and in law would be undermined. State and municipal institutions may not arbitrarily refrain from the fulfilment of obligations undertaken by them. The Constitution does not tolerate this.

**Legal certainty and legal clarity**

*The Constitutional Court’s ruling of 24 December 2008*

[...] The imperative of legal certainty and legal clarity implies that any legal regulation must meet certain obligatory requirements: a legal regulation must be clear and harmonious, legal norms must be formulated precisely and may not contain any ambiguities (the Constitutional Court’s rulings of 30 May 2003 and 26 January 2004). [...] the notions (formulations) that are related to the implementation and restriction of the constitutional human rights must be very clear, they must be defined and comprehensible.

**A legal act that is in conflict with a higher-ranking legal act may not be applied**

*The Constitutional Court’s ruling of 2 March 2009*

One of essential elements of the constitutional principle of a state under the rule of law is the principle whereby a legal act that is in conflict with a higher-ranking legal act may not be applied. The Constitutional Court has held that, while administering justice, courts must invoke only those laws and legal acts that are not in conflict with the Constitution; courts may not apply a law that is in conflict with the Constitution (the Constitutional Court’s rulings of 13 December 2004, 16 January 2006, and 27 June 2007).

**The requirements for the clarity, precision, consistency, and internal non-contradiction of a legal regulation**

*The Constitutional Court’s ruling of 8 June 2009*

[...] the requirements for the clarity, precision, consistency, and internal non-contradiction of the legal regulation stem, *inter alia*, from the constitutional principle of a state under the rule of law [...].

**A legal act that is in conflict with a higher-ranking legal act may not be applied**

*The Constitutional Court’s ruling of 22 June 2009 (repeated in the ruling of 7 September 2010)*
The Constitutional Court has held that, while administering justice, courts must invoke only those laws and legal acts that are not in conflict with the Constitution; courts may not apply a law that is in conflict with the Constitution (the Constitutional Court’s rulings of 13 December 2004, 16 January 2006, 27 June 2007, and 2 March 2009). The Constitutional Court has also held that a virtually wrong presumption would be made that, purportedly, a substatutory legal act must be in line with an unconstitutional law; such a presumption would deny the concept (consolidated in the Constitution) of the hierarchy of legal acts, on the top of which is the Constitution; thus, the very essence of constitutional justice would be distorted (the Constitutional Court’s rulings of 16 January 2007, 27 June 2007, and 17 December 2007).

One of the essential elements of the constitutional principle of a state under the rule of law is the requirement whereby a legal act that is in conflict with a higher-ranking legal act may not be applied.

The principle of a state under the rule of law

The Constitutional Court’s ruling of 26 February 2010

[…] the principle of a state under the rule of law also implies that the institutions exercising state power may not exceed the powers established for them in the Constitution, and that a certain institution of state power may not interfere with the powers of another institution of state power, where the powers of the latter are established in the Constitution.

Legal certainty and legal clarity

The Constitutional Court’s ruling of 13 May 2010 (repeated in the ruling of 20 February 2013)

The Constitutional Court has held on more than one occasion that legal certainty and legal clarity are among the essential elements of the principle of a state under the rule of law, which is consolidated in the Constitution. The imperative of legal certainty and legal clarity implies that any legal regulation must meet certain obligatory requirements: a legal regulation must be clear and harmonious, legal norms must be formulated precisely, they may not contain any ambiguities (the Constitutional Court’s rulings of 30 May 2003, 26 January 2004, 24 December 2008, and 22 June 2009, as well as its decision of 20 April 2010).

It should especially be emphasised that the legislature, while regulating relations in connection with the appointment of persons, inter alia, state officials, and their release from duties, must establish a clear and harmonious legal regulation in order that it would not be interpreted in a varied manner.

Justice as one of basic moral values and as the foundation of a state under the rule of law

The Constitutional Court’s ruling of 29 November 2010

In its acts, the Constitutional Court has also held on more than one occasion that the constitutional principle of a state under the rule of law is inseparable from the principle of justice, and vice versa (inter alia, the Constitutional Court’s rulings of 17 March 2003, 3 December 2003, 24 December 2008, 8 October 2009, and 28 May 2010). Thus, the constitutional principle of justice is an inseparable element of the constitutional principle of a state under the rule of law.

In its acts, the Constitutional Court has also held on more than one occasion that justice, as a means of regulating social relations, is one of the basic objectives of law; justice is one of the most important moral values and is [the foundation] of a state under the rule of law; justice may be implemented by ensuring a certain balance of interests and by escaping fortuity and arbitrariness, the instability of social life, and clashes of interests (the Constitutional Court’s rulings of 22 December 1995, 6 December 2000, 17 March 2003, 17 November 2003, 3 December 2003, 24 December 2008, its decision of 20 April 2010, and its ruling of 29 June 2010).
The proportionality of liability for violations of law

*The Constitutional Court’s ruling of 31 January 2011*

The Constitutional Court has [...] held that the entire legal system must be based on the constitutional principle of a state under the rule of law; the said principle also implies the proportionality of established legal liability (the Constitutional Court’s ruling of 2 October 2001). The constitutional principles of justice and a state under the rule of law also imply that the measures established by the state for violations of law must be proportionate (adequate) to the violation of law, they must be in line with the legitimate and generally important objectives sought, they may not restrict a person clearly more than necessary in order to reach these objectives; there must be a fair balance (proportion) between the objective sought and the means to attain this objective (the Constitutional Court’s rulings of 6 December 2000, 2 October 2001, 26 January 2004, 3 November 2005, 10 November 2005, 21 January 2008, 15 March 2008, and 17 September 2008). Thus, in the course of the legislative establishment of liability and its implementation, a fair balance must be sustained between the interests of society and those of a person so as to avoid unreasonable limitations on the rights of persons. On the basis of this principle, the rights of persons may be limited by law to the extent only necessary for the protection of public interests, and there must be a reasonable relation between the adopted measures and the legitimate and commonly important objective sought. To achieve this objective, such measures may be established that would be sufficient and would limit the rights of the person not more than it is necessary (the Constitutional Court’s rulings of 2 October 2001 and 10 April 2009).

[...]

[...] under the Constitution and, *inter alia*, the constitutional principle of a state under the rule of law, the establishment of any such legal regulation, in the course of the application of which a person who fails to observe requirements established by legal acts could escape legal liability, is not allowed. The constitutional principle of a state under the rule of law would be violated if the law failed to establish corresponding legal measures for persons who do not observe requirements established in legal acts. Under the Constitution, the legislature has the duty to lay down such a legal regulation under which the measures that are established in legal acts and are applied would be proportionate to the objective sought, would not limit the rights of a person more than necessary in order to attain the legitimate and universally significant objective, and would not create any preconditions for the abuse of rights.

The principle of a state under the rule of law

*The Constitutional Court’s decision of 19 November 2012*

The essence of the constitutional principle of a state under the rule of law is the rule of law; the constitutional imperative of the rule of law means that freedom of state power is limited by law that must be obeyed by all the subjects of legal relations (*inter alia*, the Constitutional Court’s rulings of 13 December 2004, 16 January 2006, 13 August 2007, and 22 December 2011); all the institutions implementing state power as well as other state institutions must act on the basis of law and in compliance with law (*inter alia*, the Constitutional Court’s rulings of 30 December 2003 and 26 January 2004). Thus, if the supremacy of the Constitution is denied, the constitutional imperative of the rule of law is also denied.

The presumption that decisions adopted by institutions exercising state power are legitimate and fair

*The Constitutional Court’s decision of 8 January 2013*

[...] in a state under the rule of law it is presumed that decisions of the state authority institutions [...] consolidated in Paragraph 1 of Article 5 of the Constitution are legitimate and fair and that they may not be opposed to one another.
On the principle of a state under the rule of law

The duty of the legislature to provide for a proper *vacatio legis* (Paragraph 1 of Article 70 of the Constitution)

*The Constitutional Court’s ruling of 15 February 2013*

Paragraph 1 of Article 70 of the Constitution prescribes that laws adopted by the Seimas come into force after they are signed and officially promulgated by the President of the Republic, unless the laws themselves establish a later date for their entry into force.

It needs to be noted that this constitutional provision may not be interpreted as meaning that the legislature is granted an absolutely free discretion to decide whether to postpone the date of the entry into force of the law (the beginning of the application of the law).

[...] the purpose of the principles of legal certainty, legal security, and the protection of legitimate expectations, which arise from the constitutional principle of a state under the rule of law, is securing the trust of a person in the state and in law; these principles imply the duty of the state to secure the certainty and stability of a legal regulation; persons have the right to reasonably expect that their rights acquired under effective legal acts will be retained for the established period of time and will be implemented in reality. While taking account of the aforementioned, the changes in the legal regulation must be made in such a manner that the persons whose legal status is affected by those changes would have a real opportunity to adapt to a new legal situation. Therefore, in order to create the conditions for persons not only to familiarise themselves with new legal regulation prior to the beginning of its validity, but also to adequately prepare for the expected changes, it might be necessary to establish a later date of the entry into force of the law (the beginning of the application thereof).

Thus, when Paragraph 1 of Article 70 of the Constitution is interpreted in the context of the constitutional principle of a state under the rule of law, it needs to be held that, in some situations, the legislature must provide for a sufficient *vacatio legis*, i.e. a time period from the official publication of the law until its entry into force (the beginning of its application), within which the interested persons might be able to prepare themselves to implement the requirements arising from that law.

The jurisprudence of the Constitutional Court has pointed out this duty of the legislature on more than one occasion, while relating this duty to the adoption of the laws restructuring the system of social guarantees or individual guarantees (*inter alia*, the Constitutional Court’s rulings of 4 July 2003, 22 October 2007, 22 November 2007, and 6 February 2012); however, the constitutional requirement to provide for a proper *vacatio legis* must also be complied with in adopting other laws that establish duties or limitations with respect to persons. The time period that should be established for each concrete situation must be assessed in view of a number of circumstances: the purpose of the law in the legal system and the character of the social relations regulated by that law, the circle of subjects to whom it is applied and their possibilities of preparing for the entry into force of the new legal regulation, as well as other important circumstances, *inter alia*, those due to which the law must come into force as soon as possible. An important public interest, the concern to protect other values consolidated in the Constitution, outweighing the interest of a person to have more time to adapt to the legal regulation establishing new duties or limitations may determine the speedy entry into effect of the law on the day when it is officially published without any term of *vacatio legis*. Still, it needs to be emphasised that the speedy entry into effect of laws establishing duties or limitations with respect to persons should be an exception, based on and justified by special objective circumstances, rather than a rule.

In this context, it should also be noted that, in the course of making substantial amendments to an effective legal regulation, where the said amendments create consequences unfavourable to the legal situation of persons, it may be necessary to provide not only for a sufficient *vacatio legis*, but also for a certain transitional legal regulation. The legal situation of persons, to whom
the new legal regulation is applicable, should be regulated by means of transitional provisions in order that those persons would be given enough time to finish the actions started by them on the basis of the previous legal regulation, because the said persons started those actions expecting that the said previous legal regulation would be stable, and in order that such persons might implement their rights acquired under the previous legal regulation.

**The hierarchy of legal acts**

*The Constitutional Court’s ruling of 20 February 2013*

The principle of a state under the rule of law consolidated in the Constitution implies the hierarchy of legal acts. In its acts, the Constitutional Court has held on more than one occasion that this constitutional principle does not permit that substatutory legal acts establish any such legal regulation that would compete with that established in a law, that substatutory legal acts may not be in conflict with laws, with constitutional laws, and with the Constitution, that substatutory legal acts must be adopted on the basis of laws, that a substatutory legal act is an act of the application of the norms of a law, irrespective of whether that substatutory legal act has one-off (*ad hoc*) application or permanent validity (*inter alia*, the Constitutional Court’s rulings of 6 September 2007, 9 March 2010, and 18 April 2012).

In the context of the constitutional justice case at issue, it needs to be noted that the fact where the Seimas does not comply with the Constitution and the Statute of the Seimas in the course of the adoption of substatutory legal acts means that the constitutional principle of a state under the rule of law, which implies the hierarchy of legal acts, is violated as well.

**Law may not be not public**

*The Constitutional Court’s ruling of 2 April 2013*

*Inter alia*, the fact that only published legal acts are effective is an essential element of the principle of a state under the rule of law. Law may not be not public (the Constitutional Court’s rulings of 29 November 2001 and 30 May 2003).

In its ruling of 26 February 2010, the Constitutional Court held that the constitutional requirement that law may not be not public must also be complied with in the course of adopting the acts of the Government, whereby privatisation agreements are assented to; the said constitutional requirement means not only that a government resolution through which assent is given to draft agreements on the privatisation of the key objects of the Lithuanian economy as well as to draft annexes to such agreements must be officially published, but also that such a government resolution must not only contain formal assent to the draft agreement and draft annexes thereto, but also, *inter alia*, specify the compliance of the provisions of the draft agreement that is being assented to with the terms and conditions envisaged in the object privatisation programme, and point out the principal provisions of the agreement, as, for instance, the purpose of the agreement, the object of the agreement, and the basic obligations undertaken by the state.

In the context of the constitutional justice case at issue, it needs to be noted that the constitutional requirement that law may not be not public, where the said requirement must also be observed while adopting a government resolution through which assent is given to an agreement on privatisation, also means that a government resolution through which assent is given to the amendment of the provisions of a privatisation agreement, previously assented to by the Government, must not only contain formal assent to the amendment to the agreement, but also specify, *inter alia*, the purpose of the amendment to the agreement and the principal provisions amending the agreement.
The link between the principle of a state under the rule of law and the principle of social solidarity

The Constitutional Court’s ruling of 1 July 2013

The content of the constitutional principle of a state under the rule of law must be disclosed in conjunction with the content of the principle of social solidarity. The Constitutional Court has held that the principle of social solidarity, which is consolidated in the Constitution, implies that the burden of fulfilling certain obligations should also be distributed to a certain extent among members of society; however, such distribution should be constitutionally reasoned, it cannot be disproportionate, it cannot deny the social orientation of the state and the obligations to the state that arise from the Constitution (the Constitutional Court’s rulings of 7 June 2007, 26 September 2007, and its decision of 20 April 2010).

The principle of a state under the rule of law

The Constitutional Court’s ruling of 1 July 2013

[...] the essence of the constitutional principle of a state under the rule of law is the rule of law. The constitutional imperative of the rule of law means that freedom of state power is limited by law that must be obeyed by all the subjects of legal relations, including the law-making subjects (the Constitutional Court’s ruling of 13 December 2004).

Paragraph 2 of Article 5 of the Constitution provides that the scope of power is limited by the Constitution.

In interpreting Paragraph 2 of Article 5 of the Constitution, the Constitutional Court has noted on more than one occasion that the Seimas, as the legislative institution that passes laws and other legal acts, is independent inasmuch as its powers and its wide discretion are not limited by the Constitution, inter alia, by the constitutional principles of a state under the rule of law, the separation of powers, responsible governance, the protection of legitimate expectations, legal clarity, as well as by other principles.

It needs to be emphasised that, when it passes laws, the Seimas is bound not only by the Constitution, but also by its own laws. This is an essential element of the constitutional principle of a state under the rule of law (inter alia, the Constitutional Court’s rulings of 24 January 2003 and 24 September 2009).

The principle of a state under the rule of law (the requirement for ensuring human rights and freedoms, the principles of proportionality, justice, legal certainty, legal security, and of the protection of legitimate expectations, the link with the principle of the equality of the rights of persons)

The Constitutional Court’s ruling of 14 April 2014

The Constitutional Court has held that the constitutional principle of a state under the rule of law is a universal principle on which the entire legal system of Lithuania and the Constitution itself are based. The constitutional principle of a state under the rule of law is especially broad and comprises a wide range of various interrelated imperatives.

The Constitutional Court has held on more than one occasion that the principle of a state under the rule of law, which is consolidated in the Constitution, in addition to other requirements, also implies that human rights and freedoms must be ensured (inter alia, the Constitutional Court’s rulings of 23 February 2000, 22 December 2010, 16 May 2013, and 9 October 2013).

The Constitutional Court has also held in its acts on more than one occasion that the constitutional principle of proportionality is one of the elements of the constitutional principle of a state under the rule of law; the principle of proportionality means that the measures provided for by law must be in line with legitimate objectives that are important to society, that such
measures must be necessary in order to reach the said objectives, and that such measures must not restrict the rights and freedoms of a person clearly more than necessary in order to reach the said objectives (inter alia, the Constitutional Court’s rulings of 11 December 2009, 15 February 2013, 16 May 2013, and 9 October 2013).

The requirement, while complying with the constitutional principle of proportionality, not to limit the rights and freedoms of a person more than necessary in order to reach legitimate objectives that are important to society, inter alia, implies the requirement for the legislature to establish the legal regulation that would create the preconditions for the sufficient individualisation of the limitations on the rights and freedoms of a person: the legal regulation limiting the rights and freedoms of a person, as provided in a law, must be such that would create the preconditions for assessing, to the extent possible, an individual position of each person and, in view of all the important circumstances, for individualising as appropriate the specific measures that are applicable to and limit the rights of that person (the Constitutional Court’s ruling of 7 July 2011).

The Constitutional Court has noted that the content of the constitutional principle of a state under the rule of law should be disclosed by taking account of the content of various other constitutional principles, including the principle of justice (which comprises, inter alia, natural justice). Any disregard for the principle of justice, which is consolidated in the Constitution, would also mean disregard for the constitutional principle of a state under the rule of law (the Constitutional Court’s rulings of 3 November 2005, 22 December 2010, and 9 October 2013). Justice may not be achieved through the satisfaction of the interests of exclusively one group and the simultaneous denial of the interests of others (the Constitutional Court’s rulings of 4 March 2003 and 9 October 2013).

The Constitutional Court has held on more than one occasion that legal certainty, legal security, and the protection of legitimate expectations are inseparable elements of the principle of a state under the rule of law. The constitutional principles of legal certainty, legal security, and the protection of legitimate expectations imply the obligation of the state to ensure the certainty and stability of any legal regulation, to protect the rights of persons, and to respect legitimate interests and legitimate expectations. These principles, inter alia, imply that the state must fulfil all its obligations undertaken to a person. If legal certainty, legal security, and the protection of legitimate expectations are not ensured, the trust of persons in the state and in law will not be ensured, either.

The constitutional principle of a state under the rule of law is also inseparable from the principle of the equality of the rights of persons, which is consolidated in the Constitution, inter alia, in Article 29 thereof. A violation of the constitutional principle of the equality of the rights of persons is, at the same time, a violation of the constitutional imperatives of justice and harmonious society; thus, such a violation is also a violation of the constitutional principle of a state under the rule of law (inter alia, the Constitutional Court’s rulings of 6 February 2012, 14 December 2012, 30 April 2013, and 1 July 2013).

[…]

[…] the mere fact that, in view of a certain legal regulation, an exception is made does not mean that the principles of legal certainty, legal security, and the protection of legitimate expectations of a person are violated.
The State of Lithuania recognises the principles and norms of international law (Paragraph 1 of Article 135 and Paragraph 3 of Article 138 of the Constitution)

*The Constitutional Court’s ruling of 9 December 1998*

Paragraph 1 of Article 135 of the Constitution states that, in implementing its foreign policy, the Republic of Lithuania follows the universally recognised principles and norms of international law, seeks to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and contributes to the international order based on law and justice.

Paragraph 3 of Article 138 of the Constitution provides that international treaties ratified by the Seimas of the Republic of Lithuania are a constituent part of the legal system of the Republic of Lithuania.

Interpreting these articles of the Constitution, it needs to be noted that the State of Lithuania, when recognising the principles and norms of international law, may not apply virtually different standards to the people of this country. Holding that it is 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, naturally integrates itself into the world culture, and becomes its natural part.

The Republic of Lithuania observes the international obligations undertaken by it and respects the universally recognised principles of international law (Paragraph 1 of Article 135 and Paragraph 3 of Article 138 of the Constitution)

*The Constitutional Court’s ruling of 14 March 2006*

[…] the observance of international obligations undertaken of its own free will and the respect of the universally recognised principles of international law (as well as the principle of *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania.

[…] the principle consolidated in the Constitution that the Republic of Lithuania observes international obligations undertaken of its own free will and respects the universally recognised principles of international law implies that, in cases when national legal acts (*inter alia*, laws or constitutional laws) establish such a legal regulation that competes with the one established in an international treaty, the international treaty is to be applied.

The obligation of the Republic of Lithuania to protect the secrets that belong to other states or international organisations (Article 136 and Paragraph 3 of Article 138 of the Constitution)

*The Constitutional Court’s ruling of 15 May 2007*

[…] the constitutional obligation to protect state secrets (or other classified information) also arises from the international treaties that are ratified by the Seimas and are a constituent part
of the legal system of the Republic of Lithuania (Paragraph 3 of Article 138 of the Constitution); adherence to such treaties is a constitutional obligation of the State of Lithuania. As the Constitutional Court held in its ruling of 14 March 2006, the said international treaties should be applied in cases where a national legal act establishes a legal regulation that competes with the one established in an international treaty, *inter alia*, with the one laid down in the international treaties on which the membership of the Republic of Lithuania in appropriate international organisations is based (the Republic of Lithuania may participate in such international organisations unless this is not in conflict with the interests and independence of the Republic of Lithuania (Article 136 of the Constitution)). The international treaties ratified by the Seimas as well as the membership of the Republic of Lithuania in international organisations imply that the Republic of Lithuania (its institutions and officials) may also dispose of secrets that belong to other states or international organisations. Doubtless to say, the constitutional obligation to protect state secrets (or other classified information) also includes the obligation to protect secrets that belong to other states or international organisations, where such secrets are disposed of by the Republic of Lithuania (its institutions and officials). [...] All this is applicable *mutatis mutandis* to secrets that belong to other states or international organisations, where such secrets can be disposed of by the Republic of Lithuania (its institutions, officials) according to such international treaties of the Republic of Lithuania the ratification of which by the Seimas is not required under the Constitution and laws, or where such secrets can be disposed of by the Republic of Lithuania (its institutions, officials) according to international agreements concluded by state institutions.

**The Republic of Lithuania observes the international obligations undertaken by it and respects the universally recognised principles of international law (Paragraph 1 of Article 135 of the Constitution)**

*The Constitutional Court’s ruling of 29 November 2010*

Under Paragraph 1 of Article 135 of the Constitution, in implementing its foreign policy, the Republic of Lithuania follows the universally recognised principles and norms of international law, *inter alia*, it seeks to ensure the welfare of its citizens, and their basic rights and freedoms.

It was held in the Constitutional Court’s ruling of 14 March 2006 that the adherence of the State of Lithuania to universally recognised principles of international law was declared in the Act “On the Re-establishment of the State of Lithuania” of the Supreme Council of the Republic of Lithuania, which was adopted on 11 March 1990; consequently, the observance of international obligations undertaken on its own free will and respect for the universally recognised principles of international law (as well as the principle of *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania.

**The constitutional grounds for international cooperation carried out by the state; the geopolitical orientation of the state**

*The Constitutional Court’s ruling of 15 March 2011*

The general constitutional grounds for international cooperation carried out by the state, where such cooperation is related, *inter alia*, to national defence, are consolidated in various provisions of the Constitution.

Paragraph 1 of Article 135 of the Constitution provides that, in implementing its foreign policy, the Republic of Lithuania follows the universally recognised principles and norms of international law, seeks to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and contributes to the creation of the international order based
on law and justice (Paragraph 1); in the Republic of Lithuania, war propaganda is prohibited (Paragraph 2).

Article 136 of the Constitution states that the Republic of Lithuania participates in international organisations provided that this is not in conflict with the interests and independence of the state.

Article 138 of the Constitution provides that the Seimas ratifies or denounces the following international treaties of the Republic of Lithuania: 1) on the alteration of the boundaries of the State of the Republic of Lithuania; 2) on political cooperation with foreign states; mutual assistance treaties; as well as treaties of a defensive nature related to the defence of the state; 3) on the renunciation of the use of force or threatening by force; as well as peace treaties; 4) on the presence and status of the armed forces of the Republic of Lithuania on the territories of foreign states; 5) on the participation of the Republic of Lithuania in universal international organisations and regional international organisations; 6) multilateral or long-term economic treaties (Paragraph 1); that laws, as well as international treaties, may also provide for other cases when the Seimas ratifies international treaties of the Republic of Lithuania (Paragraph 2); that international treaties ratified by the Seimas of the Republic of Lithuania are a constituent part of the legal system of the Republic of Lithuania (Paragraph 3).

The Constitutional Act “On Membership of the Republic of Lithuania in the European Union” adopted while “seeking to ensure the fully fledged participation of the Republic of Lithuania in the European integration, as well as the security of the Republic of Lithuania and welfare of its citizens” (Preamble) provides, inter alia, that the Republic of Lithuania as a Member State of the European Union shares with or confers on the European Union the competences of its state institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas, as well as enjoy membership rights (Paragraph 1); the norms of European Union law are a constituent part of the legal system of the Republic of Lithuania; where it concerns the founding Treaties of the European Union, the norms of European Union law are applied directly, while in the event of the collision of legal norms, they have supremacy over the laws and other legal acts of the Republic of Lithuania (Article 2).

Thus, the general grounds (consolidated in the Constitution) for international cooperation carried out by the state, where such cooperation is related, inter alia, to the defence of the state, are characterised, inter alia, by the consolidation of the geopolitical orientation of the State of Lithuania – the participation of the state in European integration as a Member of the European Union and the striving of the state for ensuring national independence and security by contributing to the creation of international order based on law and justice.

[…] the geopolitical orientation of the State of Lithuania – the participation of the state in European integration – is inseparable from other international obligations of the Republic of Lithuania, where such obligations arise from the membership of Lithuania in other international organisations, inter alia, the United Nations and the North Atlantic Treaty Organisation; this membership provides Lithuania not only with additional security guarantees, but also implies the necessity to observe the international obligations undertaken by it.

[…] The power of the Seimas, which is consolidated in Paragraph 1 of Article 142 of the Constitution, to adopt the decision to use the armed forces when the need arises to defend the Homeland or to fulfil the international obligations of the State of Lithuania also includes such a decision to use the armed forces when it is necessary to fulfil the international obligations of the Republic of Lithuania under international treaties of the Republic of Lithuania.
The geopolitical orientation of the state

*The Constitutional Court’s ruling of 24 January 2014*

[...]

the fundamental constitutional values consolidated in Article 1 of the Constitution – the independence of the state, democracy, the republic – are closely interrelated with the geopolitical orientation of the State of Lithuania, which is consolidated in the Constitution and implies European and transatlantic integration pursued by the Republic of Lithuania. As the Constitutional Court noted in its ruling of 7 July 2011, the geopolitical orientation of the State of Lithuania means the membership of the Republic of Lithuania in the EU and NATO as well as the necessity to fulfil the corresponding international obligations related with the said membership. It should also be noted that such geopolitical orientation of the State of Lithuania is based upon the recognised and protected universal constitutional values that are common with the values of other European and North American states.

The geopolitical orientation of the State of Lithuania is expressed in the text of the Constitution both in the negative and positive aspects. The negative aspect of the geopolitical orientation of the State of Lithuania is expressed in the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”, whereas the positive aspect is consolidated in the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”. These constitutional acts are a constituent part of the Constitution.

The negative aspect of the geopolitical orientation of the State of Lithuania – non-alignment to post-Soviet Eastern unions (the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”)

*The Constitutional Court’s ruling of 24 January 2014*

The Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” lays down the limits that may not be overstepped by the Republic of Lithuania in the processes of its participation in international integration and consolidates the prohibition on joining any new political, military, economic, or other unions or commonwealths of states formed on the basis of the former USSR. It is clear from the preamble to this constitutional act that it was adopted invoking “the 16 February 1918 and 11 March 1990 Acts on the Restoration of the Independent State of Lithuania and acting upon the will of the entire Nation, as expressed on 9 February 1991”. Thus, the basis of the provisions of this constitutional act is the same fundamental principle of the state, which is founded on the declaration of the sovereign will of the Nation and consolidated in Article 1 of the Constitutional Law “On the State of Lithuania”: i.e., the State of Lithuania is an independent democratic republic. Therefore, under the Constitution, the provisions of the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” should enjoy the same protection as the provision “The State of Lithuania shall be an independent democratic republic”, which is stipulated in Article 1 of the Constitution and Article 1 of the Constitutional Law “On the State of Lithuania”. In view of this fact, it needs to be held that, although Article 148 of the Constitution does not explicitly regulate the procedure for the alteration of the constituent parts of the Constitution, *inter alia*, the procedure for the alteration of the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”, the requirement stems from the very essence of the provisions of the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” to amend those provisions under the procedure that is the same procedure for the alteration of the constitutional provision “The State of Lithuania shall be an independent democratic republic”, i.e. under the same procedure as established in Article 2 of the Constitutional Law “On the State of Lithuania”.
On the principle of respect for international law

[...] an imperative stems from Paragraph 1 of Article 6 of the Constitution to the effect that no amendments to the Constitution may violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them. In view of this fact, it should be noted that, under the Constitution, no amendments may be made to the Constitution that would deny the provisions of the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”, with the exception of the cases where certain provisions of this constitutional act would be altered in the same manner as provided for in Article 2 of the Constitutional Law “On the State of Lithuania”.

The positive aspect of the geopolitical orientation of the State of Lithuania – membership in the European Union (the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”)

The Constitutional Court’s ruling of 24 January 2014

The membership of the Republic of Lithuania in the European Union was constitutionally confirmed by means of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”. The preamble to this Constitutional Act makes it clear that the Seimas adopted it in order to execute “the will of the citizens of the Republic of Lithuania, as expressed in the referendum on membership of the Republic of Lithuania in the European Union, held on 10–11 May 2003” and while “expressing its conviction that the European Union respects human rights and fundamental freedoms and that Lithuanian membership in the European Union will contribute to the more efficient securing of human rights and freedoms”, “noting that the European Union respects the national identity and constitutional traditions of its Member States”, and “seeking to ensure the fully fledged participation of the Republic of Lithuania in the European integration, as well as the security of the Republic of Lithuania and welfare of its citizens”.

Thus, it needs to be emphasised that the full participation of the Republic of Lithuania, as a Member of the European Union, in the European Union is a constitutional imperative grounded in the expression of the sovereign will of the Nation and that the full membership of the Republic of Lithuania in the European Union is a constitutional value.

It should be noted that the Constitutional Act “On Membership of the Republic of Lithuania in the European Union” establishes, inter alia, the constitutional grounds of the membership of the Republic of Lithuania in the European Union. In case such constitutional grounds were not consolidated in the Constitution, the Republic of Lithuania would not be able to be a full member of the European Union: the Republic of Lithuania as a Member State of the European Union shares with or confers on the European Union the competences of its state institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas, as well as enjoy membership rights (Article 1); the norms of European Union law are a constituent part of the legal system of the Republic of Lithuania; where it concerns the founding Treaties of the European Union, the norms of European Union law are applied directly, while in the event of the collision of legal norms, they have supremacy over the laws and other legal acts of the Republic of Lithuania (Article 2). It needs to be emphasised that these constitutional grounds of the membership of the Republic of Lithuania in the European Union were consolidated in the Constitution so as to execute the will of the Nation that the Republic of Lithuania could be a member of the European Union.

In view of this fact, it needs to be held that those grounds themselves and the expression of the sovereign will of the Nation, as the source of these grounds, determine the requirement that the provisions of Articles 1 and 2 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union” be altered or annulled only by referendum.
It has been mentioned that the geopolitical orientation of the State of Lithuania means, *inter alia*, the membership of the Republic of Lithuania in the EU as well as the necessity to fulfil the corresponding international commitments related with the said membership; […] any amendments to the Constitution may not violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them. In view of this fact, it should be noted that, under the Constitution, as long as the aforesaid constitutional grounds for membership of the Republic of Lithuania in the European Union, which are consolidated in Articles 1 and 2 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”, have not been annulled by referendum, any amendments to the Constitution that would deny the commitments of the Republic of Lithuania arising from its membership in the European Union are not permitted.

[…]

It should be emphasised that the constitutional imperative of a full membership of the Republic of Lithuania in the European Union implies that the constitutional value is namely full membership in the European Union, i.e. fully fledged, rather than partial, participation in the activities of this Union and in the integration of its Member States.

[…] 

[…] the constitutional imperative of the fully fledged participation of the Republic of Lithuania in the European Union and its fully fledged membership in the European Union, as a constitutional value, also implies the constitutional obligation of the Republic of Lithuania to participate, as a fully fledged Member State, *inter alia*, in the integration of the member countries into the economic and monetary union, *inter alia*, by adopting the common currency of this union – the euro – and conferring on the European Union the exclusive competence in the area of monetary policy. It should be noted that such a constitutional obligation of the State of Lithuania is concurrently an obligation arising from its membership in the European Union, which the State of Lithuania is obliged to fulfil while observing its geopolitical orientation consolidated in the Constitution and the constitutional principle of *pacta sunt servanda*.

**The principle of respect for international law (Paragraph 1 of Article 135 of the Constitution)**

_The Constitutional Court’s ruling of 24 January 2014_

Respect for international law, which is also a constitutional value, is related to the geopolitical orientation of the State of Lithuania, which is consolidated in the Constitution.

It should be noted that, under Paragraph 1 of Article 135 of the Constitution, in implementing its foreign policy, the Republic of Lithuania follows the universally recognised principles and norms of international law. The constitutional principle of respect for international law, i.e. the principle of *pacta sunt servanda*, as consolidated in this provision, means the imperative of fulfilling in good faith the obligations assumed by the Republic of Lithuania under international law, *inter alia*, international treaties.

As the Constitutional Court has noted, the observance of international obligations undertaken of its own free will and respect for the universally recognised principles of international law (as well as the principle of *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania (the Constitutional Court’s rulings of 14 March 2006 and 5 September 2012). It should be noted that respect for international law is an inseparable part of the constitutional principle of a state under the rule of law; the essence of the said principle is the rule of law.

[…] any amendments to the Constitution may not violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them. In view of this fact, it should
be noted that the Constitution does not permit any such amendments to the Constitution that would deny the international obligations of the Republic of Lithuania (inter alia, the obligations of the Republic of Lithuania arising from its membership in NATO where such obligations are preconditioned by the […] geopolitical orientation of the Republic of Lithuania) and at the same time – the constitutional principle of pacta sunt servanda, as long as the said international obligations have not been renounced in accordance with the norms of international law.

The principle of respect for international law (Paragraph 1 of Article 135 of the Constitution)

The Constitutional Court’s ruling of 18 March 2014

[…] As noted by the Constitutional Court in its ruling of 24 January 2014, under Paragraph 1 of Article 135 of the Constitution, the Republic of Lithuania is obliged to follow the universally recognised principles and norms of international law; the said provision consolidates the constitutional principle of respect for international law, i.e. the principle of pacta sunt servanda, which means the imperative of fulfilling in good faith the obligations assumed by the Republic of Lithuania under international law, inter alia, international treaties.

It should be noted that the constitutional principle of pacta sunt servanda also means the imperative of fulfilling in good faith the international obligations arising from the universally recognised norms of international law (general international law) that prohibit international crimes.

[…] It should be noted that respect for international law is an inseparable part of the constitutional principle of a state under the rule of law; the essence of the said principle is the rule of law (the Constitutional Court’s ruling of 24 January 2014).

In the context of the constitutional justice case at issue, it should be noted that, under Paragraph 1 of Article 135 of the Constitution and the constitutional principle of a state under the rule of law, the Republic of Lithuania is obliged to fulfil, in good faith, its international obligations arising under the universally recognised norms of international law (general international law), inter alia, under the jus cogens norms that prohibit international crimes and are consolidated, inter alia, in the international treaties of the Republic of Lithuania ratified by the Seimas, which, as stipulated in Paragraph 3 of Article 138 of the Constitution, are a constituent part of the legal system of the Republic of Lithuania.

[…] In this context, it should be noted that, in its ruling of 9 December 1998, in interpreting Paragraph 1 of Article 135 of the Constitution, under which, in implementing its foreign policy, the Republic of Lithuania follows the universally recognised principles and norms of international law, seeks to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and contributes to the creation of the international order based on law and justice, as well as Paragraph 3 of Article 138, which stipulates that international treaties ratified by the Seimas of the Republic of Lithuania are a constituent part of the legal system of the Republic of Lithuania, the Constitutional Court held that the State of Lithuania, recognising the principles and norms of international law, may not apply substantially different standards to the people of this country; holding that it is 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, naturally integrates itself into the world culture, and becomes its natural part.

It has been mentioned that respect for international law is an inseparable part of the constitutional principle of a state under the rule of law; the essence of the said principle is the rule
of law. As the Constitutional Court has mentioned on more than one occasion, this constitutional principle also embodies the striving for an open, just, and harmonious civil society and a state under the rule of law, as consolidated in the Preamble to the Constitution (the Constitutional Court’s rulings of 19 September 2002, 17 November 2003, and 13 December 2004). […] respect for international law is also linked to the striving for an open, just, and harmonious civil society, which is expressed through the constitutional principle of a state under the rule of law and implies, *inter alia*, the openness for universal democratic values and integration into the international community founded on these values.

Thus, in the context of the constitutional justice case at issue, it should also be noted that, in order to be in line with the commitment of the Republic of Lithuania, as prescribed in Paragraph 1 of Article 135 of the Constitution, to fulfil, in good faith, its international obligations arising under the universally recognised norms of international law (general international law), *inter alia*, under the *jus cogens* norms that prohibit international crimes, the criminal laws of the Republic of Lithuania that are related to liability for international crimes, *inter alia*, genocide, may not establish any such standards that would be lower than those established under the universally recognised norms of international law. Disregard for the said requirement would be incompatible with the striving for an open, just, and harmonious civil society and a state under the rule of law, as consolidated in the Preamble to the Constitution and expressed through the constitutional principle of a state under the rule of law.

The constitutional grounds for international cooperation carried out by the State of Lithuania

*The Constitutional Court’s decision of 16 May 2016*

[...] the provisions of the official constitutional doctrine that are related to the general constitutional grounds for international cooperation carried out by the State of Lithuania are as follows:

– the general constitutional grounds for international cooperation carried out by the state are consolidated in various provisions of the Constitution, *inter alia*, in Paragraph 1 of Article 135 thereof; the said paragraph states that, in implementing its foreign policy, the Republic of Lithuania follows the universally recognised principles and norms of international law, seeks to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and contributes to the creation of the international order based on law and justice; the aforementioned constitutional grounds are also consolidated in Article 136 of the Constitution, whereby the Republic of Lithuania participates in international organisations provided that this is not in conflict with the interests and independence of the state (the Constitutional Court’s ruling of 15 March 2011); under Paragraph 3 of Article 138 of the Constitution, international treaties ratified by the Seimas of the Republic of Lithuania are a constituent part of the legal system of the Republic of Lithuania; respect for international law, i.e. the observance of international obligations undertaken of its own free will and respect for the universally recognised principles of international law (as well as the principle of *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania (the Constitutional Court’s ruling of 14 March 2006);

– respect for international law is an inseparable part of the constitutional principle of a state under the rule of law; the essence of the said principle is the rule of law (the Constitutional Court’s rulings of 24 January 2014 and 18 March 2014); respect for international law is also linked to the striving for an open, just, and harmonious civil society, which is expressed through the constitutional principle of a state under the rule of law and implies, *inter alia*, the openness
for universal democratic values and integration into the international community founded on these values (the Constitutional Court’s ruling of 18 March 2014);

– the general grounds (consolidated in the Constitution) for international cooperation carried out by the state are characterised, *inter alia*, by the consolidation of the geopolitical orientation of the State of Lithuania (the Constitutional Court’s ruling of 15 March 2011); the geopolitical orientation of the State of Lithuania means the membership of the Republic of Lithuania in the EU and NATO as well as the necessity to fulfil the corresponding international obligations related with the said membership (the Constitutional Court’s rulings of 24 January 2014 and 19 November 2015); such geopolitical orientation of the State of Lithuania is based upon the recognised and protected universal constitutional values that are common with the values of other European and North American states (the Constitutional Court’s ruling of 24 January 2014); the fully fledged participation of the Republic of Lithuania, as a member of the European Union, in the European Union is a constitutional imperative grounded in the expression of the sovereign will of the Nation; the fully fledged membership of the Republic of Lithuania in the European Union is a constitutional value (the Constitutional Court’s ruling of 24 January 2014).

[...] Paragraph 1 of Article 135 of the Constitution consolidates the grounds for international cooperation carried out by the Republic of Lithuania in order to implement the constitutional objectives of foreign policy to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and to contribute to the creation of the international order based on law and justice; when account is taken of the geopolitical orientation of the State of Lithuania, the aforementioned grounds for international cooperation imply such an activity performed by the State of Lithuania, by its institutions, and by individuals employed therein which is aimed at contributing to the partnership of other states either with the European Union or with NATO, or at contributing to the integration of the said states in these international organisations by promoting the dissemination of universal and democratic values, as well as the principles of EU law, as, for instance, democracy, the rule of law, transparency, the independence of courts and judges, respect for human rights and basic freedoms, and, *inter alia*, by promoting the dissemination of the said values and principles in the spheres of the improvement of the systems of justice and the activity of courts.
I. THE RIGHT OF ACCESS TO A COURT

The principle of judicial protection (Paragraph 1 of Article 30 of the Constitution)
*The Constitutional Court’s ruling of 2 July 2002*

The constitutional principle of judicial protection is consolidated in Paragraph 1 of Article 30 of the Constitution. In its ruling of 18 April 1996, the Constitutional Court held that, in a democratic state, the court is the main institutional guarantee of human rights and freedoms and that the constitutional principle of judicial protection is universal.

It should be noted that, under the Constitution, the legislature has the duty to establish such a legal regulation on the basis of which all the disputes regarding any violation of the rights or freedoms of individuals could be resolved in a court. A prelitigation procedure for settling disputes may also be provided for. However, it is not permitted to establish any such legal regulation that would deny the right of an individual who believes that his/her rights or freedoms are violated to defend his/her rights and freedoms in a court.

In its ruling of 8 May 2000, the Constitutional Court held that a person is guaranteed the protection of his/her violated right in a court regardless of the legal status of this person and that the violated rights and legitimate interests of persons must be protected in a court irrespective of the fact whether they are directly consolidated in the Constitution or not.

The right of access to a court (Paragraph 1 of Article 30 of the Constitution)
*The Constitutional Court’s ruling of 4 March 2003*

The constitutional right to apply to a court means that in a state under the rule of law everyone is given an opportunity to defend their rights in a court against unlawful actions of other persons and those of state institutions and officials. The provision of Paragraph 1 of Article 30 of the Constitution that the person whose constitutional rights or freedoms are violated has the right to apply to a court consolidates the constitutional right of a person to have an impartial arbiter of a dispute (the Constitutional Court’s rulings of 1 October 1997 and 12 July 2001). The provision of Paragraph 1 of Article 30 of the Constitution consolidates the constitutional principle of the priority and universality of judicial protection; the effectiveness of the said principle is directly related to the provision of Article 29 of the Constitution, whereby all persons are equal before the law (the Constitutional Court’s ruling of 18 April 1996). The right of a person to apply to a court may not be limited or denied; otherwise, a threat would arise for one of the most significant values of a state under the rule of law.

The right of access to a court (Paragraph 1 of Article 30 of the Constitution)
*The Constitutional Court’s ruling of 17 August 2004*

Paragraph 1 of Article 30 the Constitution provides that a person whose constitutional rights or freedoms are violated has the right to apply to a court.
In a state under the rule of law, everyone is given an opportunity to defend their rights in a court against unlawful actions of other persons and those of state institutions and officials (the Constitutional Court’s ruling of 1 October 1997). Under Paragraph 1 of Article 30 of the Constitution, a person must be guaranteed the right to an independent and impartial arbiter of a dispute who, on the basis of the Constitution and laws, would settle a legal dispute on its merits; each person has this right; the defence of violated rights in a court is guaranteed to persons regardless of their legal status; the infringed rights and legitimate interests of persons must be defended in a court irrespective of whether or not they are directly established in the Constitution; the rights of a person must be defended not formally, but in reality and effectively against unlawful actions of both private persons and state institutions or officials (the Constitutional Court’s rulings of 1 October 1997, 8 May 2000, and 12 July 2001). The guarantee of the judicial protection of the rights and freedoms of persons is a guarantee of a procedural character and an essential element of the constitutional institute of the rights and freedoms of persons (the Constitutional Court’s ruling of 30 June 2000), as well as a necessary condition of the administration of justice and an inseparable element of the content of the constitutional principle of a state under the rule of law.

The right to apply to a court is an absolute one (the Constitutional Court’s ruling of 30 June 2000). It is not permitted to limit or deny this right. Under the Constitution, the legislature has the duty to lay down such a legal regulation on the basis of which all the disputes regarding any violation of the rights or freedoms of persons could be resolved in a court. A prelitigation procedure for settling disputes may also be provided for in legal acts. However, it is not permitted to establish any such legal regulation that would deny the right of a person who believes that his/her rights or freedoms are violated to defend his/her rights or freedoms in a court (the Constitutional Court’s rulings of 2 July 2002 and 4 March 2003).

**The right of access to a court (Paragraph 1 of Article 30 of the Constitution)**

*The Constitutional Court’s ruling of 16 January 2006*

The provision of Paragraph 1 of Article 30 of the Constitution, according to which a person whose constitutional rights or freedoms are violated has the right to apply to a court, means that, in Lithuania, as a state under the rule of law, everyone must be given an opportunity to defend their rights in a court against unlawful actions of other persons as well as against those of state institutions or officials (the Constitutional Court’s rulings of 1 October 1997, 4 March 2003, and 17 August 2004). A person is guaranteed the right to an independent and impartial arbiter of a dispute who, on the basis of the Constitution and laws, would settle a legal dispute on its merits; each person who believes that his/her rights or freedoms are violated has the right to defend his/her rights and freedoms in a court – the implementation of the right to apply to a court is determined by the fact that the person himself/herself understands that his/her rights or freedoms are violated; the defence of violated rights in a court is guaranteed to persons regardless of their legal status; the violated rights, *inter alia*, acquired rights, and legitimate interests of a person must be defended in a court regardless of whether they are directly consolidated in the Constitution; the rights of a person must be defended not formally, but in reality and effectively against unlawful actions of both private persons and state institutions or officials (the Constitutional Court’s rulings of 1 October 1997, 8 May 2000, 12 July 2001, 17 August 2004, and 7 February 2005). The constitutional right of a person to apply to a court, when interpreted in the context of other provisions of the Constitution, also implies that a law must establish such a legal regulation so that it would be possible to lodge an appeal with at least one court of higher instance against any final act adopted by a court of general jurisdiction or by a specialised court established under Paragraph 2 of Article 111 of the Constitution.
The guarantee of the judicial protection of the rights and freedoms of a person is a guarantee of a procedural character, an essential element of the constitutional institute of the rights and freedoms of the person and an inseparable element of the content of the constitutional principle of a state under the rule of law (the Constitutional Court’s rulings of 30 June 2000, 17 August 2004, and 13 December 2004). The right of a person to apply to a court also implies his/her right to the due process of law (the Constitutional Court’s rulings of 13 December 2004 and 29 December 2004).

The right to apply to a court is an absolute one; the constitutional right of a person to apply to a court cannot be artificially restricted and the implementation of this right may not be unreasonably burdened (the Constitutional Court’s rulings of 30 June 2000, 17 August 2004, 13 December 2004, and 7 February 2005). Otherwise, it would have to be stated that this constitutional right is a mere declaration (the Constitutional Court’s rulings of 14 February 1994 and 22 February 2001).

Thus, under the Constitution, the legislature has the duty to lay down by law such a legal regulation on the basis of which all the disputes concerning the violation of the rights and freedoms as well as acquired rights of a person could be resolved in a court (the Constitutional Court’s rulings of 2 July 2002, 4 March 2003, 17 August 2004, 29 December 2004, and 7 February 2005). At the same time, it needs to be noted that the constitutional right of a person to apply to a court cannot be interpreted as meaning that, purportedly, the legislature may establish only such a legal regulation under which a person seeking to defend his/her rights and freedoms that, in his/her opinion, were violated would be able to apply to a court only directly in all situations. In its acts, the Constitutional Court has held on more than one occasion that legal acts can also establish a prelitigation procedure for settling disputes; however, it is not permitted to establish any such legal regulation that would deny the right of a person who believes that his/her rights or freedoms are violated to defend his/her rights or freedoms in a court (the Constitutional Court’s rulings of 2 July 2002, 4 March 2003, 17 August 2004, 29 December 2004, and 7 February 2005).

The right of access to a court in criminal proceedings (the right of a person who believes that his/her rights are violated because of a criminal act to defend his/her rights in a court) (Paragraph 1 of Article 30 of the Constitution)

The Constitutional Court’s ruling of 16 January 2006

In regulating criminal procedure relations, the constitutional right of a person to apply to a court may not be violated in any respect.

[…]

[…] the obligation of the state, which arises from the Constitution, to protect each person and all society against criminal attempts and the right of a person to the due process of law imply the right of each person who believes that his/her rights are violated because of a criminal act to defend his/her rights in a court and the duty of the state to ensure an effective mechanism of implementing this right of a person. The legislature has rather broad discretion in this sphere: the legislature can provide for the grounds according to which an investigation into a criminal act is launched, for subjects (institutions) that launch an investigation into a criminal act, etc. […] the legislature, while regulating the relations of criminal procedure, while taking account of the nature, danger (gravity), scale, other signs of criminal acts, as well as other significant circumstances, may consolidate such a legal regulation where an application (petition, statement, complaint, etc.) from a victim (from his/her representative) concerning a criminal act serves as sufficient grounds for launching an investigation into such a criminal act. However, by
establishing such a legal regulation, the legislature may not create any legal preconditions for denying the state obligation that arises from the Constitution, *inter alia*, from the principle of a state under the rule of law, to protect each person and all society against criminal attempts, or any legal preconditions for artificially or unreasonably burdening the implementation of the right of a person to defend his/her rights in a court.

 [...] the constitutional right of a person to apply to a court does not mean that the legislature cannot establish in procedural laws, *inter alia*, in the laws that regulate criminal procedure relations, a certain procedure of applying to a court and certain formal requirements where such requirements would have to be complied with by applications filed with courts. It also needs to be noted that the constitutional right of a person to apply to a court does not preclude the legislature from establishing also the formal requirements applicable to the application of a person, subsequent to which an investigation into a criminal act or the consideration of a criminal case in a court can be commenced. As such, the establishment of such formal requirements does not mean that the constitutional right of a person to apply to a court has been artificially restricted or that the implementation of this right has been burdened unreasonably. However, when regulating the procedure for applying to a court and while establishing certain requirements that must be met by an application filed with a court, *inter alia*, the requirements applied to an application for a court subsequent to which an investigation into a criminal act or the consideration of a criminal case in a court is commenced, the legislature may not establish any such legal regulation whereby the implementation of a certain constitutional right or legitimate interest of a person, *inter alia*, the right of a person to judicial protection, would be burdened unreasonably or its implementation would become impossible altogether. Otherwise, the Constitution would be violated, *inter alia*, the right of a person to judicial protection, as consolidated in Paragraph 1 of Article 30 of the Constitution, the right of a person and society to safety from criminal attempts and the right of a person to the due process of law, where the said right arises from the principle of a state under the rule of law, would be infringed.

 [...] under the Constitution, the legislature must regulate by law criminal procedure relations in such a way that the subjects of criminal procedure relations who believe that their rights are violated would have the right to defend their rights in a court regardless of their legal status in criminal proceedings. Otherwise, the preconditions would be created for violating the constitutional right of a person to judicial protection, thus, Paragraph 1 of Article 30 of the Constitution as well.

 In this context, it should also be noted that the legislature, when regulating criminal procedure relations, may also establish such a legal regulation that would not allow any person to abuse the constitutional right to apply to a court where there are no grounds for such an application.

 [...] under the Constitution, the legislature can also establish such a legal regulation whereby private persons (their representatives) but not prosecutors uphold charges in certain criminal cases; such a legal regulation, in itself, does not create any preconditions for violating the right of a person to judicial protection;

 [...] the fact that victims (their representatives) uphold charges in certain criminal cases is a specific form of the implementation of the constitutional right of a person to defend his/her rights and freedoms as well as legitimate interests in a court and, as such, it does not mean that the constitutional right of a person to apply to a court is artificially restricted or that the implementation of the said right is unreasonably burdened; [...].
The right of a party to a case to request the court that considers a relevant case to apply to the Constitutional Court

_The Constitutional Court’s ruling of 28 March 2006_

Interpreting Paragraph 2 of Article 6 and Paragraph 1 of Article 30 of the Constitution in the context of Paragraph 1 of Article 109 and Article 110 of the Constitution, as well as in the context of the constitutional principle of a state under the rule of law, it needs to be noted that the right of each person to defend his/her rights on the basis of the Constitution and the right of a person whose constitutional rights or freedoms are violated to apply to a court also imply that each party of a case considered by a court, when such a party has doubts over the compliance of a law or another legal act (part thereof) with the Constitution (with another higher-ranking legal act), where such a law or another legal act (part thereof) may be applied in that case and where an investigation into the compliance of which with the Constitution (with another higher-ranking legal act) falls under the jurisdiction of the Constitutional Court (i.e., when such a party doubts about the compliance of a certain act (part thereof) of the Seimas, the President of the Republic or the Government or an act (part thereof) adopted by referendum with the Constitution (with another higher-ranking legal act)), has the right to apply to a court of general jurisdiction or the respective specialised court, which is established under Paragraph 2 of Article 111 of the Constitution, that considers the relevant case, requesting such a court to suspend the consideration of the case and to apply to the Constitutional Court with the petition to investigate and to decide whether the legal act (part thereof) that was passed by the Seimas, the President of the Republic or the Government or adopted by referendum and is applicable in the same case is not in conflict with a higher-ranking legal act, _inter alia_ (and, first of all), with the Constitution.

The right to the judicial protection of the rights and freedoms of a person that are violated by the inaction of law-making subjects (the failure of law-making subjects to adopt decisions)

_The Constitutional Court’s decision of 8 August 2006_

The jurisprudence of the Constitutional Court has pointed out more than once the imperative arising from the constitutional principle of a state under the rule of law and other provisions of the Constitution ( _inter alia_ , from Paragraph 1 of Article 30 of the Constitution, whereby a person whose constitutional rights or freedoms are violated has the right to apply to a court), according to which a person who believes that his/her rights or freedoms are violated has the absolute right to access an independent and impartial court – an arbiter that would settle the respective dispute. […] If the constitutional right of persons to apply to a court were not ensured, the generally recognised legal principle _ubi ius, ibi remedium_ – if there is a certain right (freedom), there must be a measure for its protection – would also be disregarded. Under the Constitution, a legal situation where it is impossible to defend a certain right or freedom of persons (as well as to defend such a right before a court), even though those persons believe that such a right or freedom is violated, is impermissible; the Constitution does not tolerate such a legal situation.

Therefore, the fact that the subjects specified in the Constitution may not challenge before the Constitutional Court such failure of a law-making subject to act where, instead of the legal regulation that was ruled by the Constitutional Court to be in conflict with a higher-ranking legal act, _inter alia_ , with the Constitution, the said law-making subject has not passed a legal act (acts) (parts thereof) that would establish a new (different) legal regulation harmonised with the said higher-ranking legal acts, _inter alia_ , with the Constitution, and where the Constitutional Court does not have the powers to investigate the non-adoption of such law-making decisions, does not mean that the aforementioned persons cannot defend their rights and freedoms (as well as in a court) that are violated because the said law-making decisions have not been adopted. The
general legal principle *ubi ius, ibi remedium*, the provision of Paragraph 1 of Article 6 of the Constitution, whereby the Constitution is a directly applicable act, the constitutional principle of responsible governance, the provision of Paragraph 3 of Article 5 of the Constitution, according to which state institutions serve the people, the provision of Article 18 of the Constitution, whereby human rights and freedoms are innate, as well as the constitutional right of a person who believes that his/her constitutional rights or freedoms are violated to apply to a court, imply not only the fact that, in such cases, the rights, freedoms, legitimate interests, and legitimate expectations must and may be defended by means of interpreting the Constitution and by directly applying its provisions, but also the fact that such protection must be guaranteed by courts.

**The right of a party to a case to request the court that considers a relevant case to apply either to the Constitutional Court or to an appropriate administrative court**

*The Constitutional Court’s ruling of 24 October 2007*

[...] the right of each person to defend his/her rights on the basis of the Constitution and the right of a person whose constitutional rights or freedoms are violated to apply to a court also imply that each party of a case considered by a court, when such a party has doubts over the compliance of a law or another legal act (part thereof) with the Constitution (with another higher-ranking legal act), where such a law or another legal act (part thereof) may be applied in that case and where an investigation into the compliance of which with the Constitution (with another higher-ranking legal act) falls under the jurisdiction of the Constitutional Court (i.e., when such a party doubts about the compliance of a certain act (part thereof) of the Seimas, the President of the Republic or the Government or an act (part thereof) adopted by referendum with the Constitution (with another higher-ranking legal act)), has the right to apply to a court of general jurisdiction or the respective specialised court, which is established under Paragraph 2 of Article 111 of the Constitution, that considers the relevant case, requesting such a court to suspend the consideration of the case and to apply to the Constitutional Court with the petition to investigate and to decide whether the legal act (part thereof) that was passed by the Seimas, the President of the Republic or the Government or adopted by referendum and is applicable in the same case is not in conflict with a higher-ranking legal act, *inter alia* (and, first of all), with the Constitution; this is also applicable *mutatis mutandis* to those legal situations where a certain party of a case considered by a court has doubts over the compliance of a legal act (part thereof) with the Constitution (with another higher-ranking legal act), where such a legal act (part thereof) may be applied in that case and where an investigation into the compliance of which with the Constitution (with another higher-ranking legal act) does not fall under the jurisdiction of the Constitutional Court (i.e., the said act has not been passed by the Seimas, by the President of the Republic or by the Government and it has not been adopted by referendum) – the said party, under the Constitution [...] has the right to request the court considering its case to apply to an appropriate administrative court regarding the compliance of such a legal act (part thereof) with the Constitution (with another higher-ranking legal act) [...].

**The right to lodge an appeal against a final act of a court of first instance**

*The Constitutional Court’s ruling of 24 January 2008*

[...] as it has been held by the Constitutional Court, the constitutional right of a person to apply to a court and the instance system of courts imply that a law must establish such a legal regulation so that it could be possible to lodge an appeal with at least one court of higher instance against a final act adopted either by a court of general jurisdiction or by a specialised court established under Paragraph 2 of Article 111 of the Constitution (the Constitutional Court’s rulings of 16 January 2006, 28 March 2006, 21 September 2006, 27 November 2006, and 24
January 2007). Justice is always administered by leaving an opportunity to rectify a possible mistake or change a judgment in the light of new circumstances (the Constitutional Court’s ruling of 9 December 1998). The Constitutional Court has held that a law must establish not only the right of a party to the proceedings to lodge an appeal with at least one court of higher instance against any final act that was adopted in a case by a court of first instance, but also it must establish a procedure for lodging such an appeal; such a procedure would allow correcting possible mistakes made by a court of first instance; otherwise, the constitutional principle of a state under the rule of law would be deviated from and the constitutional right of a person to the due court process would be violated (the Constitutional Court’s rulings of 21 September 2006 and 24 October 2007); the said correction of mistakes of courts of lower instance and the related prevention of injustice is the conditio sine qua non of the confidence of the parties of corresponding cases and society in general not only in the court of general jurisdiction that considers the corresponding case, but also in the whole system of courts of general jurisdiction (the Constitutional Court’s ruling of 28 March 2006).

[...] the purpose of the institute of lodging a complaint against a final act of a court of first instance is the defence and protection of the rights of not only the person (convict) who has been brought to legal liability, but also the defence and protection of the rights and legitimate interests of other persons, inter alia, the victim, as well as the defence and protection of the public interest and the legal order of the state.

The right to the judicial protection of the rights and freedoms of a person that are violated by the activity (or inaction) of the President of the Republic or the Government

The Constitutional Court’s ruling of 13 May 2010

The constitutional principle of judicial protection is consolidated in Paragraph 1 of Article 30 of the Constitution. [...] Paragraph 1 of Article 30 of the Constitution should be interpreted in conjunction with Paragraph 2 of the same article, in which it is prescribed that compensation for the material and moral damage inflicted on a person is established by law. [...] It needs to be noted that the provisions of Article 30 of the Constitution should be interpreted in conjunction with other provisions of the Constitution, inter alia, with Paragraph 1 of Article 109 thereof, whereby, in the Republic of Lithuania, justice is administered only by courts, and with Paragraph 1 of Article 29 thereof, according to which all persons are equal before the law, the court, and other state institutions and officials.

[...] “[...] the fact that the subjects specified in the Constitution may not challenge before the Constitutional Court such failure of a law-making subject to act where, instead of the legal regulation that was ruled by the Constitutional Court to be in conflict with a higher-ranking legal act, inter alia, with the Constitution, the said law-making subject has not passed a legal act (acts) (parts thereof) that would establish a new (different) legal regulation harmonised with the said higher-ranking legal acts, inter alia, with the Constitution, and where the Constitutional Court does not have the powers to investigate the non-adoption of such law-making decisions, does not mean that the aforementioned persons cannot defend their rights and freedoms (as well as in a court) that are violated because the said law-making decisions have not been adopted. The general legal principle ubi ius, ibi remedium, the provision of Paragraph 1 of Article 6 of the Constitution, whereby the Constitution is a directly applicable act, the constitutional principle of
responsible governance, the provision of Paragraph 3 of Article 5 of the Constitution, according
to which state institutions serve the people, the provision of Article 18 of the Constitution,
whereby human rights and freedoms are innate, as well as the constitutional right of a person
who believes that his/her constitutional rights or freedoms are violated to apply to a court, imply
not only the fact that, in such cases, the rights, freedoms, legitimate interests, and legitimate
expectations must and may be defended by means of interpreting the Constitution and by directly
applying its provisions, but also the fact that such protection must be guaranteed by courts” (the
Constitutional Court’s decision of 8 August 2006).

The aforesaid provisions of the constitutional doctrine formulated in the Constitutional
Court’s decision of 8 August 2006 are also applicable \textit{mutatis mutandis} to those legal situations
where the rights and freedoms of a person are violated because of the fact that an act of the
President of the Republic or an act of the Government has not been adopted, although the adoption
of such an act is required by a certain higher-ranking legal act, \textit{inter alia}, by the Constitution.

\[\ldots\]
\[\ldots\] the activities of the President of the Republic or the Government can also cause a
violation of the rights or freedoms of a person, \textit{inter alia}, such activities can inflict damage.

\[\ldots\]
\[\ldots\] administrative courts may consider cases concerning, \textit{inter alia}, the result or consequence
of the activities (failure to act) of the President of the Republic or the Government where such
activities (failure to act) violated (could violate) the rights or freedoms of a person, \textit{inter alia}, they
may consider cases concerning compensation for damage.

\textbf{The right to have an advocate as a condition of the effective implementation of the
duty to judicial protection}
\textit{The Constitutional Court's ruling of 9 June 2011}

\[\ldots\] the right of a person to apply to a court and the requirement, arising from the Constitution,
\textit{inter alia}, from the provisions of Paragraph 1 of Article 30 and Paragraph 6 of Article 31 thereof,
to defend the rights of a person not formally, but in reality and in an effective manner means, \textit{inter
alia}, that the legislature must establish such a legal regulation that would create the preconditions
for the effectiveness of legal assistance that is rendered by an advocate, where a person has the right
to make use of such legal assistance in protecting his/her violated rights and legitimate interests,
\textit{inter alia}, while applying to a court.

\[\ldots\]
\[\ldots\] an advocate, while being engaged in an independent professional activity and rendering
legal assistance to a person whose rights and legitimate interests are violated, helps to implement
the constitutional right of such a person to judicial protection. Thus, the right of a person to have
an advocate is one of the conditions for the effective implementation of the right of a person to
judicial protection.

\[\ldots\]
\[\ldots\] the constitutional right to judicial protection and the right to have an advocate, which
are consolidated in the Constitution, \textit{inter alia}, in the provisions of Paragraph 1 of Article 30
and Paragraph 6 of Article 31 thereof, give rise to the duty of the legislature to establish such a
legal regulation that would create the preconditions for a person who defends his/her violated
rights and legitimate expectations to make use of legal assistance rendered by an advocate, \textit{Inter
alia}, the legislature should provide for such rights of advocates that would enable them to pursue
their professional activity and to render effective legal assistance. It should be noted that the
establishment of the rights of advocates is not an objective in itself – it is necessary to provide
for such rights in order that advocates would effectively perform their professional activity and, having used all legitimate measures of defence, they would help to secure the implementation of the right of a person to judicial protection, *inter alia*, that of the right to apply to a court.

**The right to judicial protection (Paragraph 1 of Article 30 of the Constitution)**

*The Constitutional Court’s ruling of 5 July 2013*

The constitutional principle of judicial protection is consolidated in Paragraph 1 of Article 30 of the Constitution. […]

The Constitutional Court has held on more than one occasion that, under the Constitution, the legislature has the duty to lay down such a legal regulation on the basis of which all the disputes concerning the violation of the constitutional rights and freedoms and acquired rights of a person could be resolved in a court (*inter alia*, the Constitutional Court’s rulings of 2 July 2002, 4 March 2003, 29 December 2004, 7 February 2005, and 16 January 2006). The constitutional right of a person to apply to a court may not be interpreted as meaning that the legislature, purportedly, may not establish any such legal regulation under which a person seeking to defend, in his/her opinion, his/her violated rights or freedoms would be allowed to apply to a court only in the manner provided for by means of a law. When fulfilling its constitutional duty to lay down such a legal regulation on the basis of which all the disputes concerning the violation of the rights and freedoms of a person could be resolved in a court, and by paying regard, *inter alia*, to the imperatives consolidated in Paragraph 2 of Article 29 and Paragraph 1 of Article 30 of the Constitution, the legislature may establish a certain procedure governing the constitutional right to apply to a court, *inter alia*, the conditions, time limits, and means of implementing this right that are determined, *inter alia*, by the public interest; however, the legislature may not establish any such legal regulation that would deny the right of a person to defend his/her rights and freedoms in a court where he/she believes that his/her rights and freedoms are violated.

[…]

Paragraph 1 of Article 30 of the Constitution should be interpreted in conjunction with Paragraph 2 of the same article, in which it is prescribed that compensation for the material and moral damage inflicted on a person is established by law. […]

When Paragraph 1 of Article 30 of the Constitution is interpreted in conjunction with Paragraph 2 of the same article […], it should be noted that the judicial awarding of damages is one of the means of the defence of violated rights and freedoms in a court.

**The right to have an advocate as a condition of the effective implementation of the right to judicial protection**

*The Constitutional Court’s ruling of 9 July 2015*

The Constitutional Court has […] noted that an advocate, while performing an independent professional activity and rendering legal assistance to a person whose rights and legitimate interests have been violated, helps to implement the constitutional right of a person to judicial protection. The right of a person to have an advocate is one of the conditions for the effective implementation of the right of a person to judicial protection (the Constitutional Court’s ruling of 9 June 2011).

In the acts of the Constitutional Court, it has also been held that the constitutional right to defence and the right to have an advocate give rise to the duty of the legislature to particularise in laws the implementation of the constitutional right of persons to judicial protection. When it establishes such a legal regulation, the legislature is bound by the Constitution. The constitutional right to defence and the right to have an advocate also give rise to the duty of state institutions
to ensure real opportunities for the implementation of these rights (the Constitutional Court’s rulings of 12 February 2001 and 9 June 2011).

In the context of the constitutional justice case at issue, it should be noted that the Constitution, inter alia, the right of a person to apply to a court as consolidated in Paragraph 1 of Article 30 thereof, the imperative of a public and fair hearing of a case by an independent and impartial court, as guaranteed in Paragraph 2 of Article 31 thereof, and the constitutional principle of a state under the rule of law imply the duty of the state to ensure, under the procedure and conditions established in a law and taking account of the financial capacities of the state, the provision of effective legal aid to those socially sensitive (vulnerable) persons to whom, in the general market of legal services, such legal aid would otherwise either be a sham or its access would be extremely difficult due to financial reasons, as well as in those cases when this is necessary for the interests of justice. While regulating the legal aid (a public legal service) that is financed from state budget funds or other public funds and is ensured by a special institutional and organisational means, the legislature has broad discretion to choose a model of organising, providing, and funding such legal aid, inter alia, to establish the subjects administering this legal aid (service) and directly rendering it, the forms of their activity, and the grounds for remunerating them.

The right of access to a court

The Constitutional Court’s decision of 28 June 2016

The Constitutional Court has formulated in its jurisprudence an extensive official constitutional doctrine of the right of access to a court and has revealed the constitutional imperatives that should be complied with in regulating the respective relations by means of legal acts.

The Constitutional Court has held that each person who believes that his/her rights or freedoms are violated has the right to the judicial protection of his/her violated constitutional rights or freedoms; the defence of violated rights in a court is guaranteed to persons regardless of their legal status (inter alia, the Constitutional Court’s rulings of 17 August 2004, 13 May 2010, and 5 July 2013); the implementation of the right to apply to a court is determined by the fact that the person himself/herself understands that his/her rights or freedoms are violated (the Constitutional Court’s rulings of 1 October 1997, 16 January 2006, and 28 March 2006). The guarantee of the judicial protection of the rights and freedoms of persons is an essential element of the constitutional institute of the rights and freedoms of persons (inter alia, the Constitutional Court’s rulings of 30 June 2000 and 29 December 2004, as well as its decision of 3 July 2013). The rights of a person must be defended not formally, but in reality and effectively against unlawful actions of both private persons and state institutions (inter alia, the Constitutional Court’s rulings of 8 May 2000 and 28 March 2006, as well as its decision of 3 July 2013).

In its rulings, the Constitutional Court has held that, if the constitutional right of persons to apply to a court were not ensured, the generally recognised legal principle of ubi ius, ibi remedium – if there is a certain right (freedom), there must be a measure for its protection – would also be disregarded; under the Constitution, a legal situation where it is impossible to defend a certain right or freedom of persons (as well as to defend such a right before a court), even though those persons believe that such a right or freedom is violated, is impermissible; the Constitution does not tolerate such a legal situation (inter alia, the Constitutional Court’s ruling of 21 January 2008, its decision of 16 April 2014, and its ruling of 19 November 2015).

The Constitutional Court has also held on more than one occasion that, in a democratic state, the court is the main institutional guarantee of human rights and freedoms (the Constitutional
Court’s rulings of 18 April 1996, 2 July 2002, and 10 December 2012). Under the Constitution, the legislature has the duty to lay down such a legal regulation on the basis of which all the disputes concerning the violation of the constitutional rights and freedoms of a person could be resolved in a court (inter alia, the Constitutional Court’s rulings of 2 July 2002, 29 December 2004, and 5 July 2013). A prelitigation procedure for settling disputes may also be established (inter alia, the Constitutional Court’s rulings of 2 July 2002, 29 December 2004, and 22 January 2008); however, the legislature is not permitted to establish any such legal regulation that would deny the right of a person who believes that his/her rights or freedoms are violated to defend his/her rights or freedoms in a court (inter alia, the Constitutional Court’s decision of 31 January 2007 and its ruling of 5 July 2013).

The legal regulation that consolidates the procedure for implementing the judicial protection of the rights and freedoms of a person must be in line with the constitutional requirement of legal clarity; the legislature must clearly establish in laws in what manner and at what court persons can lodge their applications in order that they would implement in reality their right to apply to a court regarding the violation of their rights and freedoms (inter alia, the Constitutional Court’s rulings of 29 December 2004, 27 November 2006, and 13 May 2010). When complying with the constitutional principle of a state under the rule of law, the legislature has the discretion to establish at what court and under what procedure persons may lodge their applications regarding the defence of their violated rights and freedoms (the Constitutional Court’s ruling of 27 November 2006).

Paragraph 4 of Article 111 of the Constitution provides that the formation and competence of courts is established by the Law on Courts. When interpreting this constitutional provision, the Constitutional Court has held that the Constitution not only obliges the legislature to lay down by law the establishment and competence of all the courts of the Republic of Lithuania specified in Paragraph 1 of Article 111 of the Constitution, but also expressis verbis consolidates the title of this law – the Law on Courts (the Constitutional Court’s rulings of 28 March 2006, 22 October 2007, and 15 November 2013); this imperative (which arises from the Constitution) of the legal regulation governing the activity of courts of general jurisdiction should also be applied mutatis mutandis to the legal regulation governing the legal regulation of the specialised courts that are established under Paragraph 2 of Article 111 of the Constitution (the Constitutional Court’s ruling of 28 March 2006, its decision of 8 August 2006, and its ruling of 22 October 2007). Alongside, it was noted that, in itself, such a constitutional legal regulation does not mean that certain relations connected with the aforesaid relations may not in general be regulated by means of other laws as well; when regulating the said relations by law, the legislature must pay regard to the Constitution (the Constitutional Court’s rulings of 28 March 2006 and 15 November 2013).

[...]

[...] the fact that the constitutional right of persons has been violated by a legal act (i.e., by a certain act of the Seimas, the President of the Republic, or the Government) the investigation into the legality of which falls, under the Constitution, under the exclusive competence of the Constitutional Court, where those persons, under the Constitution, have no powers to directly initiate a constitutional justice case in the Constitutional Court for determining the legality of such an act, does not mean that such persons are not allowed in general to defend their violated rights or freedoms, i.e. the said persons are allowed to defend them before a court as well. The Constitution consolidates the right of persons whose constitutional rights or freedoms have been violated to apply to a court. This right implies not only the fact that, in such situations, the rights and freedoms of persons, their legitimate interests and legitimate expectations must and can be defended, but also the fact that courts (judges), while considering cases, have the duty to apply to the Constitutional
II. THE RIGHT TO A FAIR TRIAL

The rights that are exercised in court proceedings by persons involved in a case; the equality of arms between parties

_Consitutional Court's ruling of 18 April 1996_

Courts administer justice, i.e. they resolve legal conflicts by adopting legal decisions. Justice is administered by applying special procedural forms the purpose of which is to ensure the rights of persons in court proceedings, to facilitate the establishment of the actual circumstances of a case, and to adopt a fair decision. [...] In the civil procedure, the principle of the equality of persons before the court manifests itself as the principle of the equality of arms between parties. [...] The dispute of equal parties in the proceedings, where each party of the case has equal possibilities during the consideration of their case in a court, expresses the essence of the civil procedure.

Assessing evidence in court proceedings

_Consitutional Court's ruling of 18 April 1996_

A court is not bound in advance by evidence presented to it.

The equality of arms between parties; courts as subjects of procedural legal relations

_Consitutional Court's ruling of 19 December 1996_

[...] The procedural rights of parties are equal. The rights of a certain party are the same as those of another party; for instance, the plaintiff is entitled to sue a certain person, the respondent is entitled to defend his/her case by rebutting the demand of the plaintiff or by making counter-claims, etc. This principle is of great importance as only equal parties of a dispute may compete on equal terms. It is important that the principle of the equality of arms between parties is observed in all stages of the proceedings, since the implementation of other principles of proceedings also depends on the implementation of the principle of the equality of arms.

[...] the essence of the equality of persons involved in a case is their equality before the court but never the equality between the court (a judge) and persons involved in a case. Otherwise, the nature of a court as an institution that administers justice would be denied.

The judicial protection of rights and freedoms

_Consitutional Court's ruling of 1 October 1997_

The judicial protection of rights and freedoms, unlike other ways of their protection, is based on such universally recognised democratic principles (the equality before the court, publicity, the principle of adversarial argument, the right to be heard in a court, etc.) that are characteristic of such protection only. A court obeys only the law and, in particular cases, adopts decisions in the name of the State of Lithuania (Paragraph 4 of Article 109 of the Constitution). The state guarantees that a court decision with respect to a concrete person is abided by.

While resolving a conflict, a court, as an institution of state power, adopts an act of justice. When adopting it, a court invokes special procedural rules. One of such rules prescribes that, in determining anyone’s rights and duties, a court must present clear and convincing reasoning substantiating the adopted decision. If persons disagree with a court decision adopted with
respect to them, the law guarantees a possibility for them to appeal against the said decision while following the hierarchical line, i.e. they are guaranteed the verification of the lawfulness and validity of the adopted decision at a court of higher instance.

The right to the due court process (Paragraph 2 Article 31 of the Constitution)

*The Constitutional Court’s ruling of 5 February 1999*

Paragraph 2 of Article 31 of the Constitution provides that a person charged with committing a crime has the right to a public and fair hearing of his/her case by an independent and impartial court. This constitutional provision consolidates the principle of the right of individuals to the due court process. The adherence to the said principle is a necessary condition for resolving a case in a fair manner. Guaranteeing the appropriate rights of persons in court proceedings, it is necessary to ensure by means of legal norms that proceedings are carried out fairly and professionally, that the rights of the parties to proceedings are respected, and that cases are considered by impartial judges.

The provisions contained in Paragraph 2 of Article 31 of the Constitution are related with the norm of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms providing for the right of every individual to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[...]

The stipulation of the Constitution that cases must be investigated in a fair manner implies the fact that courts must correctly establish the actual circumstances of respective cases and that they must correctly apply criminal laws. The safeguarding of the impartiality of courts is one of the conditions for a fair consideration of a case. The same condition would be the separation of the functions of the subjects of procedural activities. Therefore, a case is justly investigated only if the principles of constitutional procedural activities are not violated and the rights of the participants to the proceedings are ensured.

The right to a fair, independent, and impartial trial (Paragraph 2 of Article 31 of the Constitution)

*The Constitutional Court’s ruling of 12 February 2001*

The constitutional right of persons to the hearing of their case by an impartial court also means that judges whose impartiality may raise doubts may not consider such a case. Considering a case, a judge must be neutral. The impartiality and independence of a court are an essential guarantee of ensuring human rights and freedoms, and are a necessary condition of a fair consideration of a case; consequently, this is also a necessary condition for trust in courts.

The principle of the independence of judges and courts consolidated in the Constitution and the right of persons to a fair and public hearing of their case by an independent and impartial court imply the duty of the state to lay down the guarantees for the independence of judges and courts.

The right to a fair trial (Paragraph 2 of Article 31 of the Constitution)

*The Constitutional Court’s ruling of 10 June 2003.*

[...] under Paragraph 2 of Article 31 of the Constitution, a person charged with committing a crime has the right to a public and fair hearing of his/her case by an independent and impartial court.

Paragraph 2 of Article 31 of the Constitution consolidates the right of a person to a fair, impartial, and independent trial. Interpreting Paragraph 2 of Article 31 in conjunction with Paragraph 4 of this article, according to which punishment may be imposed or applied only
on the grounds established by law, in the context of the case at issue, it should be noted that, under the Constitution, an independent and impartial court may not, by considering a case and investigating all the circumstances of a case, impose a punishment by failing to observe the law.

It should be noted that the constitutional right to a fair trial means, *inter alia*, not only that the principles and norms of criminal procedure law must be observed in court proceedings, but also that the punishment established in the penal law and imposed by a court must be just; the penal law must provide for all opportunities for a court to impose, in consideration of all the circumstances of the case, a just punishment on the person who committed a criminal act. The imposition of an unjust punishment would imply that the right of a person to a fair trial is violated; consequently, this would imply that Paragraph 2 of Article 31 of the Constitution and the constitutional principle of a state under the rule of law are also violated.

**The right to the due court process (Paragraph 2 Article 31 of the Constitution)**

*The Constitutional Court’s ruling of 16 January 2006*

The due court process is a necessary condition for resolving a case in a fair manner (the Constitutional Court’s ruling of 5 February 1999).

[… the constitutional principle of a state under the rule of law implies the right of a person to the due process of law. The due process of law includes court proceedings. Thus, the constitutional principle of a state under the rule of law gives rise to the right of a person to the due court process.

Certain requirements for court proceedings stem from Paragraph 2 of Article 31 of the Constitution that prescribes that a person charged with committing a crime has the right to a public and fair hearing of his/her case by an independent and impartial court.

The Constitutional Court has held that the principle of the right of a person to the due court process, as laid down in Paragraph 2 of Article 31 of the Constitution, means, *inter alia*, that a court must unconditionally adhere to the constitutional principles and the requirements of laws that consolidate the said principles as regards the equality of parties before the law and the court in criminal proceedings; a court must also be impartial and independent. These are the most important preconditions ensuring that the circumstances of a case are investigated thoroughly, completely, and objectively and that the truth is established, as well as that penal laws are applied correctly (the Constitutional Court’s ruling of 19 September 2000).

[… Paragraph 2 of Article 31 of the Constitution and the principle of a state under the rule of law give rise to the right of a person to the due court process, which is an important condition for resolving a case in a fair manner; the said right means that, in criminal proceedings in a court, it is necessary to pay regard to the clarity of the proceedings, the equality of rights of the participants of proceedings, their participation in the procedure of providing evidence, their right to a translator, the principle of adversarial argument, and other principles in order that the circumstances of committing a criminal act would be investigated comprehensively, objectively, and impartially and that a fair decision would be adopted in the respective criminal case. The Constitution obliges the legislature to establish, while regulating the relations of criminal proceedings, such a legal regulation that would also ensure the rights of participants in criminal proceedings: the proceedings must be such so that the effective protection of the rights of a person who suffered from a criminal act would be ensured and that such a person would be able to make use of all the rights arising from the Constitution. Criminal proceedings must also be such so that the constitutional rights of a person suspected of committing a criminal act are not violated: the right to defence, the right to an advocate, the right to be informed about the accusation, etc. must be secured. The Constitutional Court has held that, guaranteeing
appropriate rights of persons in court proceedings, it is necessary to ensure that proceedings are carried out fairly and professionally, that the rights of the parties to proceedings are respected, and that cases are considered by impartial judges (the Constitutional Court’s ruling of 5 February 1999).

The independence of judges and courts as a necessary condition for the protection of human rights and freedoms (Paragraph 2 of Article 31 and Paragraph 2 Article 109 of the Constitution)

The Constitutional Court’s ruling of 28 May 2008

Paragraph 2 of Article 31 and Paragraph 2 of Article 109 of the Constitution are interrelated, as they, *inter alia*, consolidate one of the most important principles of the administration of justice – the independence of courts and judges; under the Constitution, the independence of courts and judges is, first of all, a necessary condition for the protection of human rights and freedoms (the Constitutional Court’s ruling of 5 February 1999).

In the jurisprudence of the Constitutional Court (the Constitutional Court’s rulings of 6 December 1995, 21 December 1999, 12 February 2001, 12 July 2001, 13 May 2004, 16 January 2006, and its other rulings), various aspects of the independence of judges and courts are revealed; the independence of judges and courts stems from the Constitution.

[...] the function of the administration of justice determines the independence of judges and courts (the Constitutional Court’s rulings of 12 July 2001 and 13 May 2004); the independence of judges and courts is one of the essential principles of a democratic state under the rule of law (the Constitutional Court’s rulings of 21 December 1999, 12 February 2001, and 13 May 2004); a judge can administer justice only while being independent of the parties to the case, state institutions, officials, political and public associations, natural and legal persons (the Constitutional Court’s rulings of 12 July 2001 and 13 May 2004); the independence of judges and courts is not a privilege, but one of the most important duties of judges and courts; the said duty stems from the right (guaranteed by the Constitution) of a person to an independent and impartial arbiter of a dispute; the independence of judges and courts is a necessary condition of an impartial and fair consideration of a case; therefore, the independence of judges and courts is also a condition for trust in courts (the Constitutional Court’s rulings of 6 December 1995, 21 December 1999, 12 February 2001, 9 May 2006, and 22 October 2007).

The right to the due court process (Paragraph 2 of Article 31 and Paragraph 1 of Article 109 of the Constitution)

The Constitutional Court’s ruling of 28 May 2008

The due court process is a necessary condition for resolving a case in a fair manner (the Constitutional Court’s ruling of 5 February 1999).

The Constitutional Court has held that the principle of the right of a person to the due court process, as laid down in Paragraph 2 of Article 31 of the Constitution, means, *inter alia*, that a court must unconditionally adhere to the constitutional principles and the requirements of laws that consolidate the said principles as regards the equality of parties in criminal proceedings before the law and the court; a court must also be impartial and independent. These are the most important preconditions ensuring that the circumstances of the case are investigated thoroughly, completely, and objectively and that the truth is established, as well as that penal laws are applied correctly (the Constitutional Court’s rulings of 19 September 2000 and 16 January 2006). In criminal proceedings in a court, regard must be paid to the clarity of the process, the equal rights of the participants of proceedings, their participation in the procedure of providing evidence, their right to a translator, the
principle of adversarial argument, and other principles in order that the circumstances of committing a criminal act would be investigated comprehensively, objectively, and impartially and a fair decision would be adopted in the respective criminal case (the Constitutional Court’s ruling of 16 January 2006).

The Constitutional Court has also held the following:

In criminal procedure law, the provision of Paragraph 1 of Article 109 of the Constitution, whereby only courts administer justice, means, *inter alia*, that, in criminal proceedings, a court must be an impartial arbiter who objectively assesses the data (evidence) in a criminal case regarding the circumstances of committing a criminal act and who adopts a fair decision concerning the guilt of a person accused of having committed the said criminal act; at the same time, in order to establish the objective truth, a court must take an active part in criminal proceedings – a court must define the limits of the consideration of a criminal case, must perform certain procedural actions, must ensure that persons participating in court proceedings do not abuse their rights or powers, and must resolve other issues related with the consideration of a criminal case in a court. While considering a criminal case, a court must act in such a way that the objective truth is established in a criminal case and the question of the guilt of the person accused of having committed a criminal act is fairly resolved. A court must also be equally just to all persons who participate in the criminal procedure (the Constitutional Court’s ruling of 16 January 2006). A court must also be equally just to all the persons who participate in criminal proceedings (the Constitutional Court’s ruling of 16 January 2006).

When investigating a criminal case, without overstepping the limits defined in the Constitution and laws, a court is independent throughout the entire criminal proceedings. From the point of view of the independence of a court, the fact, as such, that a court abides by the respective norms of [criminal procedure law] does not mean that the independence of such a court is denied. As noted by the Constitutional Court, the constitutional right to a fair trial means, *inter alia*, that the principles and norms of criminal procedure law must be observed in court proceedings (the Constitutional Court’s ruling of 16 January 2006).

The norms and principles consolidated in the Constitution, *inter alia*, the right of persons to a public and fair hearing of their case by an independent court, as consolidated in Paragraph 2 of Article 31 of the Constitution, as well as the principles of a state under the rule of law and justice, imply the model of a court as an institution administering justice where a court cannot be understood as a “passive” observer of court proceedings and where the administration of justice cannot depend solely on the material submitted to a court. Seeking to investigate all the circumstances of a case objectively and comprehensively and to establish the truth in a case, a court has the powers either to perform respective procedural actions by itself, or to commission certain institutions (officials), *inter alia*, the prosecutors, that they perform corresponding actions (the Constitutional Court’s ruling of 16 January 2006); when performing procedural actions, a court must be impartial and act in such a way that would not create any preconditions for doubting its impartiality or independence.

**Judicial control over the enforcement procedure**

*The Constitutional Court’s ruling of 30 June 2008*

[...] In order to ensure the lawfulness of the enforcement procedure, it is necessary to consolidate effective judicial control over the enforcement procedure (there may be various forms of such control), by exercising which a court could resolve all the questions (disputes) arising during such an enforcement procedure. The main purpose of such control is to ensure the lawfulness and effectiveness of the enforcement procedure, and the defence of violated rights of a person.
While regulating the relations linked to the enforcement procedure, the law-making subjects must comply with the constitutional requirement for the due process of law, *inter alia*, it is necessary to ensure judicial control over the enforcement procedure, as well as the imperative of the constitutional right of a person to judicial protection.

**The right to the due court process**

*The Constitutional Court’s ruling of 6 December 2012*

The due court process is a necessary condition for resolving a case in a fair manner (the Constitutional Court’s rulings of 5 February 1999, 16 January 2006, 28 May 2008, and 8 June 2009).

The constitutional right of a person to the due court process implies the duty of the legislature to establish by law such proceedings for consideration of cases in a court that would be in line with the norms and principles of the Constitution. The legislature, when regulating, by means of a law, the relations of the consideration of cases in a court, must pay regard to the Constitution, *inter alia*, to the principles laid down in Article 117 thereof, as well as to the constitutional principle of a state under the rule of law, those of the equality of rights and justice, and the impartiality and independence of judges.

While regulating the relations of the consideration of cases in a court, regard should be paid, *inter alia*, to the principle of the public consideration of cases in a court, as consolidated in Paragraph 1 of Article 117 of the Constitution.

**The principle of the public consideration of cases in a court (Paragraph 1 of Article 117 of the Constitution)**

*The Constitutional Court’s ruling of 6 December 2012*

Paragraph 1 of Article 117 of the Constitution prescribes: “In all courts, the consideration of cases shall be public. A closed court hearing may be held in order to protect the secrecy of private or family life, or where the public consideration of the case might disclose a state, professional, or commercial secret.”

Paragraph 1 of Article 117 of the Constitution consolidates the principle of the public consideration of cases in courts, stipulates that in certain circumstances a closed court hearing may be held, and provides for a list of such circumstances (the Constitutional Court’s ruling of 19 September 2000).

[...]

Thus, the provision “in all courts” of Paragraph 1 of Article 117 of the Constitution embraces the courts of all systems, the courts of all levels, and the courts of all instances.

[...]

The principle of the public consideration of cases in a court, as consolidated in Paragraph 1 of Article 117 of the Constitution, the interest of the public to be informed that stems from the Constitution (*inter alia*, from Article 25 thereof), Paragraph 5 of Article 25 of the Constitution, under which citizens have the right to receive, according to the procedure established by law, any information held about them by state institutions, as well as the constitutional principle of a state under the rule of law, *inter alia*, the requirement for legal clarity, imply the duty of the legislature to regulate by law the relations of the consideration of cases in a court in such a way that the conditions would be created both for the participants of proceedings and for the public, *inter alia*, to be aware of cases at law considered in courts, the composition of courts considering cases at law, the disputes resolved in such cases, and the adopted decisions.
It needs to be noted that, under the Constitution, the public consideration of cases is not an objective in itself. The public consideration of cases is one of the conditions for administering and ensuring justice. The public consideration of cases in a court creates the preconditions for ensuring the implementation of the law expressed in the Constitution, in laws, and in other legal acts, for guaranteeing the supremacy of law, and for protecting the rights and freedoms of persons. While ensuring the principle of the public consideration of cases in a court, the legislature is obliged to pay regard to the norms and other principles of the Constitution and not to create the preconditions for violating the values (inter alia, the rights and freedoms of persons) that are consolidated in and defended and protected by the Constitution.

[...]

It also needs to be noted that the principle of the public consideration of cases in a court is not absolute. Paragraph 1 of Article 117 of the Constitution, in which the said principle is consolidated, provides both for certain exceptions to the publicity of the consideration of cases and for the situations where a closed court hearing may be held: in order to protect the secrecy of private or family life, or where the public consideration of the case might disclose a state, professional, or commercial secret. Thus, under Paragraph 1 of Article 117 of the Constitution, the publicity of proceedings is limited for the purposes of protecting the private or public interest. The principle of the public consideration of cases in a court may also be limited by law with a view to protecting other constitutional values. For instance, the principle of the independence of judges and courts, which is consolidated, inter alia, in Article 109 of the Constitution, gives rise to the requirement for the secrecy of deliberation by judges when adopting a decision. In addition, in order to protect human dignity, the inviolability of private life (Article 22 of the Constitution), and other values, the protection of which stems from the Constitution, it is permitted to limit, by law, the publicity of separate elements of the process of the consideration of cases, inter alia, the public pronouncement of a final act of a court, and the publicity of case material.

The constitutional principle of the public consideration of cases in a court likewise determines the publicity of a court hearing in which a case is considered. With a view to ensuring the publicity of a court hearing as an element of the consideration of cases in a court, the legislature must regulate the procedure for court hearings in order that the conditions are created to ensure the right of the participants of proceedings to express their opinion on all the issues that are decided in the case, as well as the interest of the public to be informed about court proceedings and about the adopted decisions. Paragraph 1 of Article 117 of the Constitution and other norms of the Constitution give rise to the duty of the legislature to establish such forms of a court hearing that would create the conditions to ensure the implementation of the right of the participants of proceedings to public court proceedings, as well as the interest of the public to be informed; at the same time, the aforesaid forms of a court hearing may not create any preconditions for violating the values (inter alia, the rights and freedoms of a person) consolidated in and defended and protected by the Constitution.

The right to a fair trial (Paragraph 2 of Article 31 of the Constitution)

The Constitutional Court’s ruling of 15 November 2013

Paragraph 2 of Article 31 of the Constitution prescribes: “A person charged with committing a crime shall have the right to a public and fair hearing of his case by an independent and impartial court.”

This constitutional provision consolidates the principle of the right of a person to the due court process. The adherence to this principle is a necessary condition for resolving a case in a fair manner. When interpreting this principle, the Constitutional Court has noted, inter alia, the

– the stipulation of the Constitution that cases must be considered in a fair manner implies the fact that courts must correctly establish the actual circumstances of respective cases and that they must correctly apply criminal laws; the safeguarding of the impartiality of courts is one of the conditions for considering a case in a fair manner;

– a person may not be recognised guilty of the commission of a crime, nor any criminal punishment may be imposed on anyone without proper court proceedings enabling the accused to be aware of everything with which he/she is charged and on what grounds the accusations against him/her are founded, as well as allowing him/her to prepare and present evidence for his/her defence; this must be ensured by means of the criminal procedure norms that must be in conformity with the constitutional principles of lawfulness, the equality before the law and the court, the impartiality of courts and judges, and those of the public and fair consideration of cases; the participants of trials – the accuser, the accused, counsel for the defence, the victim and his/her representative, the civil plaintiff and the civil respondent and their representatives – must be guaranteed by law the equal rights to present evidence, to take part in the investigation into evidence, and to submit pleas; cases must be considered on the basis of the principle of adversarial argument;

– the criminal procedure must ensure that the constitutional rights of persons suspected of the commission of a criminal act are not violated: their right to defence, the right to an advocate, the right to be informed about the accusation, etc. must be ensured;

– the constitutional right to a fair trial, *inter alia*, means not only that the principles and norms of criminal procedure law must be observed in court proceedings, but also that the punishment established in the penal law and imposed by a court must be just; the penal law must provide for all opportunities for a court to impose, in consideration of all circumstances of the case, a just punishment on the person who committed a criminal act; the imposition of an unjust punishment would imply that the right of a person to a fair trial is violated; consequently, in such a case, Paragraph 2 of Article 31 of the Constitution and the constitutional principle of a state under the rule of law would also be violated;

– the norms and principles consolidated in the Constitution, *inter alia*, the right of persons to a public and fair hearing of their case by an independent court, as consolidated in Paragraph 2 of Article 31 of the Constitution, as well as the principles of a state under the rule of law and justice, imply the model of a court as an institution administering justice where a court cannot be understood as a passive observer of court proceedings and where the administration of justice cannot depend solely on the material submitted to a court; seeking to investigate all the circumstances of the case objectively and comprehensively and to establish the truth in a case, a court has the powers either to perform respective procedural actions by itself, or to commission certain institutions (officials), *inter alia*, the prosecutors, that they perform corresponding actions; when performing procedural actions, a court must be impartial and act in such a way that would not create any preconditions for doubting its impartiality or independence.

[…]

Under Paragraph 1 of Article 109 of the Constitution and the constitutional principles of a state under the rule of law and justice, courts have the duty not only to investigate all the circumstances of criminal cases in an exhaustive and impartial manner, but also to correctly apply criminal laws, *inter alia*, to properly classify a criminal act committed by the accused. A court must investigate whether a criminal act specified in the indictment was committed in the substantial circumstances specified namely in the said indictment with the exception of the
situations where the prosecutor, the private accuser, or the victim, submit a request that the factual circumstances specified in the indictment be changed to circumstances that are different in substance. […]

[…] under the Constitution, *inter alia*, Paragraph 2 of Article 31 and Paragraph 1 of Article 109 thereof, and under the constitutional principles of a state under the rule of law and justice, the opportunities must be created for a court considering a criminal case to change, on its own initiative, the factual circumstances specified in the indictment to circumstances that are different in substance. While implementing this right, a court must inform the accused and other participants of the court trial about such a possibility, must ensure the right to be informed about the accusation, the right to defence, and the implementation of the other constitutional principles of the due process of law.

**Requirements for a legal regulation governing criminal proceedings; a legal regulation governing coercive measures applicable in criminal proceedings; the right to the due and fair process of law in criminal proceedings**

*The Constitutional Court’s ruling of 17 February 2016*

The Constitutional Court has noted that the striving for an open, just, and harmonious civil society and a state under the rule of law, as established in the Preamble to the Constitution, implies that it is obligatory to try to ensure the security of each person and all society against criminal attempts (*inter alia*, the Constitutional Court’s rulings of 8 May 2000, 16 January 2006, 28 May 2010, and 4 June 2012); the obligation of the state, which stems from the Constitution, to ensure the security of each person and all society against criminal attempts implies not only the right and duty of the legislature to define criminal acts and establish criminal liability for them by means of laws, but also its right and duty to regulate the relations linked with the detection of and an investigation into criminal acts and with the consideration of criminal cases, i.e. its right and duty to regulate criminal procedure relations (*inter alia*, the Constitutional Court’s ruling of 16 January 2006); criminal procedure norms are aimed at creating the conditions for protecting society by lawful means against criminal acts (the Constitutional Court’s ruling of 8 May 2000).

In the context of the constitutional justice case at issue, the following provisions of the official constitutional doctrine that were formulated in the Constitutional Court’s ruling of 16 January 2006 and revealed the requirements that arise, among other things, from the Constitution, to be complied with in the course of regulating criminal procedure relations by means of a law are relevant:

– criminal procedure relations must be regulated by law in such a way that the legal preconditions would be created in order to speedily detect and thoroughly investigate criminal acts, to punish justly the persons who committed criminal acts (or, on the basis of the law, to decide the issue of their criminal liability otherwise), as well as that the legal preconditions would be created in order to ensure that no one who is innocent is be punished; it is necessary to seek to ensure the protection of the rights of persons who suffered from criminal acts and to avoid any unreasonable restriction of the rights of persons who committed criminal acts; the legal regulation of criminal procedure should not create any preconditions for procrastinating investigations into criminal acts and considering criminal cases, nor should it create any preconditions for participants of criminal proceedings to abuse their procedural and other rights;

– when it regulates criminal procedure relations, the legislature has rather broad discretion; for instance, the legislature may establish, by means of a law, different kinds of criminal proceedings, as well as the particularities of criminal proceedings in the investigation of certain criminal acts and/or in the consideration of the criminal cases of individual categories, *inter alia,*
different rules of pretrial investigation of certain criminal acts, the particularities of the legal status of the participants of criminal proceedings, etc.; however, when implementing the said discretion, the legislature must pay regard to the norms and principles of the Constitution;

– under the Constitution, the legal regulation must be such that would treat in an equal manner the participants of criminal proceedings who have the same procedural status; thus, the participants of criminal proceedings who have the same procedural status must also have the same rights and duties, unless there are differences of such a character and extent that unequal treatment would be objectively justified; otherwise, the constitutional principles of a state under the rule of law and the equality of persons would be deviated from;

– under the Constitution, inter alia, Paragraph 1 of Article 30 thereof, in regulating criminal procedure relations, the constitutional right of a person to apply to a court may not be violated in any respect; the legislature must regulate by law criminal procedure relations in such a way that the subjects of criminal procedure relations who believe that their rights are violated would have the right to defend their rights in a court regardless of their legal status in criminal proceedings.

In the context of the constitutional justice case at issue, it should be noted that, under the Constitution, implementing the obligation of the state to ensure that each person and all society are protected against criminal attempts and taking account of its own duty to regulate relations in criminal proceedings, the legislature must, in a relevant law, provide for such procedural coercive measures applicable in criminal proceedings that would enable the speedy disclosure and thorough investigation of criminal acts and would preclude new criminal acts. The law must establish such a procedure for applying the said measures that would ensure the rights of a person against whom such measures are applied, inter alia, that would create the preconditions for defending violated rights in a court when those measures are applied.

[...]

In the context of the constitutional justice case at issue, it should be noted that, when laying down in a law a procedure for applying procedural coercive measures in criminal proceedings, regard must also be paid to the constitutional principle of proportionality: these measures must be applied only where they are aimed at the speedy disclosure and thorough investigation of criminal acts, or at preventing new criminal acts; such measures must be necessary to reach the aforesaid objectives and must not restrict the rights or freedoms of a person against whom the said measures are applied clearly more than necessary in order to reach the said objectives.

The constitutional principle of a state under the rule of law also implies the right of a person to the due and fair process of law (the Constitutional Court’s ruling of 16 January 2006).

The Constitutional Court has held that, in the course of regulating criminal procedure relations, regard must be paid to the fact that, under the Constitution, pretrial investigation and the consideration of a criminal case in a court are different stages of criminal proceedings; during pretrial investigation, the necessary information is collected and assessed in order to decide whether the pretrial investigation must be continued and whether, after it has been completed, the respective criminal case must be referred to a court; in addition, the said information is collected and assessed in order to consider a case referred to a court and to resolve it in a fair manner (the Constitutional Court’s rulings of 16 January 2006 and 7 April 2011); the clarity of decisions adopted during pretrial investigation and the substantiation of such decisions with legal arguments is an important guarantee, inter alia, for the right to fair legal proceedings and the right to judicial protection; under the Constitution, it is impermissible to establish any such legal regulation that would preclude the possibility of filing an appeal with a court against decisions adopted during pretrial investigation (the Constitutional Court’s rulings of 16 January 2006);
the right of a person to apply to a court also implies his/her right to the due process of law (the Constitutional Court’s rulings of 13 December 2004 and 29 December 2004).

In this context, mention should be made of the following provisions of the official constitutional doctrine that were formulated, *inter alia*, in interpreting the constitutional right to a fair trial and, at the same time, to the due process of law:

– if interpreted in the context of other norms of the Constitution, the constitutional right to a fair trial means, *inter alia*, that the principles and norms of criminal procedure law must be complied with in the course of considering a criminal case in court proceedings (the Constitutional Court’s ruling of 10 June 2003) in order that the circumstances of committing a criminal act could be investigated comprehensively, objectively, and impartially and that a fair decision would be adopted in the respective criminal case (the Constitutional Court’s rulings of 5 February 1999 and 16 January 2006);

– the norms and principles consolidated in the Constitution imply the model of a court as an institution administering justice where a court cannot be understood as a passive observer of court proceedings and the administration of justice cannot depend solely on the material submitted to a court (*inter alia*, the Constitutional Court’s ruling of 15 November 2013).

In the context of the constitutional justice case at issue, it should be noted that the Constitution, *inter alia*, the constitutional principle of a state under the rule of law, gives rise to the right of a person to the due and fair process of law in criminal proceedings; the said right implies, among other things, an active role of the subjects authorised to adopt decisions on procedural coercive measures applicable in criminal proceedings, *inter alia*, an active role of a court as an institution administering justice, in ensuring the protection of the rights of a person against whom the said measures are applied in criminal proceedings.
ON THE PRINCIPLE OF THE SEPARATION OF POWERS

The principle of the separation of powers (Article 5 of the Constitution)

The Constitutional Court’s ruling of 6 December 1995

Paragraph 1 of Article 5 of the Constitution prescribes: “In Lithuania, state power shall be executed by the Seimas, the President of the Republic and the Government, and the Judiciary.” The content of this norm is disclosed in other articles of the Constitution. The competence of each institution of state power is established in accordance with its function; such competence is determined by the place of that branch of power in the general system of powers and by its relationship with the other branches of power.

The Seimas passes laws, considers the programme of the Government presented by the Prime Minister, supervises the activities of the Government, appoints judges in the cases provided for by the Constitution and decides other issues prescribed in Article 67 of the Constitution. The President of the Republic, who is the Head of State, represents the State of Lithuania and performs everything with which he/she is charged by the Constitution and laws. The Government manages national affairs, executes laws and resolutions of the Seimas, prepares a draft state budget and executes the state budget when it is approved by the Seimas, and implements the other powers of the Government. Courts administer justice. Thus, the independence of separate branches of power, as well as the principle of a balance of power, is established in the Constitution.

The principle of the separation of powers; cooperation among state institution (Article 5 of the Constitution)

The Constitutional Court’s ruling of 10 January 1998

Article 5 of the Constitution prescribes: “In Lithuania, state power shall be executed by the Seimas, the President of the Republic and the Government, and the Judiciary.” This norm the content of which is particularised in other articles of the Constitution consolidates the principle of the separation of powers in the state. This is the fundamental principle of the organisation and functioning of a democratic state under the rule of law. As it was noted in the Constitutional Court’s ruling of 26 October 1995, this principle means that legislative power, executive power, and judicial power must be separated, sufficiently independent, but, at the same time, such branches of power must be balanced. The competence answering their purpose is conferred on every state institution; the concrete content of such competence depends on the place of that institution among other state institutions and on the relation of its powers with those of other institutions.

In the system of state power, every branch of state power occupies a certain place and performs the functions characteristic of such a branch only. The Seimas, which is composed of the representatives of the nation – members of the Seimas, passes laws, supervises the activity of the Government, approves the state budget and supervises its execution, and decides other issues provided for in the Constitution. The President of the Republic – the Head of State – represents the state and performs everything with which he/she is charged by the Constitution and laws,
while the Government is an executive institution of this country, it executes laws and other legal acts and manages national affairs. Courts administer justice.

Paragraph 2 of Article 5 of the Constitution provides that the scope of power is limited by the Constitution. Implementing the general tasks and functions of the state, the activities of state institutions are based on their cooperation; therefore, their interrelations should be defined as inter-functional partnership. One of the ways to ensure cooperation among state institutions is the principle of the responsibility of the Government to the Parliament; the said principle is consolidated in the constitutions of most of European states.

The principle of the separation of powers; the reciprocal control and balance of state institutions; partnership among state institutions; the prohibition on taking over or transferring, waiving, changing, or limiting by law the powers of a state institution that are directly established in the Constitution

The Constitutional Court’s ruling of 21 April 1998

The main principles of the organisation and activities of the authorities of the State of Lithuania are determined both by the fundamental provision “The State of Lithuania shall be an independent democratic republic” of Article 1 of the Constitution and by the striving for a state under the rule of law (such striving is consolidated in the Preamble to the Constitution).

Paragraph 1 of Article 5 of the Constitution prescribes: “In Lithuania, state power shall be executed by the Seimas, the President of the Republic and the Government, and the Judiciary.” […]

In its rulings of 26 October 1995 and 10 January 1998, as well as in its decision of 13 November 1997, the Constitutional Court noted that the principle of the separation of powers means that legislative power, executive power, and judicial power must be separated and sufficiently independent; however, such branches of power must be balanced. Every state institution is granted the competence corresponding to its purpose, where the particular content of such competence depends on the form of state governance.

The status of the state supreme institutions is, first of all, grounded on the powers directly consolidated in the Constitution: the powers of the Seimas are consolidated in Article 67, those of the President of the Republic are consolidated in Article 84, and those of the Government are laid down Article 94 of the Constitution. The status of the Constitutional Court is consolidated in Chapter VIII, while that of courts is enshrined in Chapter IX of the Constitution.

Other articles of the Constitution also contain the directly consolidated powers of the state supreme institutions (for example, decisions concerning state loans and other basic property liabilities of the state are adopted by the Seimas (Paragraph 1 of Article 128); the Seimas hears a conclusion submitted by the Auditor General concerning the report on the annual execution of the budget (Paragraph 2 of Article 134); in the period between the sessions of the Seimas, the President of the Republic decides in respective cases whether to give his/her consent for bringing a judge to criminal liability, or for detaining him/her, or for restricting his/her liberty otherwise (Paragraph 2 of Article 114); the President of the Republic is the Commander-in-Chief of the Armed Forces of the State (Paragraph 2 of Article 140); the Government appoints representatives to supervise the observance of the Constitution and laws by municipalities (Paragraph 2 of Article 123); the Government prepares a draft state budget (Article 130)).

In defining the functions and powers of the state supreme institutions, the Constitution also provides for their reciprocal control and balance, as well as for their partnership. For example, the President of the Republic is entitled to appoint the Prime Minister; however, he/she may implement this right only after the assent of the Seimas (Item 6 of Article 67, Items 4 and 5 of Article 84, Paragraph 1 of Article 92 of the Constitution); the Seimas appoints judges and the President of the Supreme Court (Item 10 of Article 67 of the Constitution); however, this
requires the proposal of the President of the Republic (Item 11 of Article 84 of the Constitution); the Seimas establishes and abolishes the ministries of the Republic of Lithuania; however, this requires the proposal of the Government (Item 8 of Article 67 of the Constitution).

The direct establishment of powers in the Constitution means that a certain state institution may not take over any powers from another state institution, nor may it transfer or waive the said powers. Such powers may not be changed or limited by law by establishing additional conditions of their implementation. In order to change or limit such powers, an amendment to the Constitution must be adopted.

In addition to the powers directly consolidated in the Constitution, the state supreme institutions also have the powers that are established in laws. For instance, on the basis of Item 10 of Article 84 of the Constitution, wherein it is prescribed that the President of the Republic shall “according to the established procedure, appoint and release state officials provided for by law”, it is possible to judge about the possibility of such powers of the President of the Republic. In establishing such powers, consideration must be taken of the provisions and principles of the Constitution that consolidate the nature of state institutions and the character of their interaction.

The principle of the separation of powers (the independence of legislative power and judicial power in deciding the issues of constitutional and criminal liability)

The Constitutional Court’s ruling of 11 May 1999

[...] In a state under the rule of law, every branch of power (legislative, executive, or judicial) fulfils the functions vested in it and carries out its competence. Paragraph 1 of Article 109 of the Constitution provides that, in Lithuania, justice is administered only by courts, whereas, under Article 74 of the Constitution, the Seimas is commissioned to carry out impeachment. When voting on impeachment takes place at the Seimas, the question of the constitutional liability, but not that of the criminal liability of a person is being decided. The removal of a person from office or the revocation of his/her mandate of a member of the Seimas through impeachment proceedings because of the suspicion that he/she has committed a crime is not binding on a court. In its turn, the independence of legislative power and judicial power established in the Constitution determines the fact that a judgment handed down by a court is not binding on the Seimas that adopts a decision on the constitutional liability of a person. Otherwise, the constitutional principle of the separation of powers would be violated.

The powers of the Seimas to establish and abolish ministries (Item 8 of Article 67 of the Constitution)

The Constitutional Court’s ruling of 3 June 1999

In establishing the functions and powers of the institutions of legislative power and those of executive power in the Constitution, the interaction between such functions and powers is also provided for. Such a norm is consolidated in Item 8 of Article 67 of the Constitution: the Seimas shall “upon the proposal of the Government, establish and abolish the ministries of the Republic of Lithuania”. [...] [...] Item 8 of Article 67 of the Constitution consolidates the right of the Seimas to establish and abolish ministries. The implementation of such powers of the Seimas is bound by the concrete powers of the Government that are consolidated in the Constitution: if the Government does not present a particular proposal, the Seimas may not adopt a decision whether to establish or abolish a ministry. Thus, this norm of the Constitution ensures the balance of power between the legislative and executive branches.
Judicial power as the only branch of power that is formed on a professional basis
The Constitutional Court’s ruling of 21 December 1999

[...] According to the principle of the separation of powers, all branches of power are autonomous, independent, and capable of counterbalancing one another. The judiciary, being independent, may not be dependent on the other branches of power also because of the fact that it is the only branch of power formed on a professional, but not a political basis.

The principle of the separation of powers; the judiciary (Article 5 of the Constitution)
The Constitutional Court’s ruling of 12 July 2001

Article 5 of the Constitution states that, in Lithuania, state power is executed by the Seimas, the President of the Republic and the Government, and the Judiciary. In this and other articles of the Constitution, the principle of the separation of powers is enshrined. The judiciary is the only branch of state power that is assigned the task of administering justice. No other state institution or official may carry out this function. Only the independent and fully fledged judiciary may successfully fulfil this function given to it.

The fact that the judiciary is independent and fully fledged is inseparable from the principle of the independence of judges and courts, which is consolidated in the Constitution.

[...] the principle of the separation of powers is inseparable from the independence of judges and courts; such independence is characteristic of the organisation and activity of the judiciary.

The powers of the Seimas and the Government in the sphere of the state budget
The Constitutional Court’s ruling of 14 January 2002

In drafting (forming) the state budget, as well as considering and approving it, the powers of the Seimas as a legislative body and the powers of the Government as an executive body are separated; the constitutional principle of the separation of powers must be ensured in this area.

[...] Under the Constitution, only the Government has the right and duty to prepare (form) a draft state budget. Once the Government has prepared a draft state budget, it presents it to the Seimas for approval following the terms provided for in the Constitution. Under the Constitution, during the budget year the budget may also be changed only on a proposal from the Government. An additional budget is approved by law on a proposal from the Government as well. Drafting (forming) a state budget and presenting it to the Seimas belong to the sphere where the Government adopts decisions regarding state governance, as prescribed by the Constitution. Therefore, a draft state budget is presented to the Seimas by a resolution of the Government.

The Government has not only the constitutional right, but also the constitutional duty to provide for specific revenue sources in a draft state budget, to indicate their amounts as well as the specific amounts intended for financing the needs of the state and society.

While presenting a draft budget to the Seimas, the Government must substantiate the revenues and allocations indicated therein with the evaluation of the needs and possibilities of the state and society. This information must be public. A draft state budget prepared by the Government must provide for funds necessary for the implementation of laws.

Only the Seimas has the prerogative to consider a draft state budget presented by the Government and to approve it by law. According to the Constitution, the adoption of the law on the state budget constitutes the final step in the formation of the budget.

During the consideration of the draft budget, the Seimas may increase expenditure provided that it specifies financial sources for the additional expenditures (Paragraph 2 of Article 131 of the Constitution). If the state budget is not approved on time, in such cases, at the beginning of
the budget year, the budget expenditure each month may not exceed 1/12 of the expenditure of the state budget of the previous budget year (Paragraph 1 of Article 132 of the Constitution).

According to the Constitution, the budget year coincides with a calendar year. The Seimas must approve the state budget for the budget year, but not for some other period of time. Each budget year, the Seimas must form the state budget for the following budget year taking into consideration the existing social and economic situation, the needs and possibilities of society and the state, the available or potential financial resources and the liabilities of the state, as well as a number of other important factors. When passing the law on the state budget, the Seimas must pay attention to the striving for a just and harmonious society enshrined in the Constitution.

By approving the state budget by law, the Seimas approves the revenues and allocations of the state budget, based on the evaluation of the needs and possibilities of society and the state. The constitutional concept of the budgetary process implies the presumption that all the income sources of the state budget, planned revenues and expenditures of the state budget, the amount of such funds, and the subjects to whom allocations from the state budget are given must be specified in the law on the state budget.

Establishing the entities eligible for the allocations from the state budget falls solely within the competence of the Seimas. The Seimas may not waive or transfer such competence to another institution, while the latter cannot take it over. Otherwise, the competence of the Seimas to form the state budget would be denied: the said competence would become shared with the executive. This in turn would deny the constitutional principle of the separation of powers. Acts issued by executive bodies can only deal with the execution of the state budget and they cannot compete with or change the law on the state budget.

Once approved by the Seimas, the state budget becomes a law. Under Item 4 of Article 94 of the Constitution, the Government executes the state budget. The provision of Item 4 of Article 94 of the Constitution, whereby the Government executes the state budget, means that the Government has the duty to ensure that the budget receives the specified revenues and that these funds are transferred to the subjects specified in the law on the state budget. The Constitutional Court has previously held that, under the Constitution, the Government has to execute the approved state budget according to its purpose and to the extent prescribed by the budget law, and that it does not have the right to change the amounts of the allocations or their possessors established in the budget law (the Constitutional Court’s ruling of 3 June 1999).

**The powers of the Government to prepare a draft state budget (Article 5, Item 4 of Article 94, and Article 130 of the Constitution)**

*The Constitutional Court’s ruling of 11 July 2002*

Under Item 4 of Article 94 of the Constitution, the Government prepares a draft state budget. Article 130 of the Constitution prescribes that the Government draws up a draft state budget and presents it to the Seimas.

[...]

It needs to be noted that the Constitution does not contain any legal norms establishing that a draft state budget may be prepared and presented to the Seimas for consideration and approval not by the Government, but by another state institution or by another subject.

Thus, the Constitution establishes the powers to prepare a draft state budget for the Government only.

The provision of the Constitution that the Government has the powers to prepare a draft state budget means that the Government and no one else has the powers to estimate in the draft state budget how much revenues will be received and from which sources, how much funds must
be appropriated and for what purposes, etc. While estimating the expenditure of the state in a draft state budget, the Government is bound by the imperative of an open, just, and harmonious civil society, by the constitutional principle of the separation of powers, as well as by other norms and principles of the Constitution.

[...] Article 5 of the Constitution and other constitutional articles that establish the powers of state institutions exercising state power and the principle of the separation of powers give rise to the duty of the Government to provide for the necessary funds in order that the state institutions that exercise state power, i.e. the Seimas, the President of the Republic, the Government, the Judiciary, would be guaranteed independence, that the balance of power would be ensured, and that the said institutions would perform the functions established for them in the Constitution and laws.

The Government, while preparing a draft state budget, must take account of the amounts of appropriations from the state budget that have been presented from the other institutions, specified in Paragraph 1 of Article 5 of the Constitution, exercising state power, i.e. from the Seimas, the President of the Republic, the Judiciary, where the said appropriations are needed for performing those functions of the said institutions that are established in the Constitution and laws. The preconditions for violating the constitutional principle of the separation of powers and Article 5 of the Constitution would be created if a draft state budget prepared by the Government provided for considerably less appropriations for the Seimas, the President of the Republic, the Judiciary than needed in order to ensure that the institutions exercising state power might perform the functions established for them in the Constitution and laws, and in order to guarantee the independence of these state institutions exercising state power, the balance of power, and their independence from the Government as an institution of the executive.

The principle of the separation of powers; the principle of the accountability of executive bodies to the representation

The Constitutional Court’s ruling of 24 December 2002

Under the Constitution, the organisation of state power and its activity are based on the principle of the separation of powers. The Constitutional Court has held in its rulings on more than one occasion that the constitutional principle of the separation of powers implies, among other requirements, that legislative power, executive power, and judicial power must be separated and sufficiently independent; however, there must be a balance among them. The Constitutional Court has also held that certain competence is established for every state institution: the said competence corresponds to the purpose of such an institution, the particular content of the said competence depends on the place of the branch of power in question in the entire system of the branches of state power, as well as on its relation with the other branches of power; after the Constitution directly establishes the powers of a particular state institution, no state institution may take over such powers from another state institution, transfer or waive them; such powers may not be changed or limited by law.

It also needs to be noted that the system of the branches of state power encompasses legislative power, executive power, and judicial power; the constitutional principle of the separation of powers determines the relations of the aforementioned three branches of state power. There are no such three branches of power on the level of local self-government; the Constitution only provides for municipal councils – representations of territorial communities – and executive bodies that are formed by and are accountable to municipal councils. The Constitution consolidates the principle of the supremacy of municipal councils over the executive bodies that are accountable to them.
The constitutional principle of the separation of powers is not identical to the constitutional principle of the accountability of executive bodies to the representation, on which, inter alia, the relations between state legislative power and the institutions of executive power, as well as the organisation and activity of self-government institutions, are based.

Under the Constitution, the Seimas exercises parliamentary control over the Government. At the request of the Seimas, the Government or individual ministers must give an account of their activities to the Seimas (Paragraph 1 of Article 101 of the Constitution). Thus, the separation of powers in the Constitution also implies the accountability of the Government, a collegial institution of executive power, to the legislature, the representation of the Nation.

Municipal councils are formed on the basis of universal, equal, and direct suffrage by secret ballot (Paragraph 2 of Article 119 of the Constitution); municipal councils form executive bodies that are accountable to them (Paragraph 4 of Article 119 of the Constitution). Thus, the relations between municipal councils and their executive bodies are based on the constitutional principle of the accountability of executive bodies to the representation.

At the same time, it needs to be noted that the constitutional principle of the accountability of executive bodies to the representation has certain peculiarities on the state administration level and on the local self-government level. For instance, under Paragraph 2 of Article 60 of the Constitution, a member of the Seimas (i.e., the representation of the Nation) may be appointed only either as the Prime Minister or a minister (i.e., as a member of a collegial institution of executive power that is accountable to the Seimas). Meanwhile, an analogous reservation on the self-government level, whereby a member of the representation might be a member of the executive body that is accountable to the appropriate municipal council, is not provided for in the Constitution.

Thus, the constitutional principles of the separation of powers and of the accountability of executive bodies to the representation are not identical as regards the content of the said principles and their application to a relevant sphere. The relations between municipal councils and their executive bodies are based on the constitutional principles of the accountability of executive bodies to the representation and the supremacy of municipal councils over the executive bodies accountable to them; however, the aforementioned relations are not based on the principle of the separation of powers.

There is no delegated legislation in Lithuania

The Constitutional Court’s ruling of 5 March 2004

The constitutional principle of the separation of powers determines the absence of delegated legislation in Lithuania (the Constitutional Court’s rulings of 26 October 1995, 19 December 1996, and 3 June 1999). Therefore, according to the Constitution, the Seimas has no right, inter alia, to assign the Government with the implementation of the constitutional competence of the Seimas, while the Government may not accept or carry out such an assignment.

The powers of the Seimas and of the Constitutional Court in impeachment proceedings (Item 4 of Paragraph 3 of Article 105 and Paragraph 3 of Article 107 of the Constitution)

The Constitutional Court’s conclusion of 31 March 2004

Under Item 4 of Paragraph 3 of Article 105 of the Constitution, the Constitutional Court presents a conclusion on whether the concrete actions of members of the Seimas and state officials against whom an impeachment case has been instituted are in conflict with the Constitution. […] under Article 74 of the Constitution, the President of the Republic is among those state officials who may be removed from office through impeachment proceedings.
Paragraph 3 of Article 107 of the Constitution stipulates that, on the basis of the conclusions of the Constitutional Court, the Seimas takes a final decision on the issues specified in Paragraph 3 of Article 105 of the Constitution.

While disclosing the content of the legal regulation established in Item 4 of Paragraph 3 of Article 105 and Paragraph 3 of Article 107 of the Constitution, consideration must be given to the provisions of Article 74 of the Constitution, the provisions of Paragraph 2 of Article 5 of the Constitution, and the constitutional principles of the separation of powers and of a state under the rule of law.

[...] the Constitution is an integral act, [...] all the provisions of the Constitution are interrelated and constitute a harmonious whole and [...] it is not permitted to interpret any norm of the Constitution by disregarding other provisions of the Constitution. In interpreting the Constitution, the linguistic method of interpretation alone may not be applied: it is necessary to make use of the systemic, logical, teleological, and other methods of interpreting law.

It has [...] been mentioned that, under Item 4 of Paragraph 3 of Article 105 of the Constitution, the Constitutional Court presents a conclusion on whether the concrete actions of the President of the Republic against whom an impeachment case has been instituted are in conflict with the Constitution; Paragraph 3 of Article 107 of the Constitution stipulates that, on the basis of the conclusions of the Constitutional Court, the Seimas takes a final decision on the issues specified in Paragraph 3 of Article 105 of the Constitution.

Interpreting the said provisions of the Constitution only linguistically and in isolation from the other provisions of the Constitution that consolidate the institute of impeachment and the powers of both the Seimas and the Constitutional Court in impeachment proceedings, it might appear that it is possible to assert that, purportedly, the Constitution provides for the legal regulation whereby the Constitutional Court presents a conclusion on whether the concrete actions of the President of the Republic against whom an impeachment case has been instituted are in conflict with the Constitution, while the Seimas takes a final decision whether the actions of the President of the Republic are in conflict with the Constitution.

However, such an interpretation of the aforesaid provisions of the Constitution would be constitutionally groundless.

It needs to be noted that the principle of the separation of powers, which is consolidated in the Constitution, means, inter alia, that, after the Constitution has directly established the powers of a concrete state institution, no state institution may not take over such powers from another state institution, or transfer or waive them; such powers may not be changed or limited by law.

Under Item 4 of Paragraph 3 of Article 105 of the Constitution, the Constitutional Court presents a conclusion on whether the concrete actions of the President of the Republic against whom an impeachment case has been instituted are in conflict with the Constitution. Paragraph 2 of Article 107 of the Constitution provides that the decisions of the Constitutional Court on the issues assigned to its competence by the Constitution are final and not subject to appeal. The presentation of the conclusion specified in Item 4 of Paragraph 3 of Article 105 of the Constitution is one of such issues that, under the Constitution, fall under the competence of the Constitutional Court only. Thus, under the Constitution, a conclusion on whether the concrete actions of the President of the Republic against whom an impeachment case has been instituted are in conflict with the Constitution is final and not subject to appeal.

It has been mentioned that, under Paragraph 3 of Article 107 of the Constitution, on the basis of the conclusions of the Constitutional Court, the Seimas takes a final decision on the issues specified in Paragraph 3 of Article 105 of the Constitution. Assessing the interrelation of the provisions of Item 4 of Paragraph 3 of Article 105 and Paragraph 3 of Article 107 of the Constitution, it is impossible to disregard the provisions of Article 74 of the Constitution,
according to which the Seimas may, by a 3/5 majority vote of all the members of the Seimas, remove the President of the Republic from office for a gross violation of the Constitution, a breach of the oath, or if he/she is found to have committed a crime.

The provision of Paragraph 3 of Article 107 of the Constitution that, on the basis of the conclusions of the Constitutional Court, the Seimas takes a final decision on the issues set forth in Paragraph 3 of Article 105 of the Constitution, means that, in cases when impeachment proceedings are instituted against the President of the Republic for a gross violation of the Constitution, the Seimas has the duty to apply to the Constitutional Court and to request a conclusion on whether the actions of the President of the Republic are in conflict with the Constitution. […]

The provision of Paragraph 2 of Article 107 of the Constitution, whereby the decisions of the Constitutional Court on the issues assigned to its competence by the Constitution are final and not subject to appeal, also means that, when deciding whether or not to remove the President of the Republic from office, the Seimas may not reject, question, or change the Constitutional Court’s conclusion that the concrete actions of the President of the Republic are (or are not) in conflict with the Constitution. No such powers are assigned to the Seimas by the Constitution. The Constitutional Court’s conclusion that the concrete actions of the President of the Republic are in conflict (or are not in conflict) with the Constitution are binding on the Seimas insofar as the Constitution does not empower it to decide whether the conclusion of the Constitutional Court is well founded and legal – it is only the Constitutional Court that can establish the legal fact that the actions of the President of the Republic are (or are not) in conflict with the Constitution.

Under Article 74 of the Constitution, it is only the Seimas that can remove the President of the Republic from office for a gross violation of the Constitution.

Thus, the Constitution provides for the different functions of the Seimas and of the Constitutional Court in impeachment proceedings, and establishes the respective powers necessary to implement these functions: the Constitutional Court decides whether the concrete actions of the President of the Republic are in conflict with the Constitution and presents a conclusion to the Seimas (Item 4 of Paragraph 3 of Article 105 of the Constitution), while the Seimas, if the President of the Republic grossly violated the Constitution, decides whether to remove the President of the Republic from office (Article 74 of the Constitution). Thus, the provision of Paragraph 3 of Article 107 of the Constitution that the Seimas takes a final decision on the issues set forth in Paragraph 3 of Article 105 of the Constitution, in conjunction with the provision of Article 74 of the Constitution that only the Seimas decides the issue of the removal of the President of the Republic from office through impeachment proceedings, and in conjunction with the provision of Paragraph 2 of Article 107 of the Constitution that the conclusion of the Constitutional Court is final and not subject of appeal, means that, under Paragraph 3 of Article 107 of the Constitution, the Seimas has the powers to decide whether to remove the President of the Republic from office, but does not have the powers to decide whether the concrete actions of the President of the Republic are in conflict with the Constitution.

It should be noted that the constitutional provision whereby only the Constitutional Court has the powers to decide (through its conclusions on the matter) whether the concrete actions of the President of the Republic are in conflict with the Constitution consolidates the guarantee for the President of the Republic that he/she will not be held constitutionally liable unreasonably. Thus, if the Constitutional Court reaches the conclusion that the actions of the President of the Republic are not in conflict with the Constitution, the Seimas may not remove the President of the Republic from office for a gross violation of the Constitution.
The principle of the separation of powers; the scope of power is limited by the Constitution (Article 5 of the Constitution)

The Constitutional Court’s ruling of 13 May 2004

In its rulings, the Constitutional Court has held on more than one occasion that Article 5 of the Constitution consolidates, inter alia, the principle of the separation of powers.

The constitutional principle of the separation of powers is the fundamental principle of the organisation and functioning of a democratic state under the rule of law; it is consolidated not only in Article 5 of the Constitution, but also in other articles of the Constitution (the Constitutional Court’s rulings of 10 January 1998, 5 February 1999, 3 June 1999, 9 July 1999, 26 April 2001, and 12 July 2001). Interpreting the legal regulation established in Article 5 of the Constitution, it should be noted that the constitutional principle of the separation of powers is consolidated in Paragraphs 1 and 2 of this article (the Constitutional Court’s ruling of 23 April 2002); this principle is particularised in other articles of the Constitution in various aspects. On the other hand, Paragraph 2 of Article 5 of the Constitution reflects not only the constitutional principle of the separation of powers, but also the principle of the supremacy of the Constitution and the constitutional principle of a state under the rule of law (the Constitutional Court’s rulings of 12 July 2001, 24 December 2002, and 24 January 2003); if such a legal regulation is established where not only the powers of the institution of state power that is pointed out in Paragraph 1 of Article 5 of the Constitution but also the powers of some other state institution are unreasonably expanded from the constitutional standpoint, it should be held that the provision of Paragraph 2 of Article 5 of the Constitution, whereby the scope of power is limited by the Constitution, will be violated as well (the Constitutional Court’s ruling of 24 December 2002).

The principle of the separation of powers

The Constitutional Court’s ruling of 1 July 2004

In its rulings, the Constitutional Court has held on more than one occasion that the Constitution consolidates the principle of the separation of powers. The constitutional principle of the separation of powers means, inter alia, that persons performing their functions in implementing the power of a certain branch of state power may not at the same time perform the functions implementing another branch of state power, i.e. persons performing the functions implementing either legislative power, or executive power, or judicial power may not simultaneously perform the functions implementing both executive power and judicial power, or both legislative power and judicial power, or both legislative power and executive power, save the exceptions provided for in the Constitution. It needs to be noted that the provision of Paragraph 2 of Article 60 of the Constitution whereby a member of the Seimas may be appointed only either as the Prime Minister or a minister, is an exception established in the Constitution where the same person may simultaneously perform the functions of both the legislative branch (as a member of the Seimas) and the executive branch (as a member of the Government – the Prime Minister or a minister).

The reciprocal control and balance of state institutions; cooperation among state institutions

The Constitutional Court’s ruling of 9 May 2006

[...]

The Constitutional Court has held that when the general functions and tasks of the state are performed, there exists inter-functional partnership, as well as reciprocal control and balance, among state institutions (the Constitutional Court’s rulings of 10 January 1998 and 21 April 1998).

It should be emphasised that the interaction among the branches of state power may not be treated as their conflict or competition; thus, the checks and balances that the judicial branch...
(institutions thereof) and other branches of state power (institutions thereof) have towards each other may not be seen as the mechanisms of the opposition of the branches of power. The model of reciprocity among state powers consolidated in the Constitution is also described by the reciprocal control and balance of the branches of state power (institutions thereof); such reciprocal control and balance does not allow a certain branch of state power to dominate in respect of another branch of state power (or in respect of other branches of state power); the said model of reciprocity is also described by cooperation among the branches of state power, of course, where such cooperation does not overstep the limits established in the Constitution, i.e. without interfering in the implementation of the powers of another branch of state power.

Parliamentary democracy; the interaction among the branches of state power; parliamentary control

The Constitutional Court’s decision of 21 November 2006 (repeated in the decision of 16 January 2014)

The Constitution consolidates parliamentary democracy. However, parliamentary democracy is not “the convent rule”, it is not a system where the parliament directly organises the work of other state or municipal institutions or may, at any time, interfere with the activities of any state or municipal institutions (their officials) that implement public power. Nor is parliamentary democracy a system where the parliament, at the slightest pretext, may exert control over any decisions of such institutions (their officials), initiate the application of sanctions against certain persons, let alone adopt decisions by itself for the state or municipal institutions (their officials) that have particular competence, i.e. adopt such decisions that can be adopted only by the state institutions (their officials) that have particular competence, for example, courts, prosecutors, the National Audit Office, the institutions of pretrial investigation, or the subjects of the operational activity provided for in laws.

The model of parliamentary democracy consolidated in the Constitution is rational and moderate. Such a model is not based exclusively on the control exercised by the parliament or on inter-institutional checks and balances; in a parliamentary democracy, inter-functional partnership, which is based, inter alia, on trust, plays a role of no less importance. It has been held in the acts of the Constitutional Court that, when the general functions and tasks of the state are performed, there exists inter-functional partnership among state institutions, as well as reciprocal control and balance (the Constitutional Court’s rulings of 10 January 1998, 21 April 1998, and 9 May 2006). The Constitutional Court has also held that “the interaction among the branches of state power may not be treated as their conflict or competition; thus, also the checks and balances that the judicial branch (institutions thereof) and other branches of state power (institutions thereof) have towards each other may not be treated as the mechanisms of the opposition of the branches of power” (the Constitutional Court’s ruling of 9 May 2006).

A different interpretation of the provisions of the Constitution that consolidate the control function performed by the Seimas (inter alia, the provisions substantiating the possibility of forming the provisional investigation commissions of the Seimas) would unavoidably deny the constitutional principles of responsible governance, of the separation of powers, of a state under the rule of law, and of democracy, as well as the striving for an open, harmonious, and just civil society, as proclaimed in the Preamble to the Constitution; such a different interpretation would create the preconditions for instability in the governance of the state and in the management of public affairs, as well as the preconditions for violating the rights and freedoms as well as the legitimate interests and legitimate expectations of a person and for violating other values consolidated in and defended and protected by the Constitution.
The assignment to regulate certain relations given by the legislature either to the Government or to an institution authorised by it

*The Constitutional Court’s ruling of 5 May 2007*

In the cases where the Constitution does not require that certain relations that are indicated therein be regulated namely by law, and when, under the Constitution, the regulation of such relations is not within the exclusive competence of institutions exercising state power, *inter alia*, the Government, the legislature may also establish in a law that certain relations are regulated by the Government or an institution authorised by it. In the Lithuanian legislation, such law-making practice where the law prescribes that certain relations are regulated by the Government or an institution authorised by it is quite widespread.

If the legislature consolidates in a law the provision that certain relations “are regulated by the Government or an institution authorised by it”, this provisions means that: the Government has the powers to regulate the relations indicated in the law either by itself or to establish by its resolution which institution has the powers to regulate (i.e., which institution may and must regulate) the relations indicated in the law; the Government has the powers to regulate by itself a certain part of relations specified in the law; however, the Government may authorise another institution to regulate certain relations specified *expressis verbis* in the law as well as those relations that stem from relations specified *expressis verbis* in the law; the Government, when authorising a certain institution to regulate the respective relations, may not assign it also with regulating the relations that, under the Constitution and laws, may be regulated only by legal acts the legal force of which is not less than that of government resolutions.

If regard is paid to the principle of the separation of powers and the requirements that stem from them, *inter alia*, the requirement not to regulate certain relations by means of substatutory legal acts if, under the Constitution, such relations may be regulated only by means of a law, if regard is paid to the prohibition on transferring to other institutions the powers that, under the Constitution, are the exclusive competence of the Government, if regard is paid to the prohibition on transferring to other institutions the regulation of such relations that, under the Constitution and laws, may be regulated only by the legal acts the legal force of which is not less than that of government resolutions, then the aforementioned law-making practice as such is not inconsistent with the Constitution. However, in this context, it should be noted that the constitutional principle of a state under the rule of law also gives rise to the fact that, if the legislature stipulates in a law that certain relations are regulated by the Government or an institution authorised by it, then the Government, when adopting a resolution by which it authorises the respective institution to regulate certain relations, may authorise only such an institution to regulate the aforementioned relations where the said institution performs such functions and/or has such other powers that are linked to the regulation of the relations that are assigned to it by the government resolution (or are closely related to such a regulation). Also, the legal regulation where the Government, while complying with the requirements and procedure established by law, would establish (if a necessity arises) a certain state institution and would commission it to regulate the relations envisaged in the law, provided the Government or the institution authorised by it has the powers to regulate such relations, would not be in conflict with the Constitution, either. It should also be noted that, in cases where the legislature consolidates in a law that certain relations are regulated by the Government or an institution authorised by it and where such a substatutory regulation of relations is determined by the necessity to rely on special knowledge or special (professional) competence in the course of lawmaking, the constitutional principle of a state under the rule of law gives rise to the fact that, when the Government adopts a decision whereby it empowers a certain institution to regulate certain relations, such an institution must be the one that has this
special (professional) competence necessary for regulating the relations that are assigned to it by an appropriate government resolution.

**The principle of the separation of powers**

*The Constitutional Court’s ruling of 13 May 2010*

Paragraph 1 of Article 5 of the Constitution provides that, in Lithuania, state power is executed by the Seimas, the President of the Republic and the Government, and the Judiciary.

This provision of the Constitution provides for the grounds for the separation and balance of the branches of state power (the Constitutional Court’s ruling of 20 April 1999).

[...] In its rulings, the Constitutional Court has held on more than one occasion that Article 5 of the Constitution (as well as other articles of the Constitution that establish the powers of the state institutions exercising state power) consolidates the principle of the separation of powers.

[...]

[...] the particularities of the constitutional status of the Seimas, the President of the Republic, the Government, and the Judiciary, where such particularities are related with the exercise of state power and the separation of state powers imply, *inter alia*, that these institutions may not take over the constitutional powers that belong to other institutions; thus, the courts to which persons concerned apply with petitions requesting an investigation into the relevant acts adopted by the Seimas, the President of the Republic, or the Government or into activities otherwise expressed by these institutions may not take over the constitutional powers of the Seimas, the President of the Republic, or the Government, i.e. the courts may not adopt the respective decisions for these institutions of power and may not obligate the said institutions of power to pass acts related with the exercise of state power.

**The powers of the Seimas and of the Constitutional Court in impeachment proceedings**

*(Item 4 of Paragraph 3 of Article 105 and Paragraph 3 of Article 107 of the Constitution)*

*The Constitutional Court’s conclusion of 27 October 2010 (repeated in the conclusion of 3 June 2014)*

Under Item 4 of Paragraph 3 of Article 105 of the Constitution, the Constitutional Court presents a conclusion on whether the concrete actions of members of the Seimas and state officials against whom an impeachment case has been instituted are in conflict with the Constitution. [...] under Article 74 of the Constitution, the Seimas may revoke, under the procedure for impeachment proceedings, the mandate of a member of the Seimas by a 3/5 majority vote of all the members of the Seimas.

Paragraph 3 of Article 107 of the Constitution stipulates that, on the basis of the conclusions of the Constitutional Court, the Seimas takes a final decision on the issues specified in Paragraph 3 of Article 105 of the Constitution.

It should be noted that, in its rulings of 15 April 2004 and 25 May 2004, when interpreting Item 4 of Paragraph 3 of Article 105 and Paragraph 3 of Article 107 of the Constitution, the Constitutional Court held that:

– under the Constitution, two institutions of state power – the Seimas and the Constitutional Court – have the powers in impeachment proceedings. Each of these state institutions are assigned, under the Constitution, the powers that are in line with their functions in impeachment proceedings: an impeachment case may be instituted only on a proposal (initiative) of members of the Seimas; a conclusion on whether the concrete actions of the person against whom an impeachment case has been instituted are in conflict with the Constitution is presented by the Constitutional Court; if the Constitutional Court draws the conclusion that the person against whom an impeachment case has
been instituted has grossly violated the Constitution, the Seimas may remove such a person from office or may revoke his/her mandate of a member of the Seimas by not less than 3/5 majority vote of all the members of the Seimas;

– only the Constitutional Court has the powers to decide whether the persons specified in Article 74 of the Constitution, against whom impeachment proceedings have been initiated, have grossly violated the Constitution (taking account of the fact that a gross violation of the Constitution is also a breach of the oath, it has the powers to decide whether such persons have breached the oath). The conclusion of the Constitution Court that a person has grossly violated the Constitution (and, thus, has also breached the oath) is final. No other state institution, no other state official, and no other subject may change or revoke such a conclusion of the Constitution Court;

– if the Seimas, while following the Constitution, has removed a state official specified in Article 74 of the Constitution from office or revoked his/her mandate of a member of the Seimas through impeachment proceedings, such a decision of the Seimas is final.

The principle of the separation of powers

The Constitutional Court’s ruling of 29 September 2015

The constitutional principle of a state under the rule of law is related with the constitutional principle of the separation of powers, which is consolidated, inter alia, in Paragraph 2 of Article 5 of the Constitution. The said paragraph provides that the scope of power is limited by the Constitution. The Constitutional Court has noted in its acts on more than one occasion that the constitutional principle of the separation of powers is the fundamental principle of the organisation and functioning of a democratic state under the rule of law (inter alia, the Constitutional Court’s rulings of 10 January 1998, 13 May 2004, and 24 September 2009); the constitutional principle of the separation of powers means, among other things, that, if the Constitution directly establishes the powers of a concrete institution of state power, such an institution may not waive such powers and may not transfer them to some other institution, while other state institutions may not take over such powers; the said powers may not be changed or limited by law (inter alia, the Constitutional Court’s rulings of 23 August 2005 and 26 February 2010). The Constitutional Court has also emphasised on more than one occasion that the Seimas has no right to commission the Government or any other institution to exercise the constitutional competence of the Seimas (inter alia, the Constitutional Court’s rulings of 14 January 2002, 2 March 2009, and 26 May 2015). The provision “the scope of power shall be limited by the Constitution” of Paragraph 2 of Article 5 of the Constitution is violated if such a legal regulation is established whereby the powers of the state institution specified in Paragraph 1 of Article 5 of the Constitution or those of any other state institution are broadened in a constitutionally unreasonable manner (inter alia, the Constitutional Court’s rulings of 13 December 2004, 2 March 2009, and 26 May 2015).
III. RELEVANT JURISPRUDENCE OF THE CONSTITUTIONAL COURTS

This chapter provides summaries of the relevant acts of the constitutional courts
THE JUDGMENT OF 10 NOVEMBER 2009 (NO. 1/3/421, 422)
Citizens of Georgia – Giorgi Kifiani and Avtandil Ungiadze v. the Parliament of Georgia

Subject of Dispute
Claimants Giorgi Kifiani and Avtandil Ungiadze disputed the part of Paragraph 2 of Article 14 of the Law of Georgian Broadcasting prohibiting the concerned persons from the right to apply to a court when the broadcaster violated: A. The duty to provide facts in programs with due accuracy and correct mistakes in a timely manner (Paragraph 1 of Article 52); B. the duty to report facts in a just and precise manner, to clearly separate fact from opinion, and to identify the author of the opinion (Paragraph 1 of Article 54); C. the prohibition of programs or advertisements containing obscenity that violate human dignity and basic rights (part of Paragraph 4 of Article 56); D. the prohibition of broadcasting of programs that may have harmful effects on the development of minors, when there is a high probability that minors have access to such programs.

The claimants also disputed Paragraphs 1 and 2 of Article 59 of the same law and Paragraph 4 of Article 17 of the Law of Georgia on the Protection of Minors from Harmful Influence, which determined that all of the above-mentioned violations could be appealed not in courts, but solely within the self-regulation mechanisms functioning within the broadcasting institutions.

According to the claimants, the disputed norms violated the first paragraph of Article 42 of the Constitution (the right to a fair trial).

Reasoning
The Court interpreted that the right to apply to a court, protected by Article 42 of the Constitution, is an instrumental right: when an impugned norm limits the right to apply to a court, the claimant firstly needs to argue that this norm limits his/her ability to apply to a court for protecting their rights and freedoms.

The claimant notes that the violation of the duties stipulated in Paragraph 1 of Article 52 infringed against his honor and dignity, and stripped him off of the possibility of seeking financial compensation for the damages resulting from the violation in question. The Court indicated that the obligations stipulated in the Law on Broadcasting did not automatically establish the right of viewers on the fulfillment of these obligations, since the goal of the Law is not to provide the rights for viewers. The protection of human honour and dignity and, in appropriate cases, the possibility of financial compensation and correction of mistakes are provided and ensured by other laws – the Civil Code of Georgia and the Law of Georgia on Freedom of Speech and Expression. Both laws ensured the right to apply to the courts if human honour and dignity were infringed and the disputed norm did not rule it out.

Article 52 of the Law on Broadcasting addressed, qualitatively and quantitatively, different circumstances – dissemination of imprecise facts. The Court explained that dignity, as well as any other right, may not change in line with the subjective opinions of different individuals.
It must, to a certain degree, satisfy the criteria of objectivity and universality. “Only the fact that a person dislikes this or that TV Show due to his/her values, religion or worldview, cannot be considered as interference with the right to dignity.” Impreciseness of the facts mentioned under Article 52 does not mean that the information disseminated infringed a person’s honour or dignity. Therefore, prohibition of applying to a court regarding the dissemination of imprecise facts by a broadcaster does not mean prohibition of application to the court when the disseminated information infringed a person’s honour and dignity. Additionally, the claimants could not demonstrate which of their rights were infringed if the broadcasters violated their duties listed under Article 54. Therefore, the impugned norm in this part was not declared unconstitutional.

Paragraph 4 of Article 56 regulated the transmission of advertisement or program that infringes dignity and fundamental rights. The lawmaker considered a theoretical possibility here that any right could be violated and, simultaneously, unambiguously prohibited appealing against this violation in a court. The Constitutional Court declared that it was exactly for courts to balance the freedom of expression of broadcasters against the dignity and fundamental rights of others, based on the form, content and social importance of the expression. Therefore, with regard to Paragraph 4 of Article 56, the prohibition of the right to apply to a court was declared unconstitutional.

In the part of the claim concerning the harmful influences on minors, the claimant challenged the content of “immoral” programs which were unacceptable to him and which were “perverting” future generations. The Court noted that, in a democratic society, it is not allowed for a state, court, person, or a group of persons to press their moral norms or worldviews upon other social groups. “Lack of acceptance of the values, positions, and ideas of a broadcaster may not serve as a ground for limiting its freedom of expression. The state is required to protect objectively identified interests, but not subjective feelings.” The justiciability of questions of morality by courts will negatively affect the independence of broadcasters. It is true that parents have the right to bring up their children according to their moral values, but this does not grant them the right to demand from broadcasters (or from other private persons) to transmit only those shows that conform to their moral standards. Therefore, this part of the claim was not upheld.

**THE JUDGMENT OF 24 DECEMBER 2014 (NO. N3/2/577)**

*Non-Commercial Entity “Human Rights Education and Monitoring Centre (EMC) and the citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia*

**Subject of Dispute**

Non-Commercial Entity “Human Rights Education and Monitoring Centre (EMC)” and the citizen of Georgia Vakhushti Menabde disputed the constitutionality of Paragraph 41 of Article 22 and of the second sentence of Paragraph 5 of Article 25 of the organic law of Georgia “On the Constitutional Court of Georgia”. The disputed norms established, *inter alia*, the limitations on the period of the suspension of the validity of a disputed provision within constitutional proceedings. According to the claimants, the disputed norms were in conflict with Paragraph 1 of Article 42 (“Everyone shall have the right to apply to the court for protection of his/her rights and freedoms.”) of the Constitution of Georgia.

**Reasoning**

The Constitutional Court first stressed that the right to a fair trial is a very important constitutional guarantee of the protection of human rights and freedoms, of ensuring the rule of law, and of the separation of powers. The right to judicial defence recognised by Paragraph 1 of Article 42 of the Constitution of Georgia is, in formal terms, the right of access to a court, whereas, content wise, it includes the duty of the legislator to create a normative rule that would
ensure the right to a timely, fair and effective judiciary so that a person could fully defend his/her rights and freedoms in a court. The realisation of the right of access to a court is relevant for the rule of law and a democratic state.

**On the constitutionality of Paragraph 4\(^1\) of Article 22 of the organic law of Georgia “On the Constitutional Court of Georgia”**

The Constitutional Court noted that, generally, time periods have great importance in bringing order into legal relationships and into the process of exercising the right to a fair trial. However, the disputed norm, according to the claimant, set an unreasonably short period for hearing and deciding a case, which, in most situations, precluded a complete investigation of a case and the rendering of a reasoned judgment.

The Constitutional Court stressed that, on the one hand, a court judgment must be delivered within a reasonable time period and without undue delay, since such delay may undermine the trust of society in this respect. However, on the other hand, the period for hearing and deciding a case has to provide the opportunity to objectively investigate all respective circumstances. If the time period for deciding a case is unreasonably long, the protection of a particular right is delayed and loses its efficiency; however, in the case of an unreasonably short time period, the possibility of the parties and court to collect, present, investigate evidence and to determine the circumstances of a case is undermined. Therefore, the reasonableness of the proceedings should be assessed on the basis of the specific circumstances of a case.

Moreover, a part of the right to a fair trial is the right to a reasoned judgment. The quality of reasoning of judgments has an impact on their correct understanding by the parties and society. The reasoning of judgments must be clear and not limited to general formulations in order that it would not create the impression of being arbitrary or lacking transparency; it must also be based on objective arguments. Nonetheless, the content of the duty of reasoning depends on the nature of proceedings, as well as on the characteristics of the provision of proceedings.

The standard of reasoning a judgment of the Constitutional Court is particularly high (the adopted decision is final and may not be subjected to appeal, as well as it is addressed to an indefinite number of persons and usually offers practically new standards of regulating relationships or criteria for interpreting disputed provisions in accordance with constitutional requirements). The investigation of cases by the Constitutional Court is a complex process, which entails, *inter alia*, the analysis of constitutional provisions and other norms, the comprehensive research of international practice and standards, the examination of factual circumstances, etc. For this reason, considering the complexity of pending cases, the time period prescribed by the disputed norms for hearing and deciding the circumstances of a case might be insufficient for the Constitutional Court to completely investigate an appropriate case. In such a situation, the Constitutional Court would not have an objective possibility of adopting a reasoned judgment; thus, the right to a fair trial as such can be called into question.

The Constitutional Court noted that the right to a fair trial is also an instrumental right, i.e. it is applied when it is necessary to protect another specific right. As the Constitutional Court ensures the primacy of the Constitution and the protection of human rights and freedoms, Article 42 of the Constitution of Georgia includes the right to access the Constitutional Court and creates a constitutional guarantee of the protection of human rights and freedoms.

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\(^1\) Paragraph 4\(^1\) of Article 22 of the organic law of Georgia “On the Constitutional Court of Georgia” provides: “The time limit for consideration of and making a final decision on a constitutional claim or constitutional submission, if the Constitutional Court suspends the force of a disputed act or a relevant part thereof based on this claim/submission and on Article 25(5) of this Law, must not exceed 30 calendar days after the decision of suspension. In special cases, based on a reasoned referral by a court reviewing the case, the President of the Constitutional Court extends this time limit, at the latest five days before it expires, for a maximum of 15 calendar days.”
However, the right to a fair trial is not absolute: it may be limited in order to achieve the pursued legitimate aim existing in democratic society. At the same time, the legislator must maintain a reasonable balance between the means used for a limitation and the legitimate aim. The Constitutional Court noted in this respect that the legislator is allowed setting time limits for specific procedural actions; however, these restrictions must constitute proportionate measures for achieving valuable aims. No procedural time limits may pose a threat to exercising justice and constitutional review.

The Constitutional Court noted that, in some instances, suspending the validity of a normative act might limit both private and public interests and damage the values it was adopted to protect; therefore, avoiding negative effects brought by prolonging the suspension of a normative act serves the protection of significant private and public interests and it is the legitimate aim in pursuit of which limiting the right guaranteed by Paragraph 1 of Article 42 of the Constitution is permissible. The Constitutional Court estimated that the disputed legal norms established such a legal regime in which possible negative results are reduced in time, i.e. these norms to a certain extent ensured the protection of those private and public interests to protect which is the goal of a disputed provision suspended by the Constitutional Court and where the said private and public interests would be damaged by suspending the validity of the provision for an indefinite time period.

The Constitutional Court, however, estimated that the disputed legal regulation was not the least limiting and appropriate measure for avoiding negative effects caused by long suspension of the validity of a disputed provision. After assessing the proportionality of the established measure, the Constitutional Court concluded that it was not proved that the offered legal mechanism was the least limiting measure for achieving the above-mentioned legitimate aim and that less limiting (which would inflict less damage on the claimant and would still protect the interests of third parties and society) measure could not be elaborated. The Constitutional Court held that the limitation set in Paragraph 41 of Article 22 of the organic law of Georgia “On the Constitutional Court of Georgia” was disproportionate and was not in conformity with the demands of Paragraph 1 of Article 42 of the Constitution of Georgia.

On the constitutionality of the second sentence of Paragraph 5 of Article 25 of the organic law of Georgia “On the Constitutional Court of Georgia”

It was first of all stressed that the Constitutional Court is a significant guarantee of the primacy of the Constitution of Georgia and the rights and freedoms enshrined in the Second Chapter of the Constitution. Together with the other competences, the Constitutional Court exercises this function based on the complaints/submissions made by individuals and legal entities, evaluating the conformity of normative provisions with the Constitution and declaring unconstitutional normative provisions void. The right of access to a court guaranteed by Paragraph 1 of Article 42 of the Constitution of Georgia, which also entails the right of access to the Constitutional Court, cannot be illusionary: it should create a real possibility of restoring the right in a due manner and provide for an efficient tool of protecting specific rights. The Constitutional Court noted that, considering the characteristics of constitutional justice, the suspension of the validity of a disputed provision protects a claimant from unavoidable and irreparable violation of his/her right and supports the efficiency of access to the Constitutional Court.

2 According to the second sentence of Paragraph 5 of Article 25 of the organic law of Georgia “On the Constitutional Court of Georgia”, if, after the suspension of a disputed provision, the Constitutional Court fails to make a final judgment within the provided time limit (30 days with the possibility of extension of 15 days) the decision on the suspension of the force of a disputed provision or its relevant part shall become void from the day following the expiry of the above time limit.
It was noted that legislation prescribes the suspension of the validity of a disputed provision when there is real danger that the validity of this provision would cause irreparable damage. The Constitutional Court, therefore, applies this measure solely in extreme circumstances, only in cases where the threat of irreparable damage to a party is clear and there is no risk of an unjustified limitation of the interests of either a third party or the public. The suspension of the validity of a disputed provision is an extremely important preventive measure for protecting a right; it significantly influences the efficiency of the activity of the Constitutional Court.

As regards the disputed norm, the Constitutional Court noted that, although its goal was to avoid negative effects caused by the lengthy suspension of the validity of a disputed provision where the right of access to a court could be limited pursuing this goal, any limitation should be proportionate to the aim pursued. Meanwhile, the disputed norm limited the possibility of applying the suspension of the validity of a legal provision even when the suspension itself did not violate a right of a third party or relevant public interests, i.e. the disputed norm created a relevant limitation even when there was no necessity to protect the above-mentioned interests.

The legislator is under the obligation to ensure that the legitimate aim is achieved on the one hand and that a major limitation of a right is avoided on the other hand; therefore, appropriate measures that are flexible and fit the purpose should be established. The Constitutional Court estimated that the offered tool was not flexible and the disputed norm a priori prioritised the third party interest; however, such a tool simultaneously created the possibility of limiting (in a blanket and absolute way) the interests of third parties for 45 days and did not provide the Constitutional Court with the possibility of balancing on its own opposing interests in specific cases. Under the disputed norm, there was the possibility that the right to a fair trial of a claimant would be limited even when the interest to protect it was significantly higher than the interests of third parties or the public interest. Thus, the disputed norm did not provide for a proportionate measure and for the possibility of striking a fair balance between the right to a fair trial and legitimate aims, i.e. it was a disproportionate and unconstitutional limitation of the right of access to a court. Therefore, the disputed legal regulation was declared as unconstitutional.

THE JUDGMENT OF 19 DECEMBER 2008 (NO. #1/1/403, 427)

Citizen of Canada Hussein Ali and citizen of Georgia Elene Kirakosian
v. the Parliament of Georgia

Subject of Dispute

Hussein Ali, a citizen of Canada residing in Georgia, and the citizen of Georgia Elene Kirakosian lodged constitutional claims stating that Articles 6977(2) and 6978(2) of the Code of Criminal Procedure were not in conformity with Article 42(1) of the Constitution of Georgia (“Everyone shall have the right to apply to the court for protection of his/her rights and freedoms.”). Under Article 6978(2) of the Code of Criminal Procedure of Georgia, the parties to a plea bargain – a convicted person and a prosecutor – have the right in the cases listed in Article 6796 to file an appeal with higher judicial bodies against a decision on the approval of a plea bargain. However, it is stated in Article 6978(2) that a victim does not have the right to appeal against a plea bargain. According to the constitutional claims, the impugned provision failed to comply with the Constitution, since it denied both access to a court and the opportunity of a fair trial.

Both claimants asserted that the impugned legal regulation did not give the opportunity to a victim to receive compensation for moral and pecuniary damages and did not ensure that an offender would receive fair and adequate punishment. In the opinion of the claimants, fair and
adequate punishment follows from the principle of a fair trial. According to the constitutional claims, the impugned legal regulation, which granted the right to appeal only to the parties of a plea bargain, made it possible for investigative bodies to enter into unlawful agreements, whereas the judiciary was precluded from examining plea bargains. The claimants argued that, in the majority of cases, those conditions were against the interests of victims. Moreover, a fair balance was not maintained in the given case: a speedy and effective justice, which is the aim of the plea bargain procedure, would be guaranteed better if a victim had the right to lodge an appeal.

**Reasoning**

The Constitutional Court stressed that the right to a fair trial is a significant instrument, which, *inter alia*, guarantees the effective realisation of constitutional rights and ensures the protection against unreasonable interference into rights. The implementation of this right is related to the principle of the rule of law and substantially defines its essence. Therefore, it is of utmost importance that legislation guarantees the right of access to a court and the opportunity of a fair trial. The right of access to a court requires the existence of a right the protection of which is sought through access to a court; therefore, the more important an interest (protected by means of judicial procedure) is, the stricter the criteria are in reviewing the constitutionality of the limitation of the right of access to a court.

The Constitutional Court noted that both claimants named compensation for damages as the right to be protected by means of judicial procedure. According to the claimants, the impugned legal regulation did not provide them with the opportunity for such protection. The Constitutional Court stressed in this respect that it is undisputable that a person should be guaranteed access to a court in order to receive compensation for damages inflicted on him/her as a result of a crime. Accordingly, the state is under the obligation to create effective mechanisms that would provide victims with such a possibility irrespective of charges or the severity of punishment.

The Constitutional Court established, however, that the constitutional case in fact concerned the prohibition precluding a victim from appealing against a plea bargain and not the issue of receiving compensation for damages, as the disputed provisions did not regulate this issue. It was emphasised that the Constitutional Court was limited by the substance of the claim and it assessed only the constitutionality of the impugned legal regulation, whereas the above-mentioned arguments of the claimants were related to those provisions of civil and criminal legislation the assessment of which was not possible within the scope of the given dispute.

As regards the position that the main problem in this case was an investigation undertaken in an incompetent manner and the fact that the right of appeal should serve as a means for criminal prosecution against the persons who were not brought to justice following the prosecution, the Constitutional Court noted that the criminal legislation in force granted a victim the right to file an appeal against unlawful acts of an investigative body or against a decision of a prosecutor on the termination or refusal of prosecution. In this case, the claimant exercised such a right, though the preferred results were not achieved. Thus, in fact, the claimant was guaranteed all

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3 One of the claimants asserted that he was deprived of the possibility of receiving compensation for damages, as the prosecution of the persons who have unlawfully and fraudulently appropriated his property was separated from the initial case after the said persons pleaded guilty; thus, the claimant was deprived of the possibility of filing an appeal against the plea bargain.

Another claimant did not agree with how the prosecutor qualified the relevant criminal acts (according to the claimant, the perpetrators of the crime that resulted in the death of her son should not have been accused of an intentional aggravated bodily injury, but rather of intentional murder); however, there was no possibility of filing an appeal against the relevant plea bargain after such a bargain was concluded between the prosecutor’s office and the accused persons. Otherwise, in the opinion of the claimant, she may have had an opportunity to question both the qualification of the criminal acts and the imposed punishment.
the necessary legal means for the protection of his interests. Therefore, the constitutional claim in this respect and the consolidating arguments were concluded to be ill-founded, since the arguments were related to the lawfulness of the decisions made by the investigative body – it was beyond the competence of the Constitutional Court to review the lawfulness of the application of law, i.e. it could not assess whether the investigation was carried out in a competent manner.

The Constitutional Court also did not agree with the arguments that, by limiting the right to appeal against a judgment delivered on the basis of a plea bargain, the victim’s right to life was not adequately respected in the given case. The Constitutional Court noted that linking the protection of the right to life to the opportunity to influence the qualification of an accusation needs further justification in order to assert that, in the claimant’s case, the violation of the right was caused by bringing charges for an intentional aggravated bodily injury that resulted in death instead of for intentional murder. The arguments provided by the claimant were, therefore, considered to be not related to the impugned regulation. It was concluded that the alleged conflict of the impugned provision with the relevant article of the Constitution, as pointed out by one of the claimants, was excluded in this respect.

The claimants also stated that, following from the principles of legality and fairness, a victim should have the opportunity to request a court to review the judgment regarding a plea bargain if the court comes to the conclusion that the degree of punishment is not adequate to the seriousness of a crime. The Constitutional Court noted in this respect that, as a result of a crime, apart from bodily and pecuniary damages, a victim can be subjected to strong psychological and emotional stress; his/her private life, dignity and security may be threatened. The obligation to investigate a crime and bring a criminal to justice is related to the principle of the rule of law and substantially determines the credibility of the judicial system. For this reason, it is of utmost importance that, during an investigation, including the plea bargain phase, a victim’s legal interests and petitions are taken into account. However, the right of access to a court is not an absolute right and requires, on the part of the State, that an appropriate regulation be established. The determination of the rights and obligations of a victim regarding a plea bargain and the grounds for appeal amounts to the type of the above-mentioned regulation. However, the special position that a victim may have in respect of the punishment of a criminal is not a sufficient ground for exercising the constitutional right deriving from Article 42(1) of the Constitution. The realisation of a speedy and effective justice, which definitely represents a legitimate aim and which is intended to be achieved through the plea bargain system, implies the necessity for such as the existent regulation governing the procedural rights of victims.

In the light of the above-mentioned, the Constitutional Court concluded that the limitation of the right of a victim to appeal against a judgment delivered on the grounds of a plea bargain is in compliance with Article 42(1) of the Constitution.

THE JUDGMENT OF 5 NOVEMBER 2013 (NO. 3/1/531)
Citizens of Israel – Tamaz Janashvili, Nana Janashvili, and Irma Janashviliv
v. the Parliament of Georgia

Subject of Dispute
The claimants disputed Paragraph 4 of Article 426 of the Civil Procedure Code of Georgia with regard to Paragraph 1 of Article 42 (the right to a fair trial) of the Constitution of Georgia. According to the disputed norm, application to the court to claim the annulment of the judicial decision or reopening of proceedings due to the newly discovered circumstances was not allowed after 5 years, from the moment when the judicial decision became final.
Reasoning

The house owned by the claimants became state property in 2005 by the decision of a court, but the owners did not know about it. Five years after the adoption of the court decision, the claimants applied to the court to request the annulment of that decision; however, the court rejected their application, as the limitation period had expired.

The Constitutional Court reviewed only the challenged part of the disputed norm – application of the 5-year limitation period to the claims for annulment of court decisions, when the following ground (subparagraph “C” of Paragraph 1 of Article 422 of the Civil Procedure Code) for annulment is present – a person, whose lawful interests and rights had been affected by the disputed court decision, had not been invited to the court hearing. The Court determined that, under the Civil Procedure Code of Georgia, persons in the claimants’ position could join the proceedings in the capacity of third parties or as proper respondents. Therefore, the constitutionality of the disputed limitation period was only reviewed with regard to persons who had this procedural status.

The Court pointed out that the reopening of the proceedings aimed at the annulment of the judicial decision, when appropriate grounds were present, was an important component of the right to a fair trial that Article 42 protects. The enacted legislation allowed the possibility that the persons whose rights and legal interests had been affected by the decision could know nothing about the court decision that affected their interests; while the disputed norm, with the adoption of the 5-year limitation period, effectively limited the possibility of these persons to request the annulment of the court decision, and, thus, defend their rights. The Court evaluated the proportionality of the restriction of the right to a fair trial.

The application limitation period (the period during which a person can claim for his/her rights through application to a court) serves important public interests ensuring an effective, objective, and fair administration of justice, as well as legal security and certainty, establishing order and stability in legal relationships. As time passes, evidence changes, gets destroyed, or becomes more difficult to obtain, which makes evidence less trustworthy, reliable evidences may not be available at all, which increases the risk of errors in the legal proceedings. From this perspective, limitation periods are one of the effective safeguards to ensure that cases are correctly decided. At the same time, limitation periods allow courts not to adjudicate cases that are nearly impossible to be solved in an objective manner, which serves the purpose of preventing artificial burdening of courts. The Court pointed out that trustworthiness of court decisions is based on the authority of the courts and the finality of the decisions, which is crucial for the purposes of legal security and stability.

After establishing the legitimate aims of the restriction, the Court separately evaluated its proportionality with regard to judicial decisions in favour of the private persons and decisions in favor of the state. When the dispute is between two individuals, the need of defending the rights of the persons, who are in the similar position as the claimants of this case, is counteracted by the need to protect the rights of those persons, who may face the threat violation of their rights in the case of reopening of legal proceedings after a certain period of time had passed. They may no longer be able to defend their interests, since the evidence may have become inaccessible. Moreover, the possibility of a right of becoming the subject of dispute for an indefinite time brings ambiguity and restricts the rights holders in the process of enjoying their rights. To strike a fair balance between these interests, the Court determined that 5 years were minimal, but objectively fair, reasonable, and foreseeable time for the interested parties to request the annulment of a court decision, especially when the right to real estate was to be defended. The data of public registry of real estate is publicly available irrespective of the physical location of
a person and, furthermore, the owners of real estate have various duties irrespective of whether or not they utilise their property, which increases the probability that the person will become informed about the changes of the ownership status of their property.

The Court saw a different balance of interests in the case when the decision was made in favour of the state and, at the same time, the violation of rights was caused by unlawful acts, or if the interested parties knew the circumstances, which would have resulted in the decision favourable to them if these circumstances had been presented to the court earlier. The Court pointed out that the restriction of the right to request the annulment of the court decision was still legitimate in its aims, but these aims were substantially altered with respect to the state, since it is not related to the threat of violating the rights of private persons. The state is a guarantor of legal security, but it may not expect other persons to satisfy this interest that results in a different balance of interests unlike the case where only private persons were involved. The Court pointed out that, in these cases, the supreme interest of avoiding the violation of human rights prevailed, and, in order to protect the rights, irrespective of the 5-year limitation period, there should still be a possibility of annulling the court decision.

Therefore, the Court found that the disputed norm was not a proportional means to achieve the legitimate aim in the respective part of the claim, related to the subparagraph “C” of Article 422 of the Civil Procedure Code of Georgia, which restricts the fair trial rights of the proper respondents and third persons with independent claim, when the court decision, which touches upon their right, is favorable to the state and they know such circumstances/evidence that would result in a court decision favorable to them, had they been presented to the court in the previous legal proceedings.

The Court unambiguously indicated that, in order an interested party to be entitled to request the annulment of a final court decision after 5 years, this must be the only remedy for their rights; at the same time, they must present to the court appropriate evidence, which would prove the presence of one of the grounds provided for in Article 423 of the Civil Procedure Code of Georgia (newly discovered circumstances to reopen the proceedings). Additionally, when deliberating on the request of these persons to annul a court decision, a court must apply clear criteria in order to establish that the person did not know and, objectively, could not know that a decision affecting his/her interests existed.

Given the above-mentioned, the disputed normative content of Article 426 was declared unconstitutional with regard to Paragraph 1 of Article 42 of the Constitution of Georgia.

THE JUDGMENT OF 23 MAY 2014 (NO. 3/2/574)
Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia

Subject of Dispute
The claimant, Mayor of Tbilisi Giorgi Ugulava, challenged the constitutionality of Article 159 of the Criminal Procedure Code of Georgia that regulated the dismissal of an official elected via secret, universal, equal, and direct suffrage, if he was charged with a criminal offence and there was a risk that his continued occupation of the office would obstruct investigation, the compensation of costs incurred due to his crime, or he would continue felonious activities (Article 159) with respect to Paragraphs 1 and 2 of Article 29 of the Constitution of Georgia (the right to hold state and public office). Additionally, the subject of the dispute was the fact that the Court, which had decided on the suspension of the official, was allowed to try a case without oral hearing (Article 160) with regard to Paragraph 1 (the right to oral hearing) and Paragraph 3 (the right to fair trial) of Article 42 of the Constitution of Georgia.
Reasoning

The Constitutional Court deemed that there was interference with the right guaranteed by Article 29, i.e. the limitation of the right of the “elected official to carry out duties uninterruptedly, granted by Tbilisi voters for the duration of 4 years via secret, universal, equal and direct suffrage. However, in the given context, the constitutionally protected right is not limited to the applicant’s private interest, but it is also connected to such an important public interest, as is the realization of the voters’ will.”

Addressing the proportionality of interference with respect to Article 29 of the Constitution, the Court determined that the interference served the legitimate purpose to carry out investigation effectively and achieving this legitimate purpose was equally important with regard to every defendant, including high level elected officials. Nevertheless, the duration of the suspension of the official continued until the final court ruling, and i.e. for some final judgments, the law did not introduce any time limitations. While it is true that suspension is a temporary proceeding, it may continue indefinitely. This is decisive with regard to elected officials, since their service in the public office is constrained by time limits and it will objectively be impossible for them to make-up for the time lost and to reinstate themselves to office. Since it is an elected office entered by the persons who are elected by popular vote in regular elections, it cannot be jeopardized.

Therefore, when an elected, high-level official is suspended for an indeterminate period of time, this may effectively equal to his removal from office, which renders the restriction of the right of a particularly grave, intense character. Furthermore, the law has not stipulated the mechanisms to either substitute, or review this temporary measure until a final court judgment is delivered, even if there is no objective need and ground to continue imposing it. Despite the fact that the Court believes the measure is a lighter punishment than imprisonment, which would also allow achieving the legitimate purpose, due to its restrictive nature and absence of review mechanisms, the measure was found to disproportionately restrict Article 29 of the Constitution.

Additionally, the Constitutional Court considered the rule of adopting a decision with regard to the measure impugned by a court. Deciding the case without oral hearing does not necessarily violate the right to a fair trial if the restriction serves a legitimate purpose and if the specific issue to be resolved by a court does not necessitate this guarantee. The components of the right to a fair trial “shall be applied in the case and to the measure that is objectively required for specific protection/to avoid violation”.

The Court opined that the need for an oral hearing could be justified if the defendant’s participation in the trial could affect the resolution of a particular legal issue. All the more so, when the courts evaluate factual circumstances and when new evidence presented by a party could affect the court decision. The analysis of the impugned norm revealed that, in this particular case, the court had to examine factual evidence – it had to decide whether there was a probable cause that the defendant, if he stayed in office, would interfere with the investigation, hinder compensation for damages and would continue committing unlawful acts. Additionally, it was also revealed that not only was he deprived from participating in an oral hearing, but he was not even able to submit written evidence before the court. Therefore, the Court determined that the impugned norm violated Paragraph 1 of the Article 42 of the Constitution.

The right to a fair trial implies that a person is equipped with adequate, effective, and sufficient legal means to impact a future court decision. In the given case, the Court deemed that this could not be achieved without oral hearing. Therefore, the Court ruled that “hearing without oral arguments does not in itself and always equal to violating the rights of a person. However, when oral hearing is required for full enjoyment of rights, hearing without oral arguments violates not only Paragraph 1 of Article 42 of the Constitution, but also right to a fair trial guaranteed under Paragraph 3.”
THE JUDGMENT OF 15 SEPTEMBER 2015 (NO. 3/2/646)
Citizen of Georgia, Giorgi Ugulava v. the Parliament of Georgia

Subject of Dispute
Claimant Giorgi Ugulava challenged Paragraph 2 of Article 205 of the Criminal Procedure Code of Georgia, which allowed for the imposition of detention for 9 months for each criminal case, when these cases were related to crimes committed prior to the imposition of detention with regard to Paragraph 1 and Paragraph 6 of Article 18 (right to liberty) of the Constitution of Georgia. The claimant also disputed: A. The norms which allowed the detention based on the probable cause standard (Paragraph 11 of Article 3 and Paragraph 2 of Article 198) with regard to Paragraph 1 of Article 18 of the Constitution; B. the norms which allowed the use of detention for the prevention of crime (the following words of Part 2 of Article 198 “or, will commit a new crime” and sub-paragraph “G” of Article 205) with regard to Paragraph 1 of Article 18; C. the norm which imposed the duty to prove new circumstances before the court on the defense party, in order to revoke or revise a preventive measure (the third sentence of Paragraph 8 of Article 206) with regard Paragraph 1 of Article 42 (the right to a fair trial) of the Constitution.

Reasoning
First, the Constitutional Court interpreted Paragraph 6 of Article 18 of the Constitution of Georgia, according to which, the term of detention on remand of an accused shall not exceed 9 months. Unlike the prior judgment of the Constitutional Court (Judgment N2/3/182,185,191, 29 January 2003), the Court decided that 9 months’ clause did not cease to apply when the case of the defendant was submitted to the court. The goals of the application of detention (administration of justice, prevention of a new crime) remain unchanged during the entire duration of criminal prosecution, until the defendant is found guilty or innocent. Paragraph 6 of Article 18 of the Constitution protects the defendant from being under the pretrial detention for an indefinite term, which may be caused not only by arbitrariness of prosecution, but also delays or errors in the adjudication of the case by the trial court. The Court interpreted that for the purposes of the Constitution, “any person under criminal prosecution” was a defendant until found guilty; “detention on remand” is a constitutional term (its meaning is independent of ordinary legislation), which involves a temporary restriction of freedom for up to maximum of 9 months. Furthermore, the state is not allowed to extend this constitutional term, even when the detention serves legitimate aims – if the court fails to adopt a decision on the guilt of the defendant, he/she must be released from detention.

The aim of Article 18 is to force the state to adopt a judgment of guilt in a timely manner, when the person is under detention, and 9 months are considered to be sufficient to reach this aim. When the person is indicted with several charges, the detention imposed with regard to even one of the charges allows reaching the aims of detention with regard to all charges equally. “In cases of simultaneous indictment with several charges, to determine the maximum term of detention on remand in each criminal case, the time that the defendant spent in custody since the indictment, even if imposed within other criminal case, should be deducted from the applicable term of detention.” Therefore, it is unconstitutional to apply detention on remand against a person in a criminal case, if, since his/her indictment, he/she has spent 9 months in custody (in any criminal case).

The Court noted that the constitutional claim did not preclude requesting the detention for those criminal cases that were committed by a person after he/she was placed in custody or that were committed prior to detention, but appropriate evidence for indictment was only revealed
after he/she was placed in custody. Additionally, the constitutional requirement precludes artificial separation of cases with the goal to prolong the duration of detention when the new grounds (appropriate facts, information) for criminal prosecution were already known to the prosecutors, and they were sufficient for indictment.

The court decided that Paragraph 2 of Article 205 of the Criminal Procedure Code of Georgia did not prevent the aforementioned manipulations to prolong a 9-month term of detention and that it allowed to leave a person in custody in one particular criminal case, in the circumstances when the defendant had already spent 9 months in custody since the moment when enough evidence was available to indict the person. Therefore, the normative content of Paragraph 2 of Article 205 violated Paragraphs 1 and 6 of Article 18 of the Constitution of Georgia.

The Court did not uphold the claimant’s demands in the part where he was disputing the application of detention on the ground of the standard of probable cause and placing a person in custody to prevent the commission of new crimes. The disputed norms gave clear and simple instructions to a court to determine whether the grounds for the detention of the defendant made the totality of evidence and information, which would persuade an objective person in the necessity of the application of detention. Therefore, the disputed norms precluded the unsubstantiated application of detention and the burden of proof fell entirely on prosecution.

The disputed procedure for the revision of the preventive measure was substantially amended during the consideration of the case on merits by the Constitutional Court (third sentence of Paragraph 8 of Article 206 of the Criminal Procedure Code of Georgia), due to which the Court terminated the constitutional proceedings in this part.
THE RULING OF 24 JANUARY 2014
On the procedure of and limitations on the alteration of the Constitution

The Constitutional Court in its ruling of 24 January 2014 recognised that the Law Amending Article 125 of the Constitution, in view of the procedure of its adoption, was in conflict with the Constitution. In addition, Article 170 of the Statute of the Seimas, insofar as it had not established the prohibition against any substantial changes made by the Seimas Committee on Legal Affairs to draft laws amending the Constitution that have been submitted by the subjects that have the right to make a motion to amend the Constitution and had not established the prohibition against the first vote on the substantially changed text of a draft law amending the Constitution, was ruled in conflict with the Constitution as well.

The doctrine of amendments to the Constitution: limitations on amending the Constitution are determined by the Constitution itself. In this ruling, the Constitutional Court comprehensively formulated, for the first time, the doctrine of the amendments to the Constitution by disclosing the limitations on its alteration that arise out of the Constitution itself.

First of all, the Constitutional Court recalled its former doctrinal provisions of the concept, nature, and purpose of the Constitution: the Constitution is the supreme law and it reflects the social contract – the commitment democratically assumed to the present and future generations by all the citizens of the Republic of Lithuania to live in observance of the fundamental rules consolidated in the Constitution and to obey these rules; the Constitution is based on universal and unquestionable values, which are the belonging of the sovereignty to the Nation, democracy, the recognition of human rights and freedoms and respect for them, respect for law and the rule of law, limitation of the scope of powers, the duty of state institutions to serve the people and their responsibility to society, civic consciousness, justice, and the striving for an open, just, and harmonious civil society and state under the rule of law.

The Constitutional Court also emphasised the importance of the stability, harmony, and supremacy of the Constitution. The stability of the Constitution is a legal value of utmost importance and is one of the preconditions for securing the continuity of the state and respect for the constitutional order and law as well as ensuring the implementation of the objectives declared in the Constitution by the Lithuanian nation, upon which the Constitution itself is founded. The stability of the Constitution constitutes such a property of the Constitution that in conjunction with other properties (primarily in conjunction with a special, supreme, legal force of the Constitution) distinguishes the constitutional regulation from the (ordinary) regulation laid down by the legal acts of lower legal force; the Constitution is an integral act, its provisions constitute a single harmonious system, the content of some provisions of the Constitution determines the content of other provisions thereof, and no provision of the Constitution can oppose its other provisions; the nature of the Constitution as an act of the supreme legal force...
itself and the idea of constitutionality imply that the Constitution may not have nor does it have any gaps or internal contradictions.

The Constitutional Court also disclosed the purpose of amendments to the Constitution: any amendments to the Constitution change the content of the provisions of the Constitution and the interrelations between those provisions, also, the balance of the values consolidated in the Constitution might be changed; in case some provisions of the Constitution are amended, there might be changes in the content of the other provisions thereof, as well as that of the overall constitutional legal regulation. The Constitutional Court emphasised that, when amendments to the Constitution are made, the imperative that the Constitution is an integral act must be respected – the imperative stems from Paragraph 1 of Article 6 of the Constitution to the effect that no amendments to the Constitution may violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them: no amendments to the Constitution may oppose any provisions of the Constitution, or values consolidated in those provisions, against one another, *inter alia*, the legal regulation established in the chapters and articles of the Constitution may not be opposed against the constitutional legal regulation established in the constituent parts of the Constitution; no amendment to the Constitution may create any such new constitutional regulation under which one provision of the Constitution would deny or contradict another provision of the Constitution, so that it would make impossible to interpret such provisions as being in harmony.

In view of the disclosed concept, nature and purpose of the Constitution, the value of the stability of the Constitution and the imperative of the harmony of the provisions of the Constitution, it is possible to distinguish two types of the limitations on the alteration of the Constitution: substantive and procedural.

**Substantive limitations on the alteration of the Constitution.** The substantive limitations on the alteration of the Constitution are the limitations consolidated in the Constitution regarding the adoption of the constitutional amendments of certain content. These limitations stem from the overall constitutional regulation; and they are designed to defend the universal values upon which the Constitution, as supreme law and as a social contract, and the state, as the common good of the entire society, are based, as well as to protect the harmony of these values and the harmony of the provisions of the Constitution.

Under the Constitution, five substantive limitations on the alteration of the Constitution are distinguished:

1. The prohibition on denying the constitutional values constituting the foundation of the State of Lithuania: the Constitution does not permit any such amendments thereto that would deny at least one of the constitutional values lying at the foundations of the State of Lithuania – the independence of the state, democracy, the republic, and the innate character of human rights and freedoms, with the exception of the cases where Article 1 of the Constitution would be altered in the manner prescribed by Paragraph 1 of Article 148 of the Constitution, or Article 1 of the Constitutional Law “On the State of Lithuania”, which is a constituent part of the Constitution, would be altered in the manner prescribed by Article 2 of the latter law (i.e. only by referendum, if not less than 3/4 of the citizens of Lithuania with the electoral right vote in favour thereof). The Constitutional Court noted that the values consolidated in Article 1 of the Constitution – the independence of the state, democracy and the republic – form the foundation of the State of Lithuania, therefore, they must not be negated under any circumstances; the principle of recognition of the innate character of human rights and freedoms, inseparably related to the above-mentioned values, is also a fundamental constitutional value; the innate character of human rights and freedom may not be negated, either.
2. The prohibition on denying the geopolitical orientation of the State of Lithuania consolidated in the Constitution – the prohibition on joining any post-Soviet Eastern unions: under the Constitution, no amendments may be made to the Constitution that would deny the provisions of the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”, with the exception of the cases where certain provisions of this constitutional act would be altered in the same manner as provided for in Article 2 of the Constitutional Law “On the State of Lithuania” (i.e., only by referendum, if not less than 3/4 of the citizens of Lithuania with the electoral right vote in favour thereof). The Constitutional Court noted that it is clear from the Preamble to the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” that one adopted it by invoking “the 16 February 1918 and 11 March 1990 Acts on the Restoration of the Independent State of Lithuania, as well as the will of the entire Nation as expressed on 9 February 1991”, thus, the basis of the provisions of this Constitutional Act is the same fundamental principle of the state founded upon the declaration of the sovereign will of the Nation as consolidated in Article 1 of the Constitutional Law “On the State of Lithuania” – the State of Lithuania shall be an independent democratic republic. Therefore, under the Constitution, the provisions of this constitutional act should enjoy the same protection as the provision “[t]he State of Lithuania shall be an independent democratic republic”, which is stipulated in Article 1 of the Constitution and Article 1 of the Constitutional Law “On the State of Lithuania” – they may be amended in the same manner as the alteration of this provision is allowed, i.e. under the same procedure as established in Article 2 of the Constitutional Law “On the State of Lithuania”.

3. The prohibition on denying the geopolitical orientation of the State of Lithuania consolidated in the Constitution – membership of the Republic of Lithuania in the European Union: under the Constitution, as long as the constitutional grounds for membership in the European Union, which are consolidated in Articles 1 and 2 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”, have not been annulled by referendum, it is not permitted to make any such amendments to the Constitution that would deny the commitments of the Republic of Lithuania arising from its membership in the European Union. The Constitutional Court emphasised that the constitutional grounds of the membership of the Republic of Lithuania in the European Union were consolidated in Articles 1 and 2 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union” so as to execute the will of the Nation that the Republic of Lithuania could be a member of the European Union; the aforesaid grounds themselves and the expression of the sovereign will of the Nation, as the source of these grounds, determine the requirement that the provisions of Articles 1 and 2 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union” may be altered or annulled only by referendum.

4. The prohibition on denying the constitutional principle of respect for international law (pacta sunt servanda): the Constitution does not permit any such amendments to the Constitution that would deny the international obligations of the Republic of Lithuania (among them the obligations of the Republic of Lithuania arising from its membership in NATO) and at the same time – the constitutional principle pacta sunt servanda, as long as the said international obligations have not been renounced in accordance with the norms of international law.

5. The prohibition on denying the provisions of the Constitution that enjoy bigger protection: under the Constitution, the Seimas is not permitted to make any such amendments to the Constitution that would deny the provisions of Chapters I and XIV of the Constitution; it is also not permitted to introduce by referendum any such amendments to the Constitution that would, without correspondingly amending the provisions of Chapters I and XIV of the Constitution,
lay down the constitutional regulation contradicting the provisions of Chapters I and XIV of the Constitution. The Constitutional Court noted that, according to Paragraph 2 of Article 148 of the Constitution, the provisions of Chapter I “The State of Lithuania” of the Constitution, as well as of those of Chapter XIV “Alteration of the Constitution” may be altered only by referendum, thus, the values and principles consolidated in these provisions of the Constitution enjoy bigger protection in comparison with those consolidated in other provisions of the Constitution that can also be amended by the Seimas.

Procedural limitations on the alteration of the Constitution. The procedural limitations on the alteration of the Constitution are related to the special procedure for the alteration of the Constitution that is consolidated therein. This procedure is established in Chapter XIV “Alteration of the Constitution” of the Constitution. The Constitutional Court emphasised that the special procedure for the alteration of the Constitution may not be identified with the passage of laws (inter alia, constitutional ones): the provisions of Chapter XIV “Alteration of the Constitution” enjoy bigger protection in order to ensure that the Constitution would be amended only when it is necessary and that any rash amendments to the Constitution could be prevented.

The special procedure for the making amendments to the Constitution, which is established in the Constitution, includes the following special requirements, which are not applied to the passage of ordinary (and constitutional) laws:

1. The Constitution may not be amended during a state of emergency or martial law (Paragraph 2 of Article 147 of the Constitution).
2. The powers of the Seimas to amend the Constitution are limited: the provisions of Article 1 of the Constitution and those of Chapter I “The State of Lithuania” and Chapter XIV “Alteration of the Constitution” thereof may only be altered by referendum (Paragraph 2 of Article 148 of the Constitution).
3. Only special subjects enjoy the right to submit a motion to alter or supplement the Constitution to the Seimas: a group of not less than 1/4 of all the members of the Seimas or not less than 300,000 voters (Paragraph 1 of Article 147 of the Constitution). The said subjects are different in substance from the subjects of legislative initiative – members of the Seimas, the President of the Republic, the Government, and 50 thousand citizens.
4. There is a special procedure for the adoption of amendments to the Constitution at the Seimas: such amendments must be considered and voted at the Seimas twice; there must be a break of not less than three months between the votes (Paragraph 3 of Article 147 of the Constitution).
5. In order to adopt a law amending the Constitution, a qualified majority of votes of members of the Seimas is necessary: a draft law on the alteration of the Constitution shall be deemed adopted by the Seimas if, during each of the votes, not less than 2/3 of all the members of the Seimas vote in favour thereof (Paragraph 3 of Article 148 of the Constitution).
6. A special limitation is established on the submitting of an amendment to the Constitution that has not been adopted to the Seimas for reconsideration: it may be submitted not earlier than after one year (Paragraph 4 of Article 148 of the Constitution).
7. There is a special procedure for the promulgation of laws amending the Constitution: the President of the Republic does not have the right of delaying veto in connection with laws amending the Constitution; the President of the Republic must sign the adopted law on the alteration of the Constitution and officially promulgate it within five days; if the President of the Republic does not sign and promulgate such a law within the specified time, this law shall come into force when the Speaker of the Seimas signs and promulgates it (Paragraphs 1 and 2 of Article 149 of the Constitution).
8. There is a special procedure for the entry into force of a law amending the Constitution: such a law comes into force not earlier than one month after its adoption (Paragraph 3 of Article 149 of the Constitution).

*The geopolitical orientation of the State of Lithuania.* The ruling of 24 January 2014 is also notable because the Constitutional Court developed the doctrine of the geopolitical orientation of the state, which is related to the substantive limitations on the alteration of the Constitution.

The Constitutional Court noted that the fundamental constitutional values consolidated in Article 1 of the Constitution – the independence of the state, democracy, the republic – are closely interrelated with the geopolitical orientation of the State of Lithuania, which is consolidated in the Constitution and implies European and transatlantic integration pursued by the Republic of Lithuania. The geopolitical orientation of the State of Lithuania means the membership of the Republic of Lithuania in the EU and NATO as well as the necessity to fulfil the corresponding international commitments related with the said membership. The geopolitical orientation of the State of Lithuania is based upon the universal constitutional values that are common with the values of other European and North American states.

The geopolitical orientation of the State of Lithuania is expressed in the text of the Constitution both in the negative and positive aspects. The negative aspect is expressed in the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”, whereas the positive aspect – in the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”.

The Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” lays down the limits that may not be overstepped by the Republic of Lithuania in the processes of its participation in international integration and consolidates the prohibition on joining any new political, military, economic, or other unions or commonwealths of states formed on the basis of the former USSR.

The Constitutional Act “On Membership of the Republic of Lithuania in the European Union”, by which the membership of the Republic of Lithuania in the European Union was constitutionally approved, was adopted in order to execute the will of the citizens of the Republic of Lithuania expressed in the referendum. Therefore, the full participation of the Republic of Lithuania, as a Member of the European Union, in the European Union is a constitutional imperative grounded in the expression of the sovereign will of the Nation and the full membership of the Republic of Lithuania in the European Union is a constitutional value.

The Constitutional Court emphasised that the Constitutional Act “On Membership of the Republic of Lithuania in the European Union” establishes the constitutional grounds of the membership of the Republic of Lithuania in the European Union. In case such constitutional grounds were not consolidated in the Constitution, the Republic of Lithuania would not be able to be a full member of the European Union: 1) the Republic of Lithuania as a Member State of the European Union shall share with or confer on the European Union the competences of its state institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas as well as enjoy the membership rights (Article 1); 2) the norms of European Union law shall be a constituent part of the legal system of the Republic of Lithuania; where it concerns the founding Treaties of the European Union, the norms of 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 (Article 2).

Respect for international law, which is also a constitutional value, is related to the geopolitical orientation of the State of Lithuania, which is consolidated in the Constitution. The
The constitutional obligation to participate in the economic and monetary union and the constitutional status of the Bank of Lithuania. The law amending Article 125 of the Constitution that was ruled in conflict with the Constitution in view of the procedure of its adoption had been related to the constitutional institute of the Bank of Lithuania.

The Constitutional Court’s ruling of 24 January 2014 makes it clear that Article 1 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union” may be regarded as the basis for the openness of the Constitution to EU law: this is obvious from the interpretation of the issues of the participation of the Republic of Lithuania in the economic and monetary union and the status of the Bank of Lithuania.

The Constitutional Court noted that one of the areas where, under Article 1 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”, the Republic of Lithuania, as a Member State of the European Union, shares with and confers on the European Union the competences of its state institutions is the economic and monetary union, the currency of which is the euro. The constitutional imperative of the full participation of the Republic of Lithuania in the European Union determines the constitutional obligation of the Republic of Lithuania as a full member to participate in the integration of the member states into the economic and monetary union — to adopt a common currency of this union — the euro — and to confer on the European Union the exclusive competence in the area of monetary policy. Such a constitutional obligation of the State of Lithuania is concurrently an obligation arising from its membership in the European Union, which the State of Lithuania is obliged to fulfil while observing its geopolitical orientation consolidated in the Constitution and the constitutional principle *pacta sunt servanda*.

In view of this fact, upon the adoption of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”, the content of the legal regulation of the constitutional institute of the Bank of Lithuania also changed. Under the Constitution, in order to implement the obligation of the Republic of Lithuania to confer on the European Union the exclusive competence in the area of monetary policy, the competence of the Bank of Lithuania in this area, thus, also in the issuing of currency, must be conferred on the European Central Bank. In view of this fact, the constitutional status of the Bank of Lithuania should be defined as that of the central bank of the Republic of Lithuania, part of the competence of which has been conferred on the European Central Bank, and which is a constituent part of the system of the European central banks. Therefore, under the Constitution, the respective guarantees are also applied to independence of the Bank of Lithuania.

In view of this fact, the Constitutional Court noted that the legislature, when regulating the activities of the Bank of Lithuania, must pay heed to the constitutional status and the respective independence guarantees of the Bank of Lithuania and the Chairperson of its Board, as of an integral part of the European System of Central Banks. This means, among other things, that one is not allowed to establish any such legal regulation to the effect that the preconditions would
be created for the legislature and the executive to exert influence on the Bank of Lithuania, and that the established grounds for the dismissal of the Chairperson of the Board of the Bank of Lithuania before the expiration of the term of his/her powers would not be related to the non-fulfilment of the law-established conditions required for the performance of his/her duties or to the fact that he/she has been guilty of serious misconduct (i.e., the grounds for the dismissal of the Chairperson of the Board of the Bank of Lithuania by expressing political no-confidence).

The subjects that have the right to make a motion to amend the Constitution and the procedure for making such a motion. While deciding whether the Constitution had not been violated in the course of the adoption of the law amending Article 125 of the Constitution, the Constitutional Court had to thoroughly investigate the procedural limitation on the alteration of the Constitution related to the subjects that have the right to make a motion to amend the Constitution, which are established in Paragraph 1 of Article 147 of the Constitution.

The Constitutional Court, while providing the construction of the notion “[a] motion to alter or supplement the Constitution of the Republic of Lithuania”, as employed in Paragraph 1 of Article 147 of the Constitution, noted that it should not be understood literally as meaning an abstract proposal or idea lacking in clarity and concreteness to alter or supplement the Constitution; this notion means a draft amendment to the Constitution – a draft law amending the Constitution.

The right to make a motion for the Seimas to alter or supplement the Constitution, which is enjoyed by the subjects of this right as specified in Paragraph 1 of Article 147 of the Constitution, i.e. a group of not less than 1/4 of all the members of the Seimas or not less than 300,000 voters, is an exceptional right, i.e. only these subjects have the right to submit to the Seimas a concrete draft amendment to the Constitution, i.e. a concrete draft law amending the Constitution. The said right is not conferred on any other subjects. Under the Constitution, only the draft laws amending the Constitution that have been submitted by a group of not less than 1/4 of all the members of the Seimas or not less than 300,000 voters may be considered and voted upon in the Seimas; the Seimas may not consider and vote upon any such motion to alter or supplement the Constitution that would be proposed by subjects other than the subjects specified in Paragraph 1 of Article 147 of the Constitution.

In view of this fact it was noted in the Constitutional Court’s ruling that Paragraph 1 of Article 147 of the Constitution gives rise to the prohibition on changing in substance, during the consideration in the Seimas, the content of a proposed draft law amending the Constitution, submitted by a group of not less than 1/4 of all the members of the Seimas or not less than 300,000 voters, in such a way that would distort the objective of the proposed constitutional regulation, would alter the scope of the proposed constitutional regulation, would introduce essentially different means to achieve the objective sought by the proposed constitutional regulation, or would propose that a different provision of the Constitution be altered. Any draft law amending the Constitution that has been subject to amendments of an essential character should be deemed a new draft law – a new motion to alter or supplement the Constitution, which may be submitted only by the subjects specified in Paragraph 1 of Article 147 of the Constitution. In the course of the consideration of a draft law amending the Constitution in the Seimas, structural subdivisions of the Seimas and individual members of the Seimas have, under the Constitution, the right to propose for the Seimas only such modifications of the draft under consideration that do not affect the draft in substance, or the right to propose that the draft under consideration would be rejected or that the subject who has submitted the draft for consideration would submit a new, essentially changed, draft law.
The Constitutional Court held that, in the course of the adoption of the law amending Article 125 of the Constitution, one had disregarded the prohibition, stemming from Paragraph 1 of Article 147 of the Constitution, against the consideration of a draft law amending the Constitution that is submitted by structural subunits of the Seimas and individual members of the Seimas, whose content would differ in substance from the draft law amending the Constitution that was submitted by a group of not less than 1/4 of all the members of the Seimas.

In view of the overall constitutional legal regulation, inter alia, the aforesaid constitutional status of the Bank of Lithuania, it was emphasised in the Constitutional Court’s ruling that the recognition that the Law Amending Article 125 of the Constitution is in conflict with the Constitution did not mean that the wording of Article 125 of the Constitution that was valid prior to the entry into force of the said law would become effective again (it meant that the Constitution did not establish any exclusive right of the Bank of Lithuania to issue currency).

THE RULING OF 18 MARCH 2014
On criminal liability for international crimes

By means of the ruling of 18 March 2014 adopted in the constitutional justice case dealing with issues related to criminal liability for genocide and other international crimes, the Constitutional Court recognised that Article 99 of the Criminal Code (hereinafter referred to as the CC), insofar as this article provides that actions are considered to constitute genocide if they are aimed at physically destroying, in whole or in part, persons belonging to any national, ethnical, racial, religious, social, or political group (i.e., thus defining genocide in broader terms than under the universally recognised norms of international law), as well as the provision of Article 95 of the CC, under which no statute of limitations for delivering a judgment of conviction is applied to the crime of genocide, were not in conflict with the Constitution. The provision of Paragraph 3 of Article 3 of the CC, under which Article 99 of the CC, laying down criminal liability for genocide, also had a retroactive effect on such actions that were considered to constitute genocide only under national law (directed against persons belonging to social or political groups), was ruled to be in conflict with the Constitution.

In this case at law, the Constitutional Court interpreted the relation between the norms of international law that define international crimes and the norms of national law that regulate criminal liability for the said crimes, by disclosing, in more detail, certain aspects of the constitutional principle of respect for international law, it also reviewed the issues that are important for the statehood of Lithuania (the continuity of the Republic of Lithuania, the legal status of the institutions and participants of the Lithuanian resistance against the Soviet occupation), and provided guidelines on the assessment of the international crimes committed by the Soviet occupation regime.

The constitutional principle of respect for international law. In the Constitutional Court’s ruling, it was held that, under Paragraph 1 of Article 135 of the Constitution, the Republic of Lithuania is obliged to follow the universally recognised principles and norms of international law. The said provision consolidates the constitutional principle of respect for international law, i.e. the principle pacta sunt servanda, which means the imperative of fulfilling, in good faith, the obligations that are assumed by the Republic of Lithuania under international law, inter alia, international treaties, and that also arise under the universally recognised norms of international law (general international law), among other things, the jus cogens norms, that prohibit international crimes and are consolidated in international treaties ratified by the Seimas,
which, as stipulated in Paragraph 3 of Article 138 of the Constitution, are a constituent part of the legal system of the Republic of Lithuania.

Respect for international law is an inseparable part of the constitutional principle of a state under the rule of law, the essence of which is the rule of law. This constitutional principle also embodies the striving for an open, just, and harmonious civil society and a state under the rule of law, as consolidated in the Preamble to the Constitution. The Constitutional Court emphasised that respect for international law is also linked to the striving for an open, just, and harmonious civil society, which implies the openness for universal democratic values and integration into the international community founded on these values.

When interpreting Paragraph 1 of Article 135 and Paragraph 3 of Article 138 of the Constitution, as early as in its ruling of 9 December 1998, the Constitutional Court held that the State of Lithuania, recognising the principles and norms of international law, may not apply substantially different standards to the residents of this country; holding that it is 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.

In view of such a concept of respect for international law, the Constitutional Court formulated the principle of international law as a minimum constitutional standard for the protection of human rights: as prescribed in Paragraph 1 of Article 135 of the Constitution, to fulfil, in good faith, its international obligations arising under the universally recognised norms of international law, the criminal laws of the Republic of Lithuania that are related to liability for international crimes, including genocide, may not establish any such standards that would be lower than those established under the universally recognised norms of international law; disregard for the said requirement would be incompatible with the striving for an open, just, and harmonious civil society and a state under the rule of law, as consolidated in the Preamble to the Constitution and expressed through the constitutional principle of a state under the rule of law.

The Constitutional Court also specified the methods for removing incompatibilities, stemming from the Constitution, between the Constitution and international treaties ratified by the Seimas. It reiterated the doctrinal provisions formulated before that Paragraph 3 of Article 138 of the Constitution, under which international treaties ratified by the Seimas are a constituent part of the legal system of the Republic of Lithuania, should be interpreted in the light of the principle of the supremacy of the Constitution; the principle of respect for international law consolidated in the Constitution implies that in those cases where a national legal act (with the exception of the Constitution itself) establishes such legal regulation that competes with the one established in an international treaty, the international treaty must be applied; in those cases where the legal regulation consolidated in an international treaty that has been ratified by the Seimas and has entered into force competes with the legal regulation established in the Constitution, the provisions of such an international treaty have no priority in terms of application since a fact underlying the legal system of the Republic of Lithuania is that any law or other legal act as well as any international treaties may not be in conflict with the Constitution. In view of this fact, the Constitutional Court noted that, in the event of the incompatibility between an international treaty and the provisions of the Constitution, the duty arises, under Paragraph 1 of Article 135 of the Constitution, for the Republic of Lithuania to remove the said incompatibility, either by renouncing appropriate international obligations established under the international treaty in the manner prescribed by norms of international obligations or by making appropriate amendments to the Constitution.
The continuity and identity of the State of Lithuania. Since the aforesaid case was related to the classification of the crimes committed by the Soviet occupation regime against the residents of Lithuania, the Constitutional Court had to review the issues of the continuity and identity of the State of Lithuania, its resistance against the occupation, and the legal status of the participants of the resistance, which all affect the said classification.

The Constitutional Court recalled that the Act of the Supreme Council of the Republic of Lithuania “On the Re-establishment of the Independent State of Lithuania” of 11 March 1990 provided that the execution of the sovereign powers of the State of Lithuania, abolished by foreign forces in 1940, was re-established, and henceforth Lithuania was again an independent state. The Constitutional Court emphasised that the said provisions of the Act of 11 March 1990 made it clear that the restoration of the independence of the State of Lithuania had been grounded on the continuity of the State of Lithuania, which meant that the aggression that the USSR had begun against the Republic of Lithuania on 15 June 1940, the occupation and annexation of the territory of the Republic of Lithuania had abolished neither the State of Lithuania as a subject of international law nor its sovereign powers; due to the occupation of the territory of Lithuania and demolition of its state institutions, the implementation of the sovereign powers of the State of Lithuania, its international rights, and obligations had been suspended; the annexation of the territory of the Republic of Lithuania perpetrated by the USSR on 3 August 1940, as a continuation of the aggression, had been an act null and void, thus, from the viewpoint of international law, the territory of the Republic of Lithuania had been occupied by another state and it had never been a legal part of the USSR.

The Constitutional Court also emphasised that the provisions “the 16 February 1918 Act of Independence of the Council of Lithuania and the 15 May 1920 Resolution of the Constituent Seimas on the re-established democratic State of Lithuania have never lost their legal force and comprise the constitutional foundation of the State of Lithuania” of the Act of 11 March 1990 made it clear that not only the continuity of the State of Lithuania, but also the identity thereof was upheld: having restored its independence, the Republic of Lithuania, from the viewpoint of international and constitutional law, is a subject of law identical to the State of Lithuania against which the aggression of the USSR was perpetrated on 15 June 1940. The provisions of the Act of 11 March 1990 that the constitution of no other state is valid on the territory of the Republic of Lithuania made it clear that the introduction of the validity of the constitution of any other state (inter alia, the USSR), as well as the imposition of the duties established by such a constitution on citizens of the Republic of Lithuania, had been unlawful.

The Constitutional Court noted that the continuity of the State of Lithuania gives rise to the continuity of citizenship of the Republic of Lithuania, which means that, from the viewpoint of international and Lithuanian constitutional law, the imposition of USSR citizenship upon citizens of the Republic of Lithuania in 1940, as a consequence of the aggression of the USSR, was an act null and void; thus, this act was not a legal ground to lose citizenship of the Republic of Lithuania; consequently, during the years of the Soviet occupation, citizens of the Republic of Lithuania (the persons who held citizenship of the Republic of Lithuania on 15 June 1940 and their children) were also not bound by the obligations that were related to USSR citizenship and unlawfully imposed on them. According to the universally recognised norms of international law, citizens of the Republic of Lithuania had an inalienable right to resist the aggression of another state; the organised armed resistance of citizens of the Republic of Lithuania against the Soviet occupation in 1944–1953 should be assessed as self-defence of the State of Lithuania.

Consequently, in view of the fact that the aggression of the USSR was carried out against the Republic of Lithuania, also, in view of the continuity of the State of Lithuania and of citizenship
of the Republic of Lithuania, the organised armed guerrilla forces should be regarded as the armed forces of the Republic of Lithuania that resisted the occupation, i.e. as volunteer corps of a belligerent country whose members have the status of a combatant. In this context, it should be noted that the service to the State of Lithuania was possible only in the structures of the organised armed resistance against the occupation, among other things, in the structures of the Movement of the Struggle for Freedom of Lithuania (the Council of which constituted the supreme political and military structure and the sole legal authority within the territory of occupied Lithuania).

Guidelines on the assessment of the international crimes committed by the Soviet occupying totalitarian regime. Since the aforesaid case was related to the international crimes committed by the Soviet occupation regime in the territory of the Republic of Lithuania, the Constitutional Court also had to review the international and historical context of the crimes committed by the said regime and to provide guidelines on their assessment.

The Constitutional Court relied largely on the documents of the Parliamentary Assembly of the Council of Europe, firstly, on its Resolution 1481/2006 of 25 January 2006 on the need for international condemnation of crimes of totalitarian communist regimes, which not only condemned such crimes, but also gave their general definition. The said resolution noted that the totalitarian communist regimes have been “[…] without exception, characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom of conscience, thought and expression, of freedom of the press, and also lack of political pluralism”. The same resolution also noted that the crimes of the totalitarian communist regimes “[…] were justified in the name of the class struggle theory and the principle of dictatorship of the proletariat. The interpretation of both principles legitimised the ‘elimination’ of people who were considered harmful to the construction of a new society and, as such, enemies of the totalitarian communist regimes”.

The Constitutional Court drew attention to the fact that the report of 16 December 2005 made by the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe regarding the draft of the aforesaid resolution noted that “[t]he important feature of communist crimes has been repression directed against whole categories of innocent people whose only ‘crime’ was being members of these categories. In this way, in the name of ideology, the regimes have murdered tens of millions of rich peasants (kulaks), nobles, bourgeois, Cossacks, Ukrainians and other groups.” The same report of 16 December 2005 made by the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe also pointed out the following number of people killed by the communist regimes: the former USSR – 20 million; China – 65 million; Vietnam – 1 million; North Korea – 2 million; Cambodia – 2 million; Eastern Europe (excluding the former Soviet Union with the territories occupied by it – 1 million.

In addition, the Constitutional Court took note of Resolution No. 1723 (2010) of the Parliamentary Assembly of the Council of Europe of 23 April 2010 commemorating the victims of the Great Famine (Holodomor) in the former USSR, in which, inter alia, it was held that “[t]he totalitarian Stalinist regime in the former Soviet Union led to horrifying human rights violations which deprived millions of people of their right to life”; “[m]illions of innocent people in Belarus, Kazakhstan, Moldova, Russia and Ukraine, which were parts of the Soviet Union, lost their lives as a result of mass starvation caused by the cruel and deliberate actions and policies of the Soviet regime”; “[w]hile these events may have had particularities in various regions, the results were the same everywhere: millions of human lives were mercilessly sacrificed to the fulfilment of
the policies and plans of the Stalinist regime”; the Parliamentary Assembly of the Council of Europe “strongly condemns the cruel policies pursued by the Stalinist regime, which resulted in the death of millions of innocent people, as a crime against humanity” and “[i]t resolutely rejects any attempts to justify these deadly policies, by whatever purposes [...]”.

In the light of all the above considerations, the Constitutional Court emphasised that crimes against humanity and war crimes are undoubtedly attributable to totalitarian communist regimes, inter alia, the Soviet Union, whilst the crimes committed against certain national or ethnic groups during a certain period might be considered to constitute genocide as defined according to the universally recognised norms of international law.

The Constitutional Court formulated the following guidelines on the assessment of the international crimes committed by the Soviet occupation regime in the territory of the Republic of Lithuania:

– in the territory of the Republic of Lithuania, the Soviet occupation regime perpetrated international crimes that could be qualified, according to the universally recognised norms of international law, as crimes against humanity (killing and extermination of civilians, deportation of residents, their imprisonment and persecution on political and national grounds, etc.) and war crimes (killing and deportation of persons protected under international humanitarian law, forced recruitment of residents of an occupied territory to the armed forces of an occupying state, etc.);

– crimes against the residents of the Republic of Lithuania were a part of the targeted and systematic totalitarian policy pursued by the USSR: repressions against the residents of Lithuania sought to exterminate the basis of the civil nation of Lithuania, the former social and political structure of the State of Lithuania, they were directed against the most active political and social groups of the residents of the Republic of Lithuania. Thus, with consideration of the international legal and historical context – the ideology of the totalitarian communist regime of the USSR upon which the extermination of entire groups of people was grounded, the scale of repressions of the USSR against the residents of the Republic of Lithuania, which was a part of the targeted policy of the extermination of the basis of Lithuania’s civil nation and of the targeted policy of the treatment of Lithuanians as an “unreliable” nation – during a certain period (in 1941, when mass deportations of Lithuanians to the Soviet Union began and non-judicial executions of detained persons were carried out, and in 1944–1953, when mass repressions were carried out during the guerrilla war against the occupation of the Republic of Lithuania), the crimes perpetrated by the Soviet occupation regime, in case of the proof of the existence of a special purpose aimed at destroying, in whole or in part, any national, ethnic, racial or religious group, might be assessed as genocide as defined according to the universally recognised norms of international law;

– in the course of the qualification of the actions against the participants of the resistance against the Soviet occupation as a political group, one should take into account the significance of this group for the entire respective national group (the Lithuanian nation) that is covered by the definition of genocide according to the universally recognised norms of international law; according to the universally recognised norms of international law, the actions carried out during a certain period against certain political and social groups of the residents of the Republic of Lithuania might be considered to constitute genocide if such actions – provided this has been proved – were aimed at destroying the groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation;

– in case of the absence of any proof of such an aim, in its turn it should not mean that respective persons should not be punished for their actions against the residents of Lithuania (for example, their killing, torturing, deportation, forced recruitment to the armed forces of an occupying state, persecution for political, national, or religious reasons) according to the laws of the Republic of Lithuania and universally recognised norms of international law; in view of
concrete circumstances, one must assess whether those actions entail crimes against humanity or war crimes.

Thus, impunity for the international crimes committed by the Soviet occupation regime must be sought to be avoided, regardless of the classification of the said crimes.

**The assessment of the definition of genocide and of the regulation of liability for genocide in the Criminal Code.** When assessing the definition of genocide and the regulation of liability for genocide in the CC, the Constitutional Court applied the aforesaid principle of international law, as a minimum constitutional standard for the protection of human rights, under which the criminal laws of the Republic of Lithuania related to liability for international crimes, including genocide, may not establish any such standards that would be lower than those established under the universally recognised norms of international law.

In order to disclose the said minimum constitutional standard, the Constitutional Court reviewed the provisions of international legal acts (the Convention on the Prevention and Punishment of the Crime of Genocide, the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Statute of the Tribunal for Rwanda, and the Rome Statute of the International Criminal Court), as well as the jurisprudence of international courts (the International Court of Justice of the United Nations, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda). First of all, the Constitutional Court provided the following definition of genocide according to the universally recognised norms of international law:

– “genocide” means deliberate actions (for example, killing members of the protected group, causing serious bodily or mental harm to members of that group, deliberately creating the conditions of life for that group in order to intentionally bring about its physical destruction in whole or in part, imposing measures intended to prevent births within that group, forcibly transferring children of that group to another group) that are aimed at destroying, in whole or in part, any national, ethnic, racial, or religious group; the list of protected groups is exhaustive and it does not include any social and political groups;

– the specific feature of the crime of genocide that makes this crime different from crimes against humanity is the special intent (*dolus specialis*) to destroy the protected group in whole or in part;

– when part of the protected group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole.

It was also noted that, under the universally recognised norms of international law, actions may also be regarded as genocide if they are deliberate actions aimed at destroying certain social or political groups that constitute a significant part of a national, ethnical, racial, or religious group and the destruction of which would have an impact on the respective national, ethnical, racial, or religious group as a whole.

The Constitutional Court noted that, under the universally recognised norms of international law, states are under the obligation to adopt national legislation establishing liability for genocide. In the practice of the states concerned, the said obligation may also be understood as certain discretion, while taking account of a concrete historical, political, social, and cultural context, to establish, in their national law, a broader definition of the crime of genocide than that established under the universally recognised norms of international law, among other things, as the possibility of including, within the respective national law, social and political groups in the definition of genocide. The Constitutional Court also noted that the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal
Court, a party to which the Republic of Lithuania is, and which are universal international treaties that consolidate the universally recognised norms of international law on the grounds of which international crimes are defined, do not preclude the possibility of establishing a broader definition of genocide.

The Constitutional Court held that the Republic of Lithuania had availed itself of that opportunity by including social and political groups in the definition of genocide formulated in Article 99 of the CC; that had been determined by the concrete international legal and historical context – the international crimes committed by occupying totalitarian regimes, in particular, by the Soviet occupation regime, in the Republic of Lithuania. Other (national, ethnical, racial, and religious) protected groups referred to in Article 99 of the CC coincide with the protected groups as established in defining the crime of genocide under the universally recognised norms of international law, thus, when establishing the list of protected groups, the requirement, stemming from Paragraph 1 of Article 135 of the Constitution, that criminal laws relating to liability for international crimes must not establish any such standards that would be lower than those established under the universally recognised norms of international law, is implemented. Therefore, Article 99 of the CC was ruled not to be in conflict with the Constitution.

When deciding whether the provision of Article 95 of the CC, under which no statute of limitations for delivering a judgment of conviction is applied to the crime of genocide, was not in conflict with the Constitution, the Constitutional Court also held that the universally recognised norms of international law (the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the Rome Statute of the International Criminal Court) do not preclude from establishing, in national law, that no statute of limitations, including the statute of limitations for delivering a judgment of conviction, applies to the crime of genocide aimed, as defined under national law, against social or political groups, i.e. groups not included in defining genocide under the universally recognised norms of international law.

The Constitutional Court made a different assessment of the regulation, established in Paragraph 3 of Article 3 of the CC, to the effect that a person may be brought to trial under Article 99 of the CC for the actions aimed at physically destroying, in whole or in part, the persons belonging to any social or political group, where such actions had been committed prior to the time when liability for the genocide of persons belonging to any social or political group was established in the CC; such regulation was in conflict with Paragraph 4 of Article 31 of the Constitution and the constitutional principle of a state under the rule of law.

When interpreting the provision “[p]unishment may be imposed or applied only on the grounds established by law” of Paragraph 4 of Article 31 of the Constitution, the Constitutional Court noted that the said provision consolidates the principle of *nulla poena sine lege*, which means that no person may be punished for an act that was not punishable by law at the time when it was committed. The universally recognised norms of international law permit an exception to the principle of *nullum crimen, nulla poena sine lege*, by providing for the retroactivity of the national laws establishing criminal liability for the crimes recognised under international law or the general principles of law; this exception does not apply to the other crimes specified under national law. This is the only way of complying with the constitutional requirement that criminal laws relating to liability for international crimes must not establish any such standards that would be lower than those established under the universally recognised norms of international law. Thus, in view of the constitutional principle of respect for international law and the striving for an open, just, and harmonious civil society and a state under the rule of law, criminal laws may provide for an exception to the constitutional principle of *nullum crimen, nulla poena sine lege*, which would be applicable to crimes established under international law or the general
principles of law, including the crime of genocide as defined under the universally recognised norms of international law (i.e., the crime of genocide directed exclusively against national, ethnical, racial, or religious groups).

THE RULING OF 11 JULY 2014
On organising and calling referendums

The ruling of 11 July 2014 of the Constitutional Court was adopted in the constitutional justice case in which the issues connected with organising and calling referendums were decided. In this ruling, the Constitutional Court continued the development of the doctrine of amendments to the Constitution that was formulated in its ruling of 24 January 2014 and considered other fundamental issues: the relation between the sovereignty of the Nation and the Constitution, the character of the provisions of the Constitution consolidating the fundamental constitutional values (the eternal or non-amendable constitutional provisions). The Constitutional Court also provided the thorough interpretation regarding the content of the constitutional institute of referendum, by disclosing many new aspects, not considered until then, of the constitutional regulation of organising and calling referendums and by developing the concept of this constitutional institute that was presented in its previous jurisprudence, inter alia, in its ruling of 22 July 1994.

By the ruling of 11 July 2014, it was recognised that:
– the Law on Referendums insofar as it explicitly provides for neither the powers of the Central Electoral Commission to assess whether a draft law amending the Constitution complies with the Constitution in the cases where such a draft law is proposed to be put to a referendum, nor the powers of this commission to preclude an initiative to adopt by referendum such a draft law amending the Constitution that would disregard the requirements stemming from the Constitution was not in conflict with the Constitution since such powers of this commissions had been established implicitly;
– Article 6 of the Law on Referendums, insofar as it had not established the requirement that several issues unrelated by their content and nature, or several unrelated amendments to the Constitution of the Republic of Lithuania, or several unrelated provisions of laws may not be submitted as a single issue in a decision proposed to be put to a referendum, and Article 14 of the same law, insofar as it had provided that the Seimas of the Republic of Lithuania is obliged to adopt a resolution on calling a referendum where the decision proposed to be put to the referendum may not be in line with the requirements stemming from the Constitution, were in conflict with the Constitution.

The Constitutional Court also drew attention to the fact that the Seimas had undertaken the obligation to adopt the Constitutional Law on Referendums – such a law is indicated in the Constitutional Law on the List of Constitutional Laws, which that was adopted in 2012. This constitutional law could rectify the existing shortcomings of the Law on Referendums.

The sovereignty of the Nation and the Constitution: the Constitution is also binding on the national community – the civil Nation itself. The sovereignty of the Nation is a source of the statehood and of the Constitution. The Constitutional Court held that that there are two forms of the implementation of the sovereignty of the nation – direct and indirect (“the Nation executes its supreme sovereign power directly through two main organisational forms: national elections and referendums”). Under the Constitution, a referendum is a form of the direct execution of the supreme sovereign power of the Nation; the Nation may also execute its supreme sovereign
power indirectly – through its democratically elected representatives (representatives of the Nation – members of the Seimas).

It needs to be emphasised that no other subjects may implement the sovereignty of the Nation. As noted by the Constitutional Court, there are not any such subjects that may be equated, or may equate themselves, with the Nation, which enjoys sovereignty and executes its supreme sovereign power either directly or through its democratically elected representatives; in this context, the Constitutional Court recalled the provision of its ruling of 1 December 1994 that no citizens’ initiative group for a referendum may be equated with the Nation or speak on behalf of the Nation, either.

The Constitutional Court emphasised the importance of the Seimas as the representation of the Nation in the implementation of the sovereignty of the Nation: the Seimas is the representation of the Nation, through which the Nation executes its supreme sovereign power. Under the Constitution, there may not be and there is no confrontation between the supreme sovereign power executed by the Nation directly and the supreme sovereign power executed by the Nation through its democratically elected representatives – members of the Seimas; therefore, when the Constitution is interpreted, the direct (through a referendum) and indirect (through the representation of the Nation – the Seimas) forms of the execution of the supreme sovereign power of the Nation may not be opposed to each other.

In this context, it should be noted that Item 3 of Article 67 of the Constitution implies not only the powers of the institution calling referendums – the Seimas – to adopt a resolution on calling a referendum but also its powers to adopt a resolution on refusing to call a referendum on the grounds provided for by law and arising out of the Constitution; such powers of the Seimas as the representation of the Nation may not be treated as ones restricting the sovereignty of the Nation.

As mentioned before, the sovereignty of the Nation is a source of the Constitution. In this respect, the Constitutional Court recalled the statements of the official constitutional doctrine that had been formed before about the nature and purpose of the Constitution: the Constitution is supreme law; it is the legal foundation for the common life of the Nation as the national community; the Constitution reflects the social contract and the obligation of the national community – the civil Nation to create and reinforce the state by following the fundamental rules consolidated in the Constitution.

In view of the fact that the Constitution is the fundamental rules of the common life of the Nation approved by the will of the Nation and the obligation of Nation to live according to such rules, the Constitutional Court drew the conclusion that the Constitution is binding on the state community, i.e. on the civil Nation itself. Therefore, the supreme sovereign power of the Nation may also be executed directly (by referendum), only in observance of the Constitution. Consequently, referendums may be organised and called only by following the procedure established in the Constitution, including the requirements arising out of the Constitution regarding the alteration of the Constitution.

In this context, the Constitutional Court also disclosed the content of the provisions of Article 3 of the Constitution (according to such provisions, no one may restrict or limit the sovereignty of the Nation or make claims to the sovereign powers belonging to the entire Nation; also, they consolidate the right of the Nation and each citizen to resist anyone who encroaches on the independence, territorial integrity, and constitutional order of the State of Lithuania by force): the provisions of Article 3 of the Constitution may not be interpreted in such a way that, purportedly, they imply the right of the Nation to disregard the Constitution, which has been adopted by the Nation itself, i.e. Article 3 of the Constitution may not be invoked in order to justify anticonstitutional sanctions of certain persons. As noted by the Constitutional Court,
the purpose of the provisions of Article 3 of the Constitution is to protect the constitutional values referred to in this article (the sovereignty of the Nation, the independence of the State of Lithuania, its territorial integrity and constitutional order); therefore, these provisions may not be invoked for the purpose of denying the said constitutional values.

In view of this fact, the requirement that the Constitution must be observed when the Nation, *inter alia*, directly (by referendum), executes its supreme sovereign power may not be assessed as a restriction or limitation, referred to in Article 3 of the Constitution, on the sovereignty of the Nation, or as the taking over of the sovereign powers belonging to the entire Nation.

In this context, the Constitutional Court emphasised the importance of *the principle of the supremacy of the Constitution*: the principle of the supremacy of the Constitution is a fundamental requirement for a democratic state under the rule of law; this principle means that the Constitution occupies an exceptional – the highest – place in the hierarchy of legal acts; no legal act may be in conflict with the Constitution; the constitutional order must be defended; the Constitution is the measure of the lawfulness and legitimacy of all the other legal acts; the discretion of all law-making subjects is limited by the supreme law – the Constitution: all legal acts as well as the decisions of all state and municipal institutions and officials must comply with and not contradict the Constitution; the Seimas, as well as other participants of the legislation process, while drafting and adopting legal acts, must bring them into line with the Constitution.

In the context of the considered case, it was emphasised that the Constitutional Court noted in its ruling of 22 July 1994 that this rule arising out of the principle of the supremacy of the Constitution to bring legal acts into line with the Constitution must equally be observed by any group of citizens expressing an initiative to call a referendum – a draft law proposed to be put to a referendum must be brought into line with the Constitution. While summarising, it was held in the ruling of 11 July 2014 that all legal subjects, including law-making subjects, the institutions organising elections (referendums), initiative groups for referendums and other groups of citizens, are bound by the Constitution, they must observe it and must not violate it. Thus, *the constitutional imperative* arises out of the principle of the supremacy of the Constitution *not to put to a referendum any such possible decisions that would not be in line with the requirements arising out of the Constitution*.

In this respect, the Constitutional Court developed the interpretation of the provisions of Article 9 of the Constitution, which was presented in its ruling of 22 July 1994 (that the Constitution does not provide that the implementation of Article 9 of the Constitution, under which a referendum is called by the Seimas in the cases provided for by law as well as where a referendum is requested by not less than 300,000 citizens with the electoral right, may be bound by any additional conditions or decisions of any subjects). It was emphasised in the ruling of 11 July 2014 that the requirement that the Constitution be observed may not be regarded as an additional condition, not provided for in the Constitution, for calling a referendum, which would be binding in the event of implementing Article 9 of the Constitution. Such a requirement arises out of the Constitution itself: the Constitution is also binding on the national community – the civil Nation itself, meanwhile, when the Constitution is interpreted, the direct (through a referendum) and indirect (through the representation of the Nation – the Seimas) forms of the execution of the supreme sovereign power of the Nation may not be opposed to each other. Thus, the duty of the Seimas, stemming from the Constitution, not to call a referendum where the decision proposed to be put to the referendum would not comply with the requirements stemming from the Constitution may not be regarded as the power of the Seimas to adopt a preliminary decision that is not provided for in the Constitution but determines the calling of a referendum, i.e. which limits the supreme sovereign power of the Nation. The provision “[s]overeignty shall
belong to the Nation” of Article 2 of the Constitution, the provision “[t]he Nation shall execute its supreme sovereign power [...] directly” of Article 4, as well as the provision “[t]he most significant issues concerning the life of the State and the Nation shall be decided by referendum” of Article 9 of the Constitution, do not mean that the Nation may, by referendum, establish, also in the Constitution itself, any legal regulation it requests, including a legal regulation not complying with the requirements stemming from the Constitution.

_Eternal (non-amendable) fundamental constitutional provisions._ Since the Constitution gives a meaning to the sovereignty of the Nation and is binding on the civil Nation itself, in the course of the organising and calling of referendums on altering the Constitution the substantive limitations on its alteration arising out of the Constitution must be followed. The Constitutional Court recalled the substantive limitations on the alteration of the Constitution, which were disclosed in its ruling of 24 January 2014 – the limitations, arising out of the Constitution, on adopting amendments of certain content to the Constitution in order to defend the universal values upon which the Constitution and the state are based and to protect the harmony of those values and provisions of the Constitution. These limitations on the alteration of the Constitution are related to the special protection of the constitutional values that constitute the foundation of the State of Lithuania, the geopolitical orientation of the State of Lithuania, which is consolidated in the Constitution (the membership in the European Union and the prohibition on joining any post-Soviet Eastern unions), the constitutional principle of the respect for international law, and the constitutional requirement that the provisions of Chapters I and XIV of the Constitution may be changed only by referendum.

While defining the first of the above-mentioned limitations, it was noted in the ruling of 24 January 2014 that the Constitution does not permit any such amendments thereto that would deny at least one of the constitutional values lying at the foundations of the State of Lithuania – the independence of the state, democracy, the republic, and the innate character of human rights and freedoms, with the exception of the cases where Article 1 of the Constitution would be altered in the manner prescribed by Paragraph 1 of Article 148 of the Constitution, or Article 1 of the Constitutional Law “On the State of Lithuania”, which is a constituent part of the Constitution, would be altered in the manner prescribed by Article 2 of the latter law (i.e., only by referendum, if not less than 3/4 of the citizens of Lithuania with the electoral right vote in favour thereof).

Further interpreting the content of this limitation on the alteration of the Constitution, the Constitutional Court singled out the non-amendable fundamental constitutional provisions that stem from the Independence Act of the Council of Lithuania of 16 February 1918 having the supra-constitutional force¹ and whose repeal would mean the abolition of the sovereignty of the Nation itself (i.e., the destruction of the Nation and the State of Lithuania). It is clear from the Constitutional Court’s ruling of 11 July 2014 that it is not permitted to invoke the Constitution in order to repeal the Act of Independence of 16 February 1918 and the sovereignty of the Nation. The Constitutional Court emphasised that the innate character of human rights and freedoms, democracy, and the independence of the state are such constitutional values that constitute the foundation for the Constitution, as a social contract, as well as the foundation for the Nation’s common life, which is based on the Constitution, and for the State of Lithuania itself. No one may deny the provisions of the Constitution consolidating these fundamental constitutional values, since doing so would amount to the denial of the essence of the Constitution itself.

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¹ As noted by the prominent émigré lawyer Konstantinas Račkauskas, “the Act of 16 February is a supra-constitutional document with which no Constitution or law may be in conflict” (Račkauskas K. _Lietuvos konstitucinės teisės klausimais [On Issues of Constitutional Law of Lithuania]._ New York, 1967, p. 15).
Therefore, even where regard is paid to the limitations on the alteration of the Constitution, which stem from the Constitution itself, it is not permitted to adopt any such amendments to the Constitution that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state; if the Constitution were interpreted in a different way, it would be understood as creating preconditions for abolishing the restored “independent State of Lithuania, founded on democratic principles”, as proclaimed by the Act of Independence of 16 February 1918.

**The constitutional institute of referendums.** This ruling developed the official constitutional doctrine disclosing the content of Article 9 of the Constitution and of the other constitutional provisions related to organising and calling referendums.

According to Article 9 of the Constitution, the most significant issues concerning the life of the State and the Nation are decided by referendum (Paragraph 1); in the cases established by law, the Seimas shall call a referendum (Paragraph 2); a referendum shall also be called if not less than 300,000 citizens with the electoral right so request (Paragraph 3); the procedure for calling and conducting referendums shall be established by law (Paragraph 4).

In the Constitutional Court’s ruling it was noted that, according to the theory of law and constitutional traditions, the referendum is understood as the universal popular vote on the adoption of the Constitution, a law, or separate provisions of a law, as well as on the issues of the domestic and foreign policy. It was underlined that, under the Constitution, a referendum is a form of the direct execution of the supreme sovereign power of the Nation, therefore, decisions on the most significant issues concerning the life of the State and the Nation, once they are adopted by referendum, are mandatory. However, the provision of Paragraph 1 of Article 9 of the Constitution does not preclude the possibility of holding an advisory referendum where namely such a referendum is initiated.

While interpreting the provisions of Article 9 of the Constitution, the Constitutional Court exhaustively disclosed the concept of the most significant issues concerning the life of the State and the Nation that are decided by referendum. It noted that the most significant issues concerning the life of the State and the Nation are, first of all, the issues of altering the provisions of the Constitution, which, under the Constitution, may be decided only by referendum:

– the provision “[t]he State of Lithuania shall be an independent democratic republic” consolidated in Article 1 of the Constitution and in Article 1 of the Constitutional Law “On the State of Lithuania” may be altered only by referendum if not less than 3/4 of the citizens of Lithuania with the electoral right vote in favour thereof (Paragraph 1 of Article 148 of the Constitution and Article 2 of the Constitutional Law “On the State of Lithuania”);

– the provisions of the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” may be altered in the same manner (i.e., only by referendum if not less than 3/4 of the citizens of Lithuania with the electoral right vote in favour thereof) (the Constitutional Court’s ruling of 24 January 2014);

– the provisions of Chapter I “The State of Lithuania” of the Constitution and those of the Chapter XIV “Alteration of the Constitution” thereof may be altered only by referendum (Paragraph 2 of Article 148 of the Constitution);

– the provisions of Articles 1 and 2 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union” may be altered only by referendum (the Constitutional Court’s ruling of 24 January 2014).

Secondly, in addition to those established in the Constitution, the law may provide for other most significant issues concerning the life of the State and the Nation that must be decided by
The Constitutional Court emphasised that when establishing the list of such most significant issues concerning the life of the State and the Nation, the legislature is bound by the imperative that, under the Constitution, not all issues, but only the most significant issues concerning the life of the State and the Nation, must be decided by referendum, and that issues generally not concerning the life of the State and the Nation may not be decided by referendum (for example, the issues that are important for the life of only some municipalities or some territorial or other communities of citizens).

Thirdly, in addition to those established in the Constitution or the law, there may be other most significant issues concerning the life of the State and the Nation that must be decided by referendum: the issues that would be requested to be decided by referendum by not less than 300,000 citizens with the electoral right, or by the Seimas as the representation of the Nation, should be deemed to be such most significant issues, although neither the Constitution nor any other law would indicate that a relevant issue must be decided by referendum.

Fourthly, provisions of laws may also be adopted by referendum (Paragraph 4 of Article 69 of the Constitution). Thus, the Seimas may, on its own initiative or at the request of not less than 300,000 citizens with the electoral right, call a referendum on the adoption of the provisions of a law that regulate a certain most significant issue concerning the life of the State and the Nation. However, under the Constitution, it is not allowed to adopt certain laws by referendum, because, under the Constitution, the adoption of such laws is within the competence of the Seimas, as, for instance: the Seimas approves the state budget by law and supervises its execution (the budgetary function of the Seimas is a classical and one of the most important functions of the parliament in a democratic state under the rule of law); the Seimas establishes state taxes and other compulsory payments; the Seimas establishes the list of constitutional laws by a 3/5 majority vote of the members of the Seimas.

As mentioned before, there is an issue which may not be put to a referendum or submitted to the Seimas at all: this is the repeal of the fundamental values (the innate nature of human rights and freedoms, democracy, or the independence of the state).

While interpreting the constitutional institute of referendums, the Constitutional Court formulated the constitutional imperative for creating the preconditions for determining the actual will of the Nation in a referendum: the direct participation of citizens in the governance of their state is a very important expression of their supreme sovereign power; therefore, a referendum must be a testimony to the actual will of the Nation. In view of this fact, the Constitutional Court noted that, where the most significant issues concerning the life of the State and the Nation are put to a referendum, they must be such issues regarding which it would be possible to determine the actual will of the Nation: inter alia, they must be formulated in a clear and not misleading manner. Consequently, under the Constitution, several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws may not be put to a vote in a referendum as a single issue, since acting otherwise would deny the possibility of determining the actual will of the Nation regarding each most significant issue separately concerning the life of the State and the Nation.

The Constitutional Court also drew attention to the fact that, in the cases where a referendum is initiated pursuant to Paragraph 3 of Article 9 of the Constitution, under which a referendum is called if not less than 300,000 citizens with the electoral right so request, the approval of citizens for calling a referendum must be expressed separately regarding each issue being put to the referendum, i.e. a single signature may not be given in support of an initiative to call a referendum on several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws. Otherwise, no opportunity would be ensured.
for citizens to separately decide regarding their support for each initiative to call a referendum, and it would be impossible to determine whether each of the issues, which are unrelated to one another, is indeed requested to be put to a referendum by the subject indicated in Paragraph 3 of Article 9 of the Constitution – not less than 300,000 citizens with the electoral right.

While interpreting Paragraph 4 of Article 9 of the Constitution, according to which the procedure for calling and conducting referendums shall be established by law, the Constitutional Court disclosed the requirements that arise out of the Constitution for such a law (on referendums). Such requirements can be grouped as follows:

1. The requirement for regulating initiatives to call a referendum: one of the subjects who may exercise the initiative to call a referendum is not less than 300,000 citizens with the electoral right; thus, the formation of this subject and the announcement of an initiative to call a referendum (including requirements for the content and form of an issue proposed to be decided by referendum, requirements for the formation and registration of an initiative group for a referendum, as well as requirements for the collection of signatures in support of calling a referendum and their submission to the institution organising referendums) must be regulated by law.

2. The requirement for regulating the competence of the institution organising referendums: the powers of the institution organising referendums must be established by law. In this context, the Constitutional Court drew attention to the fact that a referendum, as well as an election, is a form of the direct execution of the supreme sovereign power of the Nation, where citizens declare their will through national voting, also that the right to initiate a referendum and to vote in a referendum is granted only to citizens who have the electoral right, as well as that referendums are conducted according to the principles of electoral law, therefore, under the Constitution, referendums must be organised by the institution directly specified in the Constitution – the Central Electoral Commission. As noted by the Constitutional Court, the constitutional status of the Central Electoral Commission implies its certain powers, inter alia, the powers to oversee and take measures that subjects participating in the organisation and conduct of a referendum observe requirements stemming from the Constitution and the laws.

3. The requirements for the content and form of the question put to a referendum that arise out of the aforesaid constitutional imperatives not to put to a referendum any such possible decisions that would not be in line with the requirements arising out of the Constitution, and to create the pre-conditions for determining the actual will of the Nation in a referendum: the requirement that a decision proposed to be put to a referendum must comply with the requirements stemming from the Constitution; the requirements for putting only such questions to a referendum that are formulated in a clear and not misleading manner, that not include several questions unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws.

4. The requirements for establishing particular duties or powers of the subjects of the relations of referendums stemming from the constitutional imperative not to put to a referendum any such possible decisions that would not be in line with the requirements arising out of the Constitution: 1) the requirement for the initiative group for a referendum to bring a decision proposed to be put to a referendum in line with the Constitution (inter alia, to submit to a referendum only such draft amendments to the Constitution that would observe the substantive limitations on the alteration of the Constitution); 2) the requirement for establishing the powers for the Central Electoral Commission in order to ensure that the Constitution and the laws would be followed in the course of the organising of referendums: to verify whether an issue proposed to be decided

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2 While investigating the compliance of the Law on Referendums with the Constitution, the Constitutional Court held that the power, established in the same law, of the Central Electoral Commission to register an initiative group for a
by referendum complies with the requirements established in relation to the content and form of such issues, to refuse to register an initiative group for a referendum that fails to fulfil the duty to bring the decision proposed to be decided by referendum into line with the Constitution, or that proposes deciding by referendum an issue that does not meet other requirements established in relation to the content and form of such issues, for example, where an issue proposed to be decided by referendum is formulated in an unclear and misleading manner, or where several unrelated issues are submitted as a single issue; 3) the requirement for establishing the grounds, which stem from the Constitution, for the Seimas to refuse to call a referendum: the Constitution gives rise to the duty of the Seimas not to call a referendum where the decision proposed to be put to the referendum would not comply with the requirements\(^3\) stemming from the Constitution, \textit{inter alia}, where the issue submitted to the referendum would make impossible to determine the actual will of the Nation (the issue would be unclear and misleading, or would include several unrelated issues, or several unrelated amendments to the Constitution, or several unrelated provisions of laws), or where the provisions of the law proposed to be put to the referendum would be in conflict with the Constitution, or where the proposed amendment to the Constitution would not comply with the requirements\(^4\) stemming from the Constitution.

\textbf{European standards for referendums.} In its ruling of 11 July 2014, the Constitutional Court reviewed the European standards for referendums formulated in the documents of the Council of Europe’s advisory body on constitutional matters, i.e. the European Commission for Democracy through Law (Venice Commission) – the Guidelines for Constitutional Referendums at National Level and the Code of Good Practice on Referendums.

According to the rules adopted in 2001 and set out in the Guidelines for Constitutional Referendums at National Level, a draft new Constitution or draft amendment to the Constitution, which is submitted to a referendum on adopting a new Constitution or altering the existing Constitution, must comply with the procedural and substantive requirements set in relation to texts submitted to a referendum. The compliance with substantive requirements means compliance with essential constitutional principles (democracy, protection of human rights, and the rule of law) as well as with the universally recognised principles and norms of international law. Procedural requirements, among other things, include the unity of the content of the text – amendments to the Constitution put to the single vote must be related to one another, i.e. the text of some proposed amendments to the provisions of the Constitution must not be put to the single vote if it combines amendments that are, in substance, of a different content. The non-compliance of the text with procedural and substantive requirements may constitute a ground

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\(^3\) It was held in the Constitutional Court’s ruling that, when establishing, in Article 14 of the Law on Referendums, the duty of the Seimas to adopt a resolution on calling a referendum where the decision proposed to be put to the referendum may not be in line with the requirements stemming from the Constitution, regard had not been paid to the requirement stemming from the Constitution that the law must lay down a ground for the Seimas not to call a referendum in such a case.

\(^4\) The Constitutional Court drew attention to the fact that a resolution of the Seimas on calling a referendum or on refusing to call it may be subject to constitutional review.
for refusing to put it to the vote. There must be a certain responsible institution that would be empowered, before the vote, to assess the compliance of the text submitted to the referendum with, among other things, procedural and substantive requirements; the judicial review of the observance of the rules governing constitutional referendums must be conducted, in accordance with the respective competence, by either the Constitutional Court or any other court adopting final decisions, which are not subject to appeal.

Procedural and substantive requirements in relation to texts submitted to a referendum, as consolidated in the Code of Good Practice on Referendums, comprising the Guidelines on the Holding of Referendums and the Explanatory Memorandum, which was adopted in 2007, are, in substance, analogous to those set out in the Guidelines for Constitutional Referendums at National Level; in addition, under the Guidelines on the Holding of Referendums, it is necessary to establish such rules on the holding of referendums that, among other things, would create the preconditions for the appeal body – an electoral commission or a court – to consider, as early as before the vote, the question of whether the text submitted to the referendum complies with procedural and/or substantive requirements; appeal to a court against an ensuing decision of the authorised institution must be possible.

THE RULING OF 30 DECEMBER 2015

On reports submitted to the Seimas by state institutions, as well as on accounting by the Prosecutor General to the Seimas and the proposal to dismiss the Prosecutor General from office

The Constitutional Court handed down its ruling of 30 December 2015 in the case in which it had to assess the constitutionality of the legal regulation governing accounting to the Seimas by the heads of state institutions (with the exception of courts), including the Prosecutor General, who are appointed by the Seimas or whose appointment requires the assent of the Seimas, for the activity of their respective institution. In this ruling, the Constitutional Court continued to develop the official constitutional doctrine revealing the powers of the Seimas, as the representation of the Nation, to receive the information required for fulfilling its functions, and defined, in more detail, the possible actions of the Seimas after it receives, inter alia, information, presented in the form of a report, about the activity of various state institutions.

In this ruling of the Constitutional Court, it was recognised that the following was in conflict with the Constitution:

– the provisions of Paragraph 5 of Article 206 of the Statute of the Seimas under which the Seimas had the powers to adopt a resolution on either approving or not approving an annual activity report submitted by the head of a state institution;

– Paragraph 6 of the same article, under which a resolution of the Seimas on refusing to approve such a report could constitute a ground for the Seimas to express no confidence in the head of a state institution where the head of the institution concerned was appointed by the Seimas itself, as well as to dismiss him/her from duties, or to submit a proposal to the President to dismiss the head of a state institution where the assignment of the head concerned required the assent of the Seimas;


The provisions of Paragraph 3 of Article 4 of the Law on the Prosecution Service, under which the Prosecutor General accounts to the Seimas for the activity of the Prosecution Service
by submitting an annual report on the activity of the Prosecution Service, and Paragraph 6 of Article 22 of the same law, which provides that the Prosecutor General may be dismissed from office upon the proposal of the Seimas, were found not in conflict with the Constitution.

In this ruling, the Constitutional Court emphasised that the Seimas – the representation of the Nation – must have exhaustive and objective information about the processes taking place in the state and society, as well as about the situation in various areas of the life of the state and society and problems arising therein; the availability of such information is a necessary precondition for the effective activity of the Seimas in the interests of the Nation and the State of Lithuania, as well as for the proper fulfilment of its constitutional duty. The receipt of information by the Seimas, among other things, about the activities of various state institutions constitutes a public interest, which is linked with the striving for an open society, consolidated in the Preamble to the Constitution, also with the principle, laid down in Article 1 of the Constitution, that the State of Lithuania is a republic, as well as with the principles of parliamentary democracy established in various provisions of the Constitution. Under the Constitution, the Seimas is obliged to establish such a legal regulation that would create the legal preconditions for receiving the information necessary to perform its constitutional powers.

Therefore, when assessing the constitutionality of the impugned provisions of the Statute of the Seimas, the Constitutional Court noted that, in order to ensure the fulfilment of its powers, the Seimas may provide for a legal regulation that would create the legal preconditions for receiving information about the activities of state institutions whose heads are appointed by the Seimas, or the appointment of whose heads requires the approval of the Seimas, including where such information is received in the form of a report submitted by the heads of the said institutions on the annual activities of their respective institutions.

On the other hand, it was held in the ruling that the principle of the separation of powers, as consolidated in Article 5 and other articles of the Constitution, and the functions of the Seimas, as reflected in the entirety of the powers conferred on the Seimas under Article 67, do not imply, with regard to the information and, thus, also activity reports, to be submitted by state institutions to the Seimas, any such legal regulation under which, after the head of a state institution submits the appropriate information in the form of a report, the procedure of accounting to the Seimas by the institution (or its head) would be considered not completed until the Seimas has approved the submitted report, i.e. under which it would be required that the Seimas not only becomes acquainted with and considers the information provided in the report, but also adopts a special resolution on approving the submitted report.

The Constitutional Court emphasised that, in a democratic state under the rule of law, officials and their institutions must observe laws and follow law in their activities; where state officials perform their functions while observing the Constitution and law and acting in the interests of the Nation and the State of Lithuania, they must be protected against any pressure and unjustified interference with their activities, and, where they conscientiously perform their duties, they must not be subject to any threats directed against their person, rights, or freedoms. When interpreting Paragraphs 1 and 2 of Article 5 and Article 67 of the Constitution in the context of the constitutional principle of a state under the rule of law, the Constitutional Court held that, if the Seimas were vested with the powers to adopt a resolution on giving or not giving its approval to annual activity reports submitted by the heads of state institutions, these heads would not be protected against the possible pressure or unjustified interference with their activities, despite the fact that they would perform their functions in observance of the Constitution and law and while acting in the interests of the Nation and the State of Lithuania; such a legal regulation would be incompatible with the Constitution; and the establishment of such a legal regulation would unreasonably expand the constitutional powers of the Seimas.
In the light of these arguments, the impugned legal regulation consolidated in the Statute of the Seimas, as well as the provision (which was based on this legal regulation and was established in a law-applying act – the aforementioned resolution of the Seimas) by which the Seimas did not approve the report on the activity of the Prosecution Service, was held in conflict with Paragraphs 1 and 2 of Article 5 and Article 67 of the Constitution. The said provision of the resolution of the Seimas was also found to be in conflict with Paragraph 3 of Article 118 of the Constitution, in which the principle of the independence of prosecutors is entrenched.

At the same time, the Constitutional Court recalled that, in the area of the legal regulation of the activities of state institutions and officials, the principles of a state under the rule of law are implemented, among other things, by combining trust in state officials with the public control of their activities and with their responsibility to the public; the legal system must provide for the possibility of removing from office those state officials who violate laws, who raise personal or group interests above the interests of society, or who discredit state authority by their actions. Therefore, as it was noted by the Constitutional Court, the Constitution does not prevent the legislature, in regulating the removal of the heads (officials) of state institutions who are appointed by the Seimas, or appointed by the President upon the approval of the Seimas, from establishing such a legal regulation under which, where considering an annual activity report of a state institution, or where the information provided in such a report makes it clear that the head of the state institution concerned may have violated laws or have raised personal or group interests above the interests of society, the Seimas would be able: 1) to consider and adopt a resolution on no confidence in such a head of the state institution, as provided for in Article 75 of the Constitution; 2) by means of an act (statement, declaration, resolution, etc.), provided for in the Statute of the Seimas, for expressing the will of the representation of the Nation concerning the issues significant to the state, to publicly address the President and propose that the head of a state institution who was appointed by the President upon the approval of the Seimas be dismissed from his/her office after applying the appropriate grounds of dismissal provided for by the law (these grounds may not include the application to the President by the Seimas, which is not binding on the President). The sole refusal, however, by the Seimas to approve an annual activity report submitted by a state institution (or a legitimate refusal by the head of a state institution to submit information requested by the Seimas) may not serve as a ground for the Seimas to express no confidence in the head of the state institution where the head of the state institution concerned is appointed by the Seimas, or to submit a proposal to the President that the head of the state institution be dismissed from office where the head concerned is appointed by the President.

When assessing the compliance of Paragraph 3 of Article 4 of the Law on the Prosecution Service with the Constitution, the Constitutional Court noted that the legislature is obliged to balance the constitutional provision that state institutions serve the people with the constitutional principle of the independence of prosecutors. The Constitutional Court held that the reconcilement of these constitutional values would be ensured if the Prosecutor General were obliged, by law, to submit to society, as well as to the Seimas and the President of the Republic, who participate in the process of the appointment of the Prosecutor General and his/her release from duties, information (public reports) about the implementation of the priorities pursued under the penal policy, the defence of the public interest, the organisation of the work and the directions of the activity of the Prosecution Service, the organisation of the cooperation between Lithuanian and foreign pretrial investigation establishments or other institutions, the time limits set for the investigation of criminal acts, particular problems arising in the work of the Prosecution Service, etc. This information (public reports) can be submitted in the form of an annual report on the activity of the Prosecution Service. At the same time, the Constitutional Court recalled that it is not permitted to establish any such legal regulation that would oblige prosecutors to submit
accounts on the performance of their constitutional functions to the legislative or executive authorities, or would, among other things, oblige the Prosecutor General to submit such accounts on the activity of the Prosecution Service that would need to be approved by the Seimas, the President of the Republic, or the Government; the establishment of such obligations would mean interference with the activities of prosecutors, who perform the functions provided for in the Constitution, as well as the restriction of their independence.

According to the Constitutional Court, in general, the Constitution permits accounting by the Prosecutor General for the activity of the Prosecution Service to the Seimas (who participates in the process of the appointment of the Prosecutor General and his/her release from duties) in the form such as an annual report on the activity of the Prosecution Service, provided such accounting does not create any preconditions for violating the constitutional principle of the independence of prosecutors. As held in the ruling, the legal regulation laid down in Paragraph 3 of Article 4 of the Law on the Prosecution Service, under which the Prosecutor General accounts to the Seimas by submitting an annual report on the activity of the Prosecution Service, does not mean in itself that this legal regulation obliges the Prosecutor General to submit to Seimas such a report on the activity of the Prosecution Service that would, subsequently, be assessed by the Seimas who would decide whether to approve this report, i.e. that the procedure of accounting by the Prosecutor General to the Seimas is considered not completed until the Seimas has not approved the submitted report. This legal regulation should be interpreted only as the obligation of the Prosecutor General to submit to the Seimas information, in the form of a report, about the implementation of the priorities pursued under the penal policy, the defence of the public interest, the organisation of the work and the directions of the activity of the Prosecution Service, the organisation of the cooperation between Lithuanian and foreign pretrial investigation establishments or other institutions, the time limits set for the investigation of criminal acts, particular problems arising in the work of the Prosecution Service, etc., i.e. accounting by the Prosecutor General to the Seimas in the form of an annual report on the activity of the Prosecution Service should be related only to the obtaining and discussion of the information necessary for legislation and the performance of other functions of the Seimas. Only if understood in this way, can this legal regulation create no preconditions for the Seimas to interfere with the activity or restrict the independence of prosecutors, who perform the functions provided for in the Constitution.

With regard to the constitutionality of Paragraph 6 of Article 22 of the Law on the Prosecution Service, which provides that the Prosecutor General may be dismissed upon the proposal of the Seimas, the Constitutional Court noted that the constitutional principle of the independence of prosecutors prohibits the legislature from establishing such a legal regulation of accounting by the Prosecutor General to the Seimas under which a resolution of the Seimas on refusing to approve an annual report on the activity of the Prosecution Service would constitute a ground for the Seimas to decide to put forward the proposal to dismiss the Prosecutor General. On the other hand, in general, the Constitution does not preclude any such legal regulation under which the Seimas, who participates in appointing the Prosecutor General and releasing him/her from duties, could propose that the President dismiss the Prosecutor General under the grounds provided for in the law. The Constitutional Court held that, after the impugned provisions of the Statute of the Seimas were found in conflict with the Constitution, the aforementioned provision of the Law on the Prosecution Service did not extend to any such cases where a resolution of the Seimas on refusing to approve an annual report on the activity of the Prosecution Service would serve as a ground for the Seimas to propose that the Prosecutor General be dismissed from office; therefore, the aforementioned provision of the Law on the Prosecution Service was held not in conflict with the Constitution.
THE DECISION OF 28 JUNE 2016
On the interpretation of the provision of a ruling of the constitutional court that is related to the right of petition

In this decision, subsequent to a petition of the Seimas, the Constitutional Court interpreted a certain provision of its ruling of 26 January 2006. By the said provision, the Constitutional Court declared unconstitutional the stipulation of the Law on Petitions, whereby it was not allowed to challenge before a court the decision of the Seimas on refusing to grant a complaint filed against the decision of the Seimas Petitions Commission not to deem an application to be a petition or to refuse to accept a petition for consideration where such a decision of the Seimas was not based on the grounds laid down in laws.

The Constitutional Court interpreted this provision as meaning that, under the Constitution, a citizen has the right to apply to a court under procedure established by law against the decision of the Seimas on refusing to grant a complaint filed against the decision of the Seimas Petitions Commission not to deem an application to be a petition or to refuse to accept a petition for consideration where such a decision of the Seimas is not based on the grounds established in the Law on Petitions or other laws, or is based on grounds that are not laid down in the Law on Petitions or other laws; if a court (judge) considering the relevant case faces doubts about the legality of such a decision of the Seimas, the said court (judge) must suspend the consideration of the case and apply to the Constitutional Court in order that such doubts may be removed.

The Constitutional Court recalled the fact that, under the Constitution, every person who believes that his/her rights or freedoms have been violated has the right to judicial defence of his/her constitutional rights or freedoms that have been violated; under the Constitution, a legal situation where it is impossible to defend a certain right or freedom of persons (as well as to defend such a right before a court), even though those persons believe that such a right or freedom has been violated, is impermissible. Under the Constitution, the legislature has the duty to lay down such legal regulation by means of which all disputes regarding the violation of the constitutional rights or freedoms of persons could be settled in a court.

In this decision, the Constitutional Court held that, under Article 106 of the Constitution, individuals do not have the right to directly address the Constitutional Court for determining the legality of the acts of the Seimas, the President, or the Government even when the constitutional review of such acts falls under the competence of the Constitutional Court and they could violate the rights or freedoms of those persons. However, when interpreting Paragraph 2 of Article 6, Paragraph 1 of Article 30, Paragraph 1 of Article 30, Paragraph 1 of Article 109, Article 110, and the constitutional principle of a state under the rule of law, the Constitutional Court noted that, the right of every person to defend his/her rights on the basis of the Constitution and the right of the person whose constitutional rights or freedoms are violated to apply to court also imply that each party in a court case which has doubts over the compliance of the law or other legal act (part thereof) that may be applied in that case with the Constitution (or another higher-ranking legal act), where the investigation into the compliance of the said law or other legal act (part thereof) with the Constitution (or another higher-ranking legal act) falls under the jurisdiction of the Constitutional Court, has the right to apply to the court of general jurisdiction or the respective specialised court, established under Paragraph 2 of Article 111 of the Constitution, which considers the said case, requesting that the court in question suspend the consideration of the case and apply to the Constitutional Court. Thus, the fact that the constitutional right of persons has been violated by a legal act (i.e., by a certain act of the Seimas, the President, or the Government) the investigation into the legality of which falls, under the Constitution, under the exclusive competence of the Constitutional Court, where those persons, under the Constitution, have no
powers to directly initiate a constitutional justice case in the Constitutional Court for determining the legality of such an act, does not mean that such persons are not allowed in general to defend their violated rights or freedoms, i.e. such persons are allowed to defend them before a court as well. The Constitution consolidates the right of persons whose constitutional rights or freedoms have been violated to apply to a court. This right implies not only the fact that, in such situations, the rights and freedoms of persons, their legitimate interests and legitimate expectations must and can be defended, but also the fact that courts (judges), while considering cases, have the duty to apply to the Constitutional Court when they face doubts over the compliance of an act (part thereof) adopted by the Seimas, the President, or the Government with higher-ranking legal acts.

The Constitutional Court noted that, under the Constitution, as well as Paragraph 3 of Article 30 and Paragraph 3 of Article 33 thereof, the legislature, while regulating the relations of petitions, must lay down such a legal regulation that would introduce the possibility of challenging before a court the final decision of an institution that accepts petitions to refuse to deem an application to be a petition or to refuse to accept a petition for consideration where such a decision is not well founded. The constitutional right of petition of citizens must be defended in a real and effective rather than perfunctory manner.

In view of the fact that, under the Constitution, while administering justice, courts (judges) must invoke only such laws that are not in conflict with the Constitution and may not apply any legal act that is in conflict with the Constitution and/or another higher-ranking legal act, in cases where the decision to refuse to deem an application filed by a citizen to be a petition or to refuse to accept a petition for consideration is adopted by a state institution (the Seimas, the Government, the President), where the consideration of the legality of acts adopted by such an institution falls under the competence of the Constitutional Court, the court (judge) that considers the relevant case, when faced by doubts over the legality of such an act, has the duty to suspend the consideration of the case and to apply to the Constitutional Court for determining the compliance of the decision adopted by a state institution with the Constitution (other higher-ranking legal acts) where such a decision, in the opinion of the court considering the case in question, is not based on the grounds established in the law. When the court (judge) that considers the respective case, upon assessing the evidence and other material of the case and upon establishing the relevant important circumstances, is not faced by doubts about the compliance of the act adopted by an institution of state power, where such act refuses to deem an application of a citizen to be a petition or refuses to accept a petition for consideration, with higher-ranking legal acts, including the Law on Petitions, such a court (judge) has the constitutional powers to consider the said case on its merits.

In this decision, the Constitutional Court noted that the legislature must clearly indicate in a law the manner of applying to a court regarding the defence of the constitutional right of petition of persons and must therein clearly specify which court has the jurisdiction in such matters (for example, special competence exercised by courts of general jurisdiction or specialised courts may be established, or a new specialised court may be founded, etc.). If the legislature failed to introduce the real possibilities of defending the right of petition of citizens, which is guaranteed in Paragraph 3 of Article 33 of the Constitution, and, among other things, if it failed to establish a procedure for challenging before a court the final decisions to refuse to deem an application to be a petition or to refuse to accept a petition for consideration, the effectiveness of the constitutional right of petition of citizens would be denied, the practical implementation of the said right would be restricted and, at the same time, the right of persons to apply to a court regarding the defence of their right of petition would be violated.

The Constitutional Court refused to interpret the provision pointed out by the petitioner asking whether it also meant that citizens must have the opportunity to challenge before a court the relevant decision adopted by the Government, since this issue was not investigated in the ruling of 26 January 2006.
The principal findings of the judgment
The Constitutional Court interpreted the following as meaning that:

1) under Paragraph 1 of Article 681 of the Constitution, the implementation of a mandate covers all parliamentary and non-parliamentary political activity of a member of Parliament, including the adoption of laws at the plenary sittings of Parliament, participation at the meetings of special parliamentary commissions, other activity that is directly connected either with the legislation process or with the supervision of the Government, participation in the work of parliamentary delegations, as well as meetings with voters;

2) The provisions “In the exercise of their mandate, the Parliament members shall be in the service of the people” and “Any imperative mandate shall be deemed null and void” of Paragraphs 1 and 2 of Article 68 of the Constitution mean that:
   – the mandate of a representative of the people defines the right granted by the people of the Republic of Moldova as the holder of national sovereignty to the members of Parliament in order that they, in accordance with constitutional and legislative provisions, implement legislative power as a constituent part of state power;
   – the members of Parliament implement their mandate directly, freely, according to their own convictions, and in the interests of all the people;

3) under Paragraph 22 of Article 69 of the Constitution, the office of a member of Parliament may cease on his/her mandate withdrawal on the conditions specially provided for by the Constitution and by the laws on the organisation and activity of Parliament and on the status of the members of Parliament.

The facts
In 2012, two members of the Parliament of the Republic of Moldova requested the Constitutional Court to interpret Paragraphs 1 and 2 of Article 68 and Paragraph 2 of Article 69 of the Constitution. The authors of the application specified that the members of the parliamentary political group of the Communist Party, by giving various reasons, boycotted for a prolonged period plenary sittings and the work in special parliamentary commissions (in September–December 2009, they missed 159 sittings/meetings; in February–September 2010, they missed 951 sittings/meetings; in 2011, they missed 623 sittings/meetings; in 2012, they did not participate in such sittings/meetings at all). According to the authors of the application, the provision “In

1 Article 68 “Representative mandate”: “1. In the exercise of their mandate, the Parliament members shall be in the service of the people. 2. Any imperative mandate shall be deemed null and void.”

2 Paragraph 2 of Article 69 “Mandate of the Parliament members”: “2. The office of the Parliament member shall cease at the date of legal assembly of the newly elected Parliament, on his/her resignation, mandate withdrawal, incompatibility or demise.”
the exercise of their mandate, the Parliament members shall be in the service of the people” of Paragraph 1 of Article 68 of the Constitution means that state power is implemented by the members of Parliament when they directly participate in plenary sessions and at the meetings of special parliamentary commissions. In the opinion of the authors of the application, those members of Parliament who do not participate in parliamentary plenary sessions or at the meetings of parliamentary commissions and who avoid implementing the sovereignty of the people violate the duty to observe the Constitution and laws; therefore, their mandates must be withdrawn.

**Key legal points**

The essence of the issue raised in the application is whether it is allowed to withdraw the mandate of a member of Parliament without his/her consent in cases where he/she does not participate in plenary sittings or at the meetings of special parliamentary commissions. In order to answer this question, the Constitutional Court assessed the content of the mandate of a representative of the people, the fact that an imperative mandate is null and void, the irrevocability of the mandate of a representative of the people, and the cases when the mandate of a member of Parliament may be withdrawn.

**The arguments of the Court**

*On the content of the mandate of a member of Parliament.* The mandate of a member of Parliament defines the public office that the respective person receives from the electorate as a result of an election in order that he/she would represent the electorate by implementing the powers of Parliament. The mandate of a member of Parliament is the set of rights and duties of a member of Parliament. The mandate of a member of Parliament is implemented inside and outside Parliament. The content of such a mandate is composed of various political rights of a member of Parliament: the right of parliamentary initiative (this right may find its expression in lawmaking initiatives (drafting legal acts, submitting proposals on amending legal acts) and in collective initiatives (voting on no confidence in the Government, applying to the Constitutional Court concerning the compliance of normative legal acts with the Constitution, putting a motion on convening the extraordinary sessions of Parliament); freedom of self-expression (the right of members of Parliament to make their views known and to vote); the rights related to parliamentary control (inquiries for the Government and its members, the preparation of interpellations, the expression of no confidence, requests for information); the rights related both to the organisation of parliamentary work and to parliamentary activities (the right to vote and be elected to the structural subunits of Parliament, to the groups of interparliamentary links with other states, and to parliamentary delegations). Thus, the role of a member of Parliament is not restricted to participating in the sittings in which voting takes place. Measuring the activity of a member of Parliament in the legislative process would prove difficult. It would be impermissible to concentrate solely on counting how many times a member of Parliament was absent during voting, how many questions he/she asked, or how many draft laws submitted. Since the members of Parliament are elected representatives of the people and represent all the electorate, dialogue with the electorate and solving their problems constitute a significant component of the activity of a member of Parliament. The mandate of a member of Parliament expresses his/her relation not only with the voters who elected him/her, but with all the people to whom he/she serves; therefore, the provision “shall be in the service of the people” means that from the moment the members of Parliament are elected until the expiry of their mandate each member of Parliament is a representative of all the people, his/her duties include acting in the service of the general interests of the people, but not only the interests of his/her party. Implementing their mandate,
members of Parliament obey only the Constitution and laws; they must adopt such decisions that, to the best of their knowledge, serve the common good.

**On the prohibition on withdrawing the mandate of a representative of the people and the non-validity of an imperative mandate.** In line with the practice of the most countries of the world, the Constitution of the Republic of Moldova rejects any form of an imperative mandate and establishes the mandate of a representative character. Thus, the members of Parliament do not act as representatives of only a part of the population, they may not defend the interests of separate groups only, and they do not have to fulfil the obligations undertaken before election, or to yield to the demands of the electorate in the course of implementing their mandate. The members of Parliament are completely free to implement their mandate. Elected persons have the right to refuse supporting a party or its group in Parliament. If his/her conduct harmed his/her party or such a group, an appropriate member of Parliament may be expelled from the party or group; however, such a member of Parliament does not lose his/her mandate. Still, this does not mean that, after election, a member of Parliament should not fulfil the undertaken obligations and should not submit to the discipline of vote of the parliamentary group to which he/she belongs. The logic of free representation implies that a mandate is irrevocable, i.e. voters may not demand its early withdrawal. The irrevocability of a mandate is a means of protecting the freedom and independence of a member of Parliament. The electorate may express their dissatisfaction with the member of Parliament who was elected by them or with the way how he/she implements his/her powers only by refusing to vote for him/her again during the next election. On the other hand, the representative character of the mandate of a member of Parliament does not mean that after the election any communication between the member of Parliament and the electorate is interrupted. Public opinion exerts influence on members of Parliament. If a member of Parliament were indifferent to the expectations of people, the principle of representation would become just a fiction. The non-validity of an imperative mandate and the representative character of the mandate of a member of Parliament means that the electorate (or parties) cannot recall the mandate that was entrusted to him/her even if such a member of Parliament is reluctant, under various pretexts, to implement the powers of the legislative branch.

**On the termination of the powers of a member of Parliament as a result of the withdrawal of the mandate.** Under Article 69 of the Constitution, mandate withdrawal is among the cases where the powers granted to a member of Parliament cease. Mandate withdrawal is a forced measure and is carried out against the will of the respective member of Parliament. So far the said constitutional norm has not been particularised in legislative provisions; the mechanisms of its application have not been established, either. The establishment of the legal regulation of the withdrawal of the mandate of a member of Parliament, among other things, in cases where a member of Parliament is reluctant to perform his/her duties, is a prerogative of Parliament. Even though the members of the parliaments of most countries are obliged to participate in plenary sittings or at the meetings of parliamentary commissions, practice in foreign states shows that a member of Parliament is held liable only for multiple absence in plenary sittings or at the meetings of parliamentary commissions. It is unquestionably important that the withdrawal of a mandate is applied as an exceptional and extreme measure only in cases provided for in a law. Otherwise, the said institute can become a dangerous weapon in the hands of a parliamentary majority directed against the opposition or minority groups. Unlike non-participation in sittings or meetings without valid reason, a parliamentary protest means that such a refusal to participate in a sitting or a meeting is politically motivated. A parliamentary protest is such a method of
political struggle where a member or a group of members of Parliament say “no” to certain actions of the majority and, without resorting to violence, express their opposition against, in their opinion, illegal actions or decisions, or against those actions or decisions that are contrary to the common interest. Thus, the provision “mandate withdrawal” is not applicable to the actions of a member of Parliament that fall within the meaning of a parliamentary protest, unless such actions are expressed in the form of physical or psychological violence. The manner of a parliamentary protest, as well as the conditions of and making an announcement about a parliamentary protest, must be regulated at the legislative level in order to eliminate any doubts about whether an action in question is a protest or a failure to attend a parliamentary sitting or meeting without valid reason. A member of Parliament or the chairperson of a parliamentary political group must publicly announce that a parliamentary protest will be organised, must specify the reasons of such a protest and the demands the satisfaction of which will end the said protest. In view of the principles of democracy and political pluralism, the Constitutional Court considered that a such legal regulation that would establish the possibility of withdrawing the mandate of a member of Parliament for using certain forms of a parliamentary protest that are an instrument of political struggle, even where such forms of a parliamentary protest are aimed at precluding or postponing the adoption of certain decisions, would be in conflict with the Constitution.

THE JUDGMENT OF 22 APRIL 2013 (APPLICATION NO. 10A/2013)

The principal findings of the judgment
The Constitutional Court of the Republic of Moldova recognised that:
1) the 8 March 2013 decree of the President by which the Government was forced to resign was not in conflict with Constitution;
2) the 10 April 2013 decree of the President on the appointment of the Prime Minister was in conflict with the Constitution.

The Constitutional Court also stated that, within the meaning of Paragraph 3 of Article 1, Paragraph 2 of Article 101, and Paragraph 25 of Article 103 of the Constitution:
– the head of the Government that is forced to resign as a result of expressed no confidence due to the suspicion of corruption may not continue in his/her office;
– if the Government is forced to resign as a result of expressed no confidence due to the suspicion of corruption, the President has the constitutional duty to appoint as the interim Prime Minister such a member of the Government whose integrity is not questioned;
– the President is not obliged to consult with Parliament over the appointment of the interim Prime Minister.

3 Paragraph 3 of Article 1: “The Republic of Moldova is a democratic and governed by the rule of law State, in which human dignity, his/her rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed.”
4 Paragraph 2 of Article 101: “In case of impossibility of the Prime Minister to discharge his/her functional duties or in case of his/her demise, the President of the Republic of Moldova shall designate another Government member to fulfil the interim office of Prime Minister until the formation of the new Government. The interim office, during the period of impossibility to perform the functional duties, shall cease whether the Prime Minister resumes his/her activity within the Government.”
5 Paragraph 2 of Article 103: “The Government, in case of expression by the Parliament of the vote of no confidence, the Prime Minister resignation or pursuant to the terms under paragraph (1), shall perform only the functions of administration of public affairs, until the taking the oath of a new Government.”
The facts
By its decision of 5 March 2013, Parliament expressed no confidence in the Government. The no confidence in the Government was expressed mainly on the basis of corruption suspicions. On 8 March 2013, the Prime Minister tendered the resignation of the Government to the President. By his decree issued on the same day, the President accepted the resignation of the Government and pointed out that the resigned Government would retain only the powers to manage public affairs until the members of a new Government were sworn in. By his decree of 10 April 2013, the President appointed as the Prime Minister the same person who had headed the resigned Government and authorised him to prepare a new programme of the Government as well as to submit the list of the members of the Government to Parliament.

Key legal points
A group of members of Parliament, the authors of the application, applied to the Constitutional Court and requested the interpretation of the provisions of the Constitution that regulated the situations where the Government is forced to resign after Parliament expresses no confidence in it, as well as to assess whether the decrees of the President by which he forced the Government to resign and appointed as the interim Prime Minister the person who was forced to resign together with the Government headed by him after Parliament expressed no confidence due to the suspicion of corruption. The authors of the application expressed the opinion that the principle of the rule of law would be violated if the President appointed as the interim Prime Minister the person who headed the Government that was forced to resign as a result of expressed no confidence due to the suspicion of corruption. According to the group of members of Parliament, it is also not allowed to appoint such a person as the Prime Minister and to give him/her the task of forming a new Government.

The arguments of the Court
The rule of law is a constitutional value and must be fully respected. Corruption undermines democracy and the rule of law and leads to human rights violations; therefore, the fight against corruption is an important measure in order to ensure that the principle of the rule of law is followed. Trust in Parliament, the President, and the Government as the main institutions of a democratic state is directly related to strict compliance with the principle of the rule of law. This fundamental principle requires that individuals holding high ranking positions must be persons of high moral standing. Any political mandate must be based on trust between citizens and their representatives. If persons of questionable integrity were appointed to high ranking positions, the principle of the rule of law would be disregarded. In genuine democracies, it is common that the officials who lost public trust immediately resign without waiting for dismissal. There is no toleration for such situations where persons who were dismissed from office due to corruption reasons shortly after such dismissal and without proving that the accusations of corruption levelled at them are unfounded are again appointed to high ranking positions. Thus, if persons of questionable integrity or those dismissed from office due to corruption reasons were appointed to high ranking positions, the principle of the rule of law would be violated.

In order to comply with the constitutional principle of the rule of law and in the light of the general public interest, appropriate measures must be taken so that ministers or other high ranking officials, if there are reasonable doubts about their integrity, would be suspended or would resign. Assessing the situation at issue, the Constitutional Court held that the Prime Minister, when tolerating those ministers in the Government who were suspected of corruption or charged with corruption, disregarded the principle of the rule of law and showed a clear lack
of integrity; therefore, the said person was not suitable for holding his office. If a person who was dismissed from the office of the Prime Minister for reprehensible actions would be commissioned to continue to act as the Prime Minister, the principles of the rule of law and integrity would be violated, the stability of democratic institutions would be threatened, irreparable harm would be inflicted on parliamentary control, the confidence of the public in the ability of the state to effectively fight corruption would be undermined, the credibility of the Government, both at home and abroad, would be destroyed, and the opportunities of the Government to implement its own programme and to maintain contacts with foreign partners would be damaged. It is not allowed to disregard the decision of Parliament to express no confidence in the Government and the Prime Minister because of the acts of corruption, unless exculpatory evidence is presented or the suspicions are disproved. The Constitutional Court drew the conclusion that, by expressing no confidence in the Government, Parliament acted in a responsible manner, i.e. this is precisely how the supreme representative institution of the people should act.

THE JUDGMENT OF 9 OCTOBER 2014 (APPLICATION NO. 44A/2014)

The principal findings of the judgment
The Constitutional Court of the Republic of Moldova declared as unfounded the request submitted by the parliamentary political group of the Communist Party of the Republic of Moldova to assess the constitutionality of the Association Agreement between the European Union and the Republic of Moldova (hereinafter – the Association Agreement) and that of the Law on the Ratification of the Association Agreement (No. 112) of 2 July 2014 (hereinafter – the Law).

The Constitutional Court held that, according to the Independence Declaration and the Constitution (Article 1 thereof), the policy of convergence with the area of European democratic values is an element that defines the constitutional identity of the Republic of Moldova; thus, the Constitutional Court recognised that the provisions of the Association Agreement and those of the Law were in compliance with the Constitution.

The facts and key legal points
Parliament ratified the Association Agreement, which is based on two essential elements: political association and consistent integration into the single European market. The provisions of the Association Agreement created the preconditions for cooperation between the Republic of Moldova and the European Union in the areas of foreign policy, justice, trade, free economy, and economic security.

The above-mentioned parliamentary political group applied to the Constitutional Court and requested an investigation into whether the Association Agreement and the Law were in conflict with the Constitution. According to the authors of the application, during the negotiations on the Association Agreement, the principle of sovereignty should have been followed; still, notwithstanding the sovereignty and independence of the state, EU law and its direct effect were declared as binding in the course of the negotiations. In the opinion of the authors of the application, the impugned legal acts were in conflict with the specified provisions of the Constitution, since the said provisions demand that all the principles of EU law and, first of all, the principle of subsidiarity, must be introduced in the legal system of Moldova; on the basis of the said principles, the Republic of Moldova will have to create an opportunity on its territory for EU institutions to carry out appropriate checks in order to ensure EU financial interests; the Association Agreement provides for establishing the Council and the Committee, which are the supranational bodies that will supervise the execution of the Association Agreement without the representatives of the Republic of Moldova.
Therefore, according to the authors of the application, the impugned legal regulation was in conflict with Article 1 of the Constitution, according to which the Republic of Moldova is a sovereign, independent, unitary, and indivisible state, with Article 9 thereof, whereby the market, free economic initiative, and fair competition represent the main elements of the economy, with Article 11 thereof, by which the Republic of Moldova proclaims its permanent neutrality, and with Article 126 thereof, which regulates the aspects related to the economy of the state.

The arguments of the Court

The Constitutional Court emphasised that the text of any Constitution is influenced by the historical, social, and economic conditions determining the respective constitutional identity. The Declaration of Independence proclaimed the Republic of Moldova a sovereign, independent, and democratic state, free to decide its present and future, without any external interference, keeping with the ideals and aspirations of the people within its historical and ethnic area of its national making. The Declaration of Independence, which is an inseparable part of the Preamble to the Constitution and is constitutionally important, and the Constitution itself constitute a single whole. By means of this constitutive act, the Republic of Moldova, among other things, expressed its readiness to establish political, economic and cultural relations, and any other relations of common interest with European countries and all other countries of the world, and its readiness to establish diplomatic relations with the above, in accordance with the norms of international law and common practice on the above matter.

The Declaration of Independence consolidated the elements that are central to the definition of the identity of a new state and its nation: the aspiration to freedom, independence, and national unity, the linguistic identity, democratisation, a state under the rule of law, a market economy, history, moral values and the norms of international law, the European direction, the guarantees of exercising social, economic, cultural, and political rights for all the citizens of the Republic of Moldova, including those of national, ethnic, religious, and linguistic groups. The Declaration of Independence also proclaimed a break with the Soviet totalitarian sphere and the reorientation of the new independent state to European democratic values. Therefore, the aspiration of the Republic of Moldova to establish relations with European states in all important areas and the direction of its integration into the sphere of European democratic values are consolidated in the constitutive act of the state, whereas, according to the meaning of the Declaration of Independence and Article 1 of the Constitution, the direction of convergence with the sphere of European democratic values is an element defining the constitutional identity of the Republic of Moldova.

The Constitutional Court noted that the Partnership and Cooperation Agreement signed as far back as 1994 marked the formal beginning of the relations between Moldova and the European Union. The said Agreement was aimed at strengthening democratic values, developing political dialogue, supporting the changes underway in Moldova, etc. The further actions of the Republic of Moldova in general and those of concrete state institutions just confirmed the chosen direction of European integration. Finally, the real progress made by the Republic of Moldova in strengthening its partnership with the European Union culminated in signing the Association Agreement on 28 June 2014.

The Constitutional Court emphasised that the universally recognised principles and norms of international law are binding on the Republic of Moldova insofar as the state expressed its consent to be bound by such principles and norms; accordingly, the implementation of the provisions of an international agreement ratified by the Republic of Moldova is unconditionally binding; in concluding and implementing international agreements, the Republic of Moldova must pay regard to the norms and principles of international law and to such provisions of the
Constitution and laws that are related to international treaty law and must perform international agreements in good faith.

The Constitutional Court also noted that it is the state that is the main subject of international law; as the holder of sovereignty, the state represents the country in the relations with other states and international organisations and acquires appropriate rights and duties in terms of international law. The sovereignty of the state implies the supremacy and independence of state power in domestic affairs as well as in international relations. Sovereignty is an exclusive and inalienable right of the state to establish and carry out independently the domestic and foreign policy, to perform its functions, to implement practical measures in order to regulate national social life and foreign relations on the basis of respect for sovereignty of other states and in accordance with the principles and norms of international law. Thus, there is a close connection between sovereignty, which is a characteristic of the state in its relations with other states, and independence; accordingly, sovereignty and independence presuppose the equality of states at the international level.

However, no absolute sovereignty can exist at the international level, since national states are the elements of the international system. The constitutional sovereignty of the Republic of Moldova demonstrates that the state does not exist in a vacuum; the said sovereignty manifests itself in foreign relations when the state carries out cooperation with other states and international organisations. Such relations are established mainly on the basis of international agreements. The Constitutional Court emphasised that the understanding of sovereignty as absolute and unlimited power is equivalent to the isolation of the state at the international level. It also noted that the delegation of specific powers defined in a law to international organisations does not lead to the loss of the traditional constituent features of a state. Such delegation of certain powers of a state that stems from the free will of states and makes sure that an appropriate sovereign state continues the implementation of respective powers (in accordance with the established procedure and under the control of such a state) does not mean the conceptual undermining of the sovereignty of a state, but, on the contrary, may be capable of consolidating such sovereignty within the framework of general measures for integration. Accordingly, the right of the state to undertake international obligations is an element of the sovereignty of the state; sovereignty is not abandoned by delegating concrete powers to international organisations by concluding treaties. In foreign relations, international organisations are those subjects within the framework of which states unite both their sovereignties and their means in order to resolve common problems and find decisions acceptable for all; therefore, in doing so, states act in their national interests.

**On the sovereignty principle and respect for international law.** The Constitutional Court emphasised that the ratification of the Association Agreement by means of the Law adopted by the Parliament of the Republic of Moldova, which is a political-legal body of the state and was formed by the will of the people, confirms the sovereign will of the people of the Republic of Moldova to move closer to European values. Parliament, when acting in full accordance with the effective constitutional and legislative norms, had the right to adopt the impugned Law; the Law was adopted in compliance with the established procedure.

The Constitutional Court emphasised that the Association Agreement is an international agreement, which continues those efforts that were made within the framework of the Partnership and Cooperation Agreement signed by the European Union and the Republic of Moldova as far back as 1994. The Constitutional Court noted that the cooperation on the basis of the impugned Association Agreement between the Republic of Moldova and EU Member States does not change the political regime in the country, does not limit the right of the people to express
their will and to adopt political decisions in free elections; therefore, the sovereignty of the people is not limited. Additionally, the Association Agreement does not envisage the accession of the Republic of Moldova to the European Union, but only establishes political association and economic integration with the European Union. Moreover, the accession of a state to the European Union does not mean the abandonment of national identity and the constitutional principles, and the sovereignty and national identity of Member States are not violated, either. It is the Association Agreement that is, at the level of the European Union, the main instrument facilitating the Republic of Moldova moving closer to European standards; in this regard, the obligation to implement the provisions of the Association Agreement includes the obligation to apply such standards.

The Constitutional Court held that the signing, ratification, and entry into force of the Association Agreement cannot create any preconditions for questioning the supremacy of the Constitution within the context of the sovereignty of the Republic of Moldova; being the expression of the will of the nation, the norms of the Constitution do not lose their binding force and do not change automatically at the entry into force of an international agreement. The impugned Association Agreement provides for political association and economic integration between the Republic of Moldova and the European Union on the basis of common values such as respect and support for sovereignty and territorial integrity, the inviolability of the borders of the Republic of Moldova and its independence, democracy, as well as respect for human rights and freedoms; therefore, the purpose and tasks of the Association Agreement completely correspond to the provisions of the Constitution. Being an inseparable part of a state under the rule of law, the observance of undertaken international obligations is a legal tradition and a constitutional principle.

In this context, the Constitutional Court also regarded as erroneous the statements of the application, according to which the working bodies established on the basis of the signed Association Agreement (the Council and the Committee) are supranational bodies, which will make decisions in the absence of the representatives of the Republic of Moldova. On the contrary, those bodies are not supranational bodies, but are formed from the representatives of both parties that signed the Association Agreement and are meant to ensure the proper implementation of the provisions thereof. Accordingly, the Constitutional Court regarded as erroneous the statements of the application concerning the supremacy and direct effect of EU law, since such aspects are not regulated by the impugned Association Agreement: the powers to pass laws remain within the exclusive competence of the national institutions. Meanwhile, the harmonisation of national legal acts with EU legislation is not of an automatic nature, but is carried out according to the established national procedures. Lastly, the Constitutional Court regarded as unfounded the arguments of the authors of the application, according to which, after the impugned Association Agreement had been signed, the national sovereignty was violated; contrary to the statements of the authors of the application, the principle of territorial integrity is not ignored, either.

On the neutrality of the Republic of Moldova and its right to participate in peacekeeping operations. The Constitutional Court emphasised that the Constitution does not envisage expressis verbis any concrete form of the participation of the Republic of Moldova in international military cooperation; nor does it provide expressis verbis for any way of how military assistance is rendered to the Republic of Moldova. Nevertheless, the forms of international military cooperation envisaged in the impugned Association Agreement are not in conflict with the provisions of the Constitution if such forms are used in order to protect the most important values – national security and independence, the welfare of citizens, human rights and fundamental freedoms – as well as other constitutional values. The contrary interpretation of the provisions of the Constitution would
mean that the Republic of Moldova may defend itself only individually, but this would lead to the denial of the right of a state, which is recognised in Article 51 of the Charter of the United Nations, for individual or collective self-defence. In addition, since the decision on the participation of the Republic of Moldova in EU operations is made by Parliament upon submission by the President, the Association Agreement does not influence and does not limit the autonomy of the Republic of Moldova in making decisions on participation in EU emergency management operations. The Constitutional Court held that the participation of the Republic of Moldova in peacekeeping operations is not in conflict with the neutral status of the country.

\textit{The economic aspect of the Association Agreement.} The Constitutional Court noted that the Association Agreement includes an important trade component – the Deep and Comprehensive Free Trade Area (DCFTA) that implies the gradual liberalisation of both trade and the supply of services with the EU, lowering custom tariffs, the removal of technical and non-tariff barriers, the elimination of quantitative restrictions, and the harmonisation of the legal acts of the Republic of Moldova with EU legislation in this sphere. The European Union is the most important trade partner of the Republic of Moldova (trade with the EU represents 45 percent of the foreign trade of the Republic of Moldova); therefore, deeper economic integration within the framework of the DCFTA will be the driving force behind the economic growth in the country. The DCFTA will create new opportunities for the development of economic relations between the Republic of Moldova and the European Union.

In this context, the Constitutional Court rejected the arguments of the authors of the application, according to which the European Union allegedly establishes discriminatory quotas on the import and export of goods, and noted that the market of the country remains not fully open for import of the most sensitive agricultural products. Such import will be duty free, however, within the allocated quotas. This mechanism will soften the risk from the excessive growth in the import of certain agricultural products and will make it possible to protect the interests of local producers.

Taking account of the spirit of the constitutional norms, the Constitutional Court drew the conclusion that the provisions of the Association Agreement ensured the strengthening of free trade and the protection of fair competition, as well as created favourable conditions for using all production factors.

\textbf{THE JUDGEMENT OF 16 APRIL 2015 (APPLICATION NO. 43A/2014)}

\textbf{Principal findings of the judgment}

The Constitutional Court of the Republic of Moldova (hereinafter – the Court), after the process of the constitutional review of certain provisions of Law No. 325/2013 on professional integrity testing (hereinafter – the Law), declared certain norms of the Law unconstitutional, in particular: Items b and d of Article 2; the notion “justified risk” from Article 4; Paragraph 5 of Article 9; Paragraphs 2–3 of Article 10; Paragraphs 1–2 and 4 of Article 11; Paragraphs 3–6 of Article 12; the phrases “without giving the name of the tested public agent” from Paragraph 3 of Article 14; Paragraph 2 of Article 16. Other provisions of the Law were declared as constitutional.

\textbf{The facts}

On 23 December 2013, the Parliament of the Republic of Moldova adopted the Law. The Law provided for professional integrity testing, which had to be applied to all the public agents employed within the public entities established in the Annex to the Law (hereinafter – the Annex). It also stated that professional integrity tests are carried out by the employees of the
National Anticorruption Centre (hereinafter – NAC) and of the Information and Security Service (hereinafter – ISS) (both of whom fall under the Executive). Prior to the adoption of the Law, such an instrument was instituted in a national law only with reference to police officers.

Four Members of the Parliament of the Republic of Moldova (hereinafter – the authors of the application) lodged an application to the Court on the constitutional review of the phrases “The Constitutional Court” and “The Courts of all levels” provided for in the Annex.

**Key legal points**

In this case, the Court examined (1) whether the guarantees of the right to a fair trial, including the right not to be judged on the basis of evidence gained by incitement, were observed; (2) whether regard was paid to the right to respect for private life; (3) whether the principles of the separation of powers and of the independence of the judiciary were observed.

**Arguments of the Court**

First of all, the Court indicated that the Annex cannot exist separately from the Law; therefore, in order to assess the constitutionality of the provisions of the Annex, the provisions of the Law must be examined as well. The Court also noted that as the rights and the principles mentioned in the application refer not exclusively to the employees of the public entities mentioned in it, the constitutionality of the Law must be examined with reference to all the public agents indicated in the Annex.

The Court stated that corruption undermines democracy and the rule of law, leads to the violation of human rights, undermines economy and erodes the quality of life. The Court also pointed out the importance of the fight against corruption and emphasised the necessity to develop appropriate legal means for this cause. However, those legal means should not compromise the constitutional order, jeopardise the stability of democratic institutions, or violate the fundamental human rights.

Having in mind that the Law provided for the application of some disciplinary sanctions after the professional integrity testing, the Court noted that the guarantees of the right to a fair trial in criminal matters are equally applicable to disciplinary proceedings. The Court also mentioned that the guarantees of a fair trial apply not only to legal procedures *stricto sensu*, but to the preceding and subsequent stages as well.

In terms of the conformity of the Law with the provisions of the Constitution that establish the **guarantees of the right to a fair trial**, including the presumption of innocence and the right not to be judged on the basis of evidence gained by incitement, the Court:

a) in accordance with the inconsistency of the statements of NAC, which is entitled to implement the Law, made about the application of the Law (on one occasion stating that it refers to judges as well as to other public agents and denying such a statement on the other, lastly, recognising differing interpretations of the term “public agent”), held that there are some ambiguities concerning the scope of the implementation of the Law related to the circle of persons to whom the Law is applicable;

b) stated that, taking into account the principle of the presumption of innocence, the professional integrity testing could be carried out only when there are preliminary and objective grounds for suspecting that a certain public agent is inclined to commit acts of corruption. Despite that, the notion “justified risk” defined in Article 4 of the Law, the rationale of which in essence is that the tester is allowed to enter into potentially criminal behaviour, because less interfering measures would not make it possible to reach the goal of the test, and the provisions of Article 10 of the Law, which establish the grounds for the initiation of the testing procedure and the selection of public agents to be subjected to testing, not only justify the illegal (inciting)
actions of the tester, without taking into account the reliability and validity of information about possibly admitted corruption-related offenses, but cast a general shadow of suspicion on the integrity of every public agent;

c) pointed out that the rights (to defend oneself) of the public agent under suspicion only seem to become effective at a very late stage, namely when the disciplinary sanction has already been imposed by the disciplinary body, and that the provisions of Paragraph 2 of Article 13 and Paragraphs 2–3 of Article 15 of the Law hinder an effective preparation of an accused person for defence (i.e., the said provisions preclude that person from examining witnesses, making an effective assessment of other evidence, since within the testing procedure this evidence is classified as “confidential”). Furthermore, the Court held that, due to the fact that a public agent under suspicion of a disciplinary offence in professional integrity test fails to benefit from effective access to the key evidence and due to the fact that the Law does not leave any discretion to the disciplinary bodies, since the dismissal from the office is imperative whenever anticorruption obligations are breached, the right of judges to an effective remedy can be infringed as well;

d) highlighted that the criminal procedure principle of foreseeability of statutory offences and their narrow interpretation should also be applied mutatis mutandis to the disciplinary proceedings provided for in the Law. The Court noted that the expression “not admit in their activity any corruption acts, corruption-related acts and actions of corruptive behaviour” (Item a of Paragraph 2 of Article 6) differs from the expression used in the Criminal Code, namely “criminal offences committed by officials” (Article 324); therefore, this term is blurred and involves serious risks related to the foreseeability of what would and what would not be considered a disciplinary offence within the professional integrity testing. The Court emphasised the seriousness of this fact, since Paragraph 2 of Article 16 of the Law provides for dismissal from office as a mandatory disciplinary sanction if during the test the breach is “admitted” by a tested public agent;

e) underlined the necessity to uphold the principle of proportionality between the offence and the sanction. In the opinion of the Court, the application of one and only sanction – automatic dismissal from office for any “breach”, i.e. for admitting any kind of corruption-related act, established in the provisions of the Law does not ensure compliance with the principle of proportionality between the offence and the sanction;

f) noted that according to the laws of the Republic of Moldova, preventing and combating corruption related acts or actions of corruptive behaviour come within the exclusive competence of NAC, though the assessment of their professional activity of employees must fall within the competence of the public entities where they work. Therefore, the Law improperly provides NAC with the competence to carry out the professional integrity testing. Such a regulation infringes the principles of the separation of powers (when the professional integrity of Parliament members or of the judiciary is tested) and good governance.

As regards the compatibility of the Law and the constitutional provisions of the right for private life, the Court noted that, although this right is not absolute, any interference with it must be in accordance with the law, in compliance with the universally recognised norms of international law, must be proportionate to the situation that caused it and must not endanger the existence of the right itself. After noting that the provisions of Paragraph 3 of Article 12 of the Law set out in a general manner the right of testers (employees of NAC and ISS) to use any technical means for the undercover acquisition of information within the public agents’ professional integrity testing and that the said technical means in general overlaps with the means established in the Criminal Procedure Code (the latter may be employed only in cases where there is a reasonable doubt regarding the preparation and commission of serious, extremely serious, or exceptionally serious crimes and can be used only upon the authorisation of an investigating judge), the Court held that the Law does not envisage any guarantees allowing effective protection against the
risks of abuse, as well as against any illegal access and use of personal data. In addition, the Court stated that the technical means for the undercover acquisition of information, as well as the data over which control is carried out, are not specified in the Law in a predictable manner. Furthermore, the Court underlined that regarding the provisions of the Law the methods and means to test and record professional integrity tests may be used for a period that is longer than that of the integrity test, as the period of the professional integrity testing consists of the process of planning, initiating, organising, and carrying out professional integrity tests. Therefore, the time limit for the professional integrity testing becomes unestablished. Finally, the Court noted that the Law fails to contain clear and precise rules on the content and application of the measure related to withholding and using recorded data, as well as that it fails to establish a genuine mechanism for exercising control over the professional integrity testing procedures. Therefore, the Court considered that the limitation on the exercise of such personal rights in consideration of some collective rights and public interests regarding national security, public order or the prevention of corruption disturbs a balance between individual rights and interests on the one hand and the interests of society on the other hand. The Law itself fails to provide for sufficient guarantees that would ensure effective data protection against the risk of abuse, as well as against any illicit access and use of personal data.

In the light of the compliance of the Law with the constitutional provisions establishing the principles of the separation of powers and the independence of the judiciary, the Court underlined that NAC, which is led by a director that is appointed and released on the proposal of the Prime Minister, is a body under the control of the Executive. Therefore, it cannot meet the requirements of independence and impartiality that derive from the above-mentioned principles. Thus, any use of this institution for the integrity testing of judges would be contrary to both of these principles. The same applies mutatis mutandis to ISS regarding the testing of NAC employees.

In conclusion, the Constitutional Court noted that the professional integrity testing may be applied to all professional categories of public agents and that no category is, by its nature, excluded from personal integrity testing. However, this procedure must respect the guarantees of the right to a fair trial and the right to respect for private life, as well as those referring to the separation of powers and the independence of the judiciary.

THE JUDGMENT OF 24 JUNE 2015 (APPLICATION NO. 1B/2015)

The principal findings of the judgment

The Constitutional Court ruled that the provision of Paragraph 2 of Article 5 of the Law on the Legal Status of Members of Parliament, whereby in cases where a member of Parliament who is in a situation of incompatibility with his/her duties does not resign from the position incompatible with the mandate of a member of Parliament, after the prescribed period he/she loses the position incompatible with the mandate of a member of Parliament, is in conflict with the Constitution.

The Constitutional Court also stated that:

1) for the purposes of Paragraph 1 of Article 69, Paragraphs 1 and 2 of Article 70 of the Constitution, the persons elected to Parliament find themselves in a situation of incompatibility with their duties: i) from the moment when the mandate of the newly elected members of

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6 Paragraph 1 of Article 69 “Mandate of the Parliament members”: “The members of Parliament shall enter upon the exercise of their mandate under the condition of prior validation.”

7 Paragraphs 1 and 2 of Article 70 “Incompatibilities and immunities” of the Constitution: “1. The office of the Parliament member shall be incompatible with the holding of any other remunerated position, except for didactic and scientific activities. 2. Other possible incompatibilities shall be established by organic law.”
Parliament is validated by the Constitutional Court; ii) when persons holding the office of a member of Parliament take another remunerated office or in other situations of incompatibility with the duties of a member of Parliament, as prescribed in the law; 2) for the purposes of Paragraph 2 of Article 69 and Paragraphs 1 and 2 of Article 70 of the Constitution:

- prior to the expiry of the period, prescribed in the law, aimed at eliminating the situation of incompatibility with the duties of a member of Parliament, the respective member of Parliament must choose between the mandate of a member of Parliament and the office that creates the incompatibility and must resign from one of the positions. If a member of Parliament who is in a situation of incompatibility with his/her duties submits the notice of resignation from the office of a member of Parliament, his/her mandate ceases from the moment he/she submits the notice;

- if the situation of incompatibility with the duties of a member of Parliament continues to exist following the expiry of the period prescribed in the law, the member of Parliament is deemed to have resigned de jure. The mandate of such a member of Parliament ceases de jure upon the expiry of the period, prescribed in the law, aimed at eliminating the situation of incompatibility with the duties of a member of Parliament.

- the resignation of a member of Parliament is notified to Parliament, which declares that the seat of a member of Parliament is vacant;

3) for the purposes of Paragraph 1 of Article 70 and Articles 99, 100, 10 and 103 of the Constitution, during the period when a new Parliament is formed, in the case where the members of an outgoing Government are elected as members of Parliament, they may combine both duties until the members of a new Government take an oath.

The facts and key legal points

In 2015, five members of the Parliament of the Republic of Moldova requested the Constitutional Court to interpret the provisions of Paragraph 2 of Article 69, Paragraph 1 of Article 70, and Article 100 of the Constitution and to answer these questions: 1) What is the moment when there arises a situation of incompatibility with the duties of a member of Parliament and when do the powers of persons elected to Parliament expire? 2) Does a member of Parliament have the right to combine the duties of a member of Parliament and those of a member of the Government, or those of an elected representative of local government, or other duties after 30 days from the moment of the validation of the mandate? 3) Is a member of Parliament who is simultaneously holding two incompatible positions entitled to attend the plenary sessions of Parliament after resigning his/her seat and following the expiry of 30 days provided for relinquishing his/her mandate? What are the legal effects of the pieces of legislation for which such a member of Parliament voted? 4) Is a member of the Government who simultaneously holds the office of a member of Parliament (and who, after 30 days from

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8 Paragraph 2 of Article 69 “Mandate of the Parliament members”: “The office of the Parliament member shall cease at the date of legal assembly of the newly elected Parliament, on his/her resignation, mandate withdrawal, incompatibility or demise.”

9 Paragraphs 1 and 2 of Article 99 “Incompatibilities” of the Constitution: “1. The office of the Government member shall be incompatible with the holding of any other remunerated position. 2. Other incompatibilities shall be specified by organic law.”


11 Paragraphs 1 and 2 of Article 103 “Termination of mandate” of the Constitution: “1. The Government shall exercise its mandate up to the date of validation of the new parliamentary elections. 2. The Government, in case of expression by the Parliament of the vote of no confidence, the Prime Minister resignation or pursuant to the terms under paragraph (1), shall perform only the functions of administration of public affairs, until the taking the oath of a new Government.”
the moment of the validation of his/her mandate, did not resign his/her seat in the Government) entitled to attend the sessions of the Government and/or Parliament? What are the legal effects of the pieces of legislation adopted by the Government with his/her participation?

The application is essentially linked, firstly, with the issue of incompatibility of duties where a member of Parliament does not decide which of the remunerated position held by him/her must be chosen within the period established in the law, and, secondly, with the fact whether a member of Parliament may remain a member of an outgoing Government without violating the prohibition against the holding of incompatible offices. The authors of the application maintained that most of the members of Parliament elected in 2014 were holding another office incompatible with the duties of a member of Parliament; since they did not resign their seats in Parliament within 30 days from the validation of their mandate, this was in conflict with Article 6 “Separation and Cooperation of Powers” of the Constitution as well as with the provisions of the Law on the Legal Status of Members of Parliament, the Law on the Government, and the Law on the Legal Status of Elected Representatives of Local Government. The Constitutional Court also decided, on its own initiative, to assess the constitutionality of the provisions of the Law on the Legal Status of Members of Parliament that were relevant in the context of the application.

The arguments of the Court

The proper functioning of the entire political and legal system implies the effective protection of the mandate of a member of Parliament. Incompatibility of duties is among the measures of such protection. Incompatibility of duties is a prohibition against the holding of two offices imposed by law for the purpose of ensuring the independence of a person holding a public office, precluding the concentration of too extensive powers in a single pair of hands, and protecting the professionalism and integrity of a person. Incompatibility of duties arises from the moment when a person holding a certain position is appointed to another position simultaneously and, within a certain period, he/she must decide which position to choose. Incompatibility of duties is a measure aimed at protecting not only a concrete position to protect which the said measure was imposed, but also those positions that become incompatible with the above-mentioned concrete position; thus, this measure precludes the possibility of combining such positions. Establishing the rule on the incompatibility of the duties of a member of Parliament is substantiated by the fact that a member of Parliament must not only be protected against any influence, but also must not perform any such duties or be engaged in such activity that in its nature is in conflict with the mandate of a representative of the people or obstructs its implementation. The purpose of the incompatibility rule is to protect the independence of a member of Parliament and to avoid a conflict of interests. Combining his/her mandate and other duties, a member of Parliament comes into conflict with his/her rights and duties that constitute his/her legal status. Such conflict can cause material dependence on the duties that are performed simultaneously with the exercise of the mandate of a member of Parliament where such a member may possibly attempt to use his/her mandate to serve private interests. In addition, the implementation of the powers of a member of Parliament requires considerable efforts; therefore, this alone creates the incompatibility of the mandate with any other position in the public or private sector.

The concept of the incompatibility of the duties of a member of Parliament with other duties is also based on the constitutional principle of the separation of powers, according to which state institutions, when implementing the powers conferred on them, must not go beyond the limits established in the Constitution and laws or interfere with the powers of other institutions. After laying down at the constitutional level the rule on incompatibility related to the performance of the duties of members of Parliament, the President of the Republic, members of the Government,
judges, prosecutors, etc., the implementation of the powers of legislative, executive, and judicial branches is ensured.

Paragraph 2 of Article 69 of the Constitution expressly provides for the consequence of the incompatibility of duties, which is the loss of the mandate of a member of Parliament and not vice versa, i.e. not the loss of the position incompatible with the mandate. If the procedure related to incompatibility of duties is not completed within a 30-day period laid down in the law, the respective member of Parliament must lose his/her mandate; there are no other requirements to be met. Therefore, the legislative provision that provides for the loss of the position incompatible with the duties of a member of Parliament in cases where the respective member of Parliament does not take the necessary actions to remove such incompatibility is in conflict with the Constitution. The Constitutional Court pointed out that it was necessary to define in a law all the situations where the mandate of a member of Parliament is lost, including the case of incompatibility of duties.

When examining the issue of whether it is possible for a member of Parliament to be a member of an outgoing Government, the Constitutional Court mentioned its previous judgement in which it held that the Government that returned its powers manages public affairs until a new Government is appointed. This means that, after returning its powers, the Government retains only a part of such powers; it “manages” public affairs, but does not “rule”. There is a substantial difference between the said notions. When interpreting the Constitution in the context of the political and legal circumstances pointed out by the authors of the application, the Constitutional Court noted that some members of the outgoing Government continued in their office under Article 103 of the Constitution until the members of a new Government took an oath and were simultaneously members of the newly elected Parliament; however, on the expiry of the 30-day period established in the law, they continued to hold both positions. The Constitutional Court emphasised that it was impossible to appoint new members of the Government in the circumstances specified in the judgment. In view of the fact that, in order to keep the status quo of public administration, the reshuffle of the members of an outgoing Government can only take place if they are unable to fulfil their duties for objective reasons (sickness or death). Thus, in cases where they are elected to Parliament, the members of an outgoing Government are allowed to combine both positions until the members of a new Government take an oath. At the same time, the Constitutional Court held that it was necessary to make certain that such short-term situations where the respective persons hold a certain office on a temporary basis for the purpose of precluding the emergence of a vacuum in power and in order to ensure that appropriate institutions are formed must be as short as possible.
DECISION NO. 3-RP/2000 OF 27 MARCH 2000
The constitutionality of the Law on the proclamation of an all-Ukrainian referendum on the initiative of the people

The members of the Parliament (Verkhovna Rada) lodged a claim with the Constitutional Court to examine the constitutionality of the Decree of the President proclaiming an all-Ukrainian referendum on the initiative of the people. They emphasised that the Decree differs from what is provided in Article 13 of the Law on all-Ukrainian and local referendums. The institution of an all-Ukrainian referendum at the request of citizens is an essentially new type of referendum. Its organisation and the procedures for its conduct are not regulated by the aforementioned Law, and this precludes holding such a referendum. The all-Ukrainian referendum on the initiative of the people cannot directly introduce changes to the Constitution since the Constitution does not provide for consultative referendums. The issues that must, according to the Decree, be included in bulletins do not comply with the requirements for holding referendums since some of them cover two or more independent issues, and this may affect the free expression of the will of citizens by voting.

The all-Ukrainian referendum is one of the forms of the expression of the will of the people (Article 69 of the Constitution); such a referendum may be called by the Parliament (Verkhovna Rada) or the President according to their powers established by the Constitution. In particular, the Parliament calls an all-Ukrainian referendum on issues regarding the territory of Ukraine (Articles 73 and 85.2 of the Constitution). The President calls an all-Ukrainian referendum on changing the Constitution in accordance with Article 156 of the Constitution. A referendum shall not be permitted regarding draft laws on issues of taxes, the budget, and amnesty (Article 74 of the Constitution).

The Constitution also provides that an all-Ukrainian referendum may be held on the initiative of the people, proclaimed by the President, at the request of at least three million Ukrainian citizens who are eligible to vote and provided that signatures in support of the referendum have been collected in at least two thirds of oblasts (regions) and that there are at least one hundred signatures per oblast (Article 72.2 of the Constitution). At the same time, the Constitution does not provide for a no-confidence vote in an all-Ukrainian referendum, including that proclaimed on the initiative of the people, in the Parliament or any other constitutional governmental bodies as a possible reason for an early termination of their powers. This is why the issue of a no-confidence vote in the Parliament would be a violation of the constitutional principle whereby the bodies of state power exercise their authorities according to the Constitution and the principles of a state ruled by law.

In accordance with the Constitution, the bearer of sovereignty and the only source of power in Ukraine is the people. The people exercise power directly and through the bodies of state power and local self-government. The right to determine and change the constitutional order in
Ukraine belongs exclusively to the people and may not be usurped by the state, its bodies, or its officials (Article 5 of the Constitution).

The issue of the adoption of a new Constitution is put to an all-Ukrainian referendum without obtaining the will of the people on the necessity to adopt a new Constitution. It brings into doubt the very existence of the current Constitution, which may lead to weakening the fundamental principles of the constitutional order and the rights and liberties of the people and citizens.

Confirming the exclusive right of the people to determine and change the constitutional order, the Constitution has established a clear procedure for introducing changes to the Constitution. Changes to the Constitution are the competence of the Parliament and this competence is exercised within the limits and in accordance with the procedures prescribed by Section XIII of the Constitution. The Constitution, while introducing changes to it, balances the actions of the President, the members of the Parliament, and the Parliament itself for the realisation of the will of the people.

DECISION NO. 15-RP/2004 OF 2 NOVEMBER 2004

The conformity with the Constitution of Article 69 of the Criminal Code (concerning more lenient punishments handed down by a court)

According to Article 8.2 of the Constitution, Ukraine recognises and applies the principle of the rule of law. All the elements of this principle are consistent with the justice ideology and the idea of law largely reflected in the Constitution.

Justice is crucial in determining the role of law as a regulator of social relations and a general human measure of law. The notion of justice implies that the offence and punishment should correspond.

The direct application of the constitutional principles of respect for humanity, justice and legitimacy is provided in the Criminal Code regulations. They allow: an offender who committed a minor offence for the first time to be exempt from criminal liability in case of true repentance (Article 45); reconciliation between the offender and the victim and the payment of damages by the offender of the loss or damage incurred (Article 46); admission to bail (Article 47); or a change of circumstances (Article 48). A person may be exempt from punishment if, by the time of the trial, no ground exists for considering him/her a social hazard (Article 74.4).

Exemption from punishment based on Articles 47 and 48 of the Code and in accordance with Article 74.4 applies to minor or medium offences. This illustrates the application of the legal equality principle in differentiating criminal liability.

Article 65 of the Code establishes general sentencing principles. Based on these, the Court will sentence:

1. according to the available penalties as defined in the provisions of the Special Part of the Code;
2. in accordance with the provisions of the General Part of the Code; and
3. taking into consideration the gravity of the offence, the personal circumstances of an offender and mitigating and aggravating factors (Article 65.1); Article 69 of the Code defines the grounds for mitigating the punishment under relevant articles of the Special Part thereof (Article 65.3).

General sentencing principles apply to all offences regardless of their gravity.

Applying to a minor crime other regulations that provide legal grounds and establish procedures of exemption from criminal liability and punishment (Articles 44, 45, 46, 47, 48, and 74 of the Code) may not be an obstacle for a court to customise punishment, for example, by using more lenient punishments than those established by law.
However, Article 69 does not provide for this kind of custom-made punishment for minor offences, even though it does allow special circumstances that mitigate the penalty and considerably lower the degree of an offence for felonies and serious and medium crimes. Therefore, the provisions of the article are inconsistent with the fundamental principle of justice in a state ruled by law since persons committing less serious crimes are disadvantaged compared to those committing more serious offences.

Article 69 of the Code violates the fundamental principle of justice, i.e. the rule of law, because it makes it impossible to provide either an equal application of punishment that is lower than the one provided for by the relevant articles of the Special Part or the application of an alternative, more lenient punishment not specified in the article, to minor crimes where the degree of social hazard is much less serious than that of felonies, serious crimes, or medium offences.

The restriction of a defendant’s constitutional rights must be governed by the proportionality principle. The provisions of Article 69 are incommensurate with said purposes.

Article 65 of the Code implements the principle established by Article 61.2 of the Constitution that all legal liability is case-dependent. The General Part of the Code describes in detail the punishment system, exemption from criminal liability, exemption from and serving a sentence, and the use of a more lenient sentence. Punishment must correspond to the degree of the social hazard of a crime, its circumstances and the personal circumstances of an offender, that is, it should be fair. This is reflected in Article 65.1.3 of the Code under which the sentence must take into account the gravity of an offence and the circumstances of an offender, as well as mitigating and aggravating factors.

The constitutional provisions concerning a person, his/her rights and freedoms as well as Articles 65.2, 66, 223.2, 324.1.5 and 334.1 of the Ukrainian Code of Criminal Procedure that stipulate the aggravating or mitigating factors to be identified and taken into account, reflect the humanistic context of the Constitution and the criminal and procedural legislation and an increased sentencing consistency for all crimes regardless of their gravity.

When deciding a sentence under Articles 65.2 and 69.1 and the relevant provisions of the Special Part of the Code, courts cannot implement the provisions of Article 61.2 of the Constitution and the articles of the Criminal Code. Article 61.9 therefore restricts the application of the constitutional principles of legal equality and customised sentencing. Without being able to deliver more lenient sentences for minor crimes, the justice and punishment consistency principles are violated.

Articles 367.1.5 and 398.1.3 of the Code of Criminal Procedure stipulate the possibility of setting aside or changing a judgement or a court ruling if it is inconsistent with the gravity of the offence and the circumstances of an offender for cases heard in courts of appeal or cassation. A punishment is considered inconsistent with the gravity of offence or with the circumstances of an offender if such a punishment, although it may not exceed the limits under a relevant Code article, is by its type or severity (either too lenient or excessively severe) clearly unfair (Article 372). Article 373.1.1 of the Code of Criminal Procedure stipulates that the court of appeal may change the judgment to a more lenient one if the severity of punishment is found to be inconsistent with the gravity of an offence or the circumstances of an offender.

The substantial violation of the criminal procedure legislation includes all the cases of the infringement of the Code of Criminal Procedure which have or may have prevented a court from considering in a comprehensive manner a case and delivering a verdict or ruling that is legal, based on evidence, and fair (Article 370.1).

The lack of a legal opportunity for a custom-made or more lenient punishment therefore results in the impossibility for a court to take account of the gravity of the offence, the magnitude
of the damage incurred, the type of guilt or motive, the legal status of a defendant, and other critical circumstances when deciding on minor offences. This violates the principle of a fair, case-dependent, and commensurate punishment.

Item 3 of the operative part of the Decision reads:

“For the Parliament (Verkhovna Rada): to bring the provision of Article 69 of the Criminal Code in conformity with the decision of the Constitutional Court.”

Judges V.D. Vozniuk and V.I. Ivashchenko submitted their dissenting opinions.

DECISION NO. 17-RP/2010 OF 29 JUNE 2010
Concerning the compatibility with the Constitution (constitutionality) of Paragraph 8 of Article 11.1.5 of the Law on Police

I. The Authorised Human Rights Representative of the Parliament (Verkhovna Rada) applied to the Constitutional Court for a declaration that the provisions of Paragraph 8 of Article 11.1.5 of the Law on Police (Law No. 565-XII of 20 December 1990, as amended; hereinafter, the “Law”) were unconstitutional in that those provisions permit the police to arrest persons suspected of vagrancy and to detain them in special detention facilities for a period up to 30 days with a reasoned court decision.

II. Ukraine is a democratic, law-based state; the human being, his/her life and health, honour and dignity, inviolability and security are recognised as the highest social value; human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State that is answerable to an individual for its activity; the affirmation and ensuring of human rights and freedoms is the main duty of the State (Articles 1, 3.1 and 3.2 of the Constitution).

The principle of the rule of law is recognised and effective (Article 8.1 of the Fundamental Law).

One of the elements of the rule of law is the principle of legal certainty, according to which the restriction of fundamental human and citizens’ rights and the implementation of these restrictions are acceptable only on the condition of ensuring the foreseeability of the application of the legal rules established by these restrictions. In other words, the restriction of any right should be based on the criteria that provide a person with the possibility of distinguishing lawful conduct from unlawful conduct and foreseeing the legal consequences of his/her conduct.

According to Article 29 of the Constitution, each person has the right to freedom and personal inviolability (Article 29.1); no one shall be arrested or held in custody other than pursuant to a reasoned court decision and only on the grounds and in accordance with a procedure established by law (Article 29.2); in the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours (Article 29.3).

The provisions of Article 29 of the Constitution define detention, arrest, and holding a person in custody as coercive measures that restrict the right to freedom and the inviolability of a person and may be applied only on the grounds and in accordance with a procedure established by law.

The Constitutional Court holds that the words “only on the grounds and in accordance with a procedure established by law” envisage the obligation of state bodies and their officials to ensure compliance with the rules of both substantive and procedural law during arrest.

The above-mentioned means that a detained person has the right to have a competent court examine not only whether state bodies and their officials have complied with the rules of the procedural law that must be followed when arrests are made, but also the basis of the suspicion that constituted the grounds for arrest, the lawfulness of its enforcement, and whether it was necessary and justified in the particular circumstances.
Arrest shall not be considered justified in any case where the acts a detainee is accused of cannot be qualified as or were not considered by law to be a violation of law at the time those acts were carried out.

The impugned provision of the Law permits the police to arrest persons who are suspected of vagrancy and to detain them in special detention facilities for a period up to 30 days with a court decision.

This provision means that the objective of such an arrest is to ascertain the involvement of a person in vagrancy, that is to say, of committing a crime or another violation of law. Such an arrest was subject to the condition of criminal liability for such acts under the 1960 wording of Article 214 of the Criminal Code. The components of the crime defined by this article were decriminalised by Law No. 2547-XII of 7 July 1992 amending and supplementing the Criminal Code, the Ukrainian SSR Code of Criminal Procedure, and the Ukrainian SSR Code on Administrative Offences.

According to Article 92.1.22 of the Constitution, the principles of civil legal liability, acts that are crimes, administrative or disciplinary offences, and liability for them shall be determined exclusively by means of laws.

The Criminal Code provides that the criminality of acts, as well as their punishment and other criminal legal consequences, is determined exclusively by this code (Article 3.3). An analysis of the provisions of the Code shows that it does not identify vagrancy as an action injurious to the public or provide for liability for its perpetration.

Nor does the Code of Administrative Offences or any other law define vagrancy as a violation of law.

The impugned provision of the Law establishes only the grounds for arrest. The Law does not set out the content or signs of vagrancy. Nor does the Law set out sufficiently accessible, clearly-worded procedures for its enforcement, that is to say, the procedures that would preclude arresting persons in an arbitrary manner on the suspicion of vagrancy. This does not conform to the principle of legal certainty.

An analysis of the rules of the Code of Criminal Procedure, in particular, Articles 106, 115, 149 and 1652, and the Code of Administrative Offences (Articles 260, 261, 262, etc.) taken together with the consideration that vagrancy is not determined in laws to be a crime or an administrative offence, gives grounds for concluding that these rules do not envisage procedures for or the consideration by courts of issues concerning the arrest of persons on the suspicion of vagrancy.

For the reasons mentioned above, the Constitutional Court considers that the provisions of Paragraph 8 of Article 11.1.5 of the Law are not compatible with Articles 8.1, 29.1, 29.2, 29.3, 55.2 and 58.2 of the Fundamental Law.

According to the Constitution, everyone who is legally present on the territory is guaranteed freedom of movement, free choice of place of residence, and the right to freely leave the territory, with the exception of restrictions established by law (Article 33.1).

The relevant provisions of the Constitution and international legal acts are further developed and specified in Law No. 1382-VI of 11 December 2003 on freedom of movement and free choice of place of residence (hereinafter – “Law No. 1382”). In particular, Article 2 of Law No. 1382 provides for the guarantee of freedom of movement and free choice of place of residence, while Articles 12 and 13 define the persons whose freedom of movement and free choice of place of residence are limited.

The above-mentioned articles of Law No. 1382 do not provide for the restriction of the right to freedom of movement and free choice of place of residence of a person suspected of vagrancy.

Proceeding from the foregoing, the Constitutional Court holds that the provisions of Article 11.1.5.8 of the Law are not compatible with Article 33.1 of the Constitution.
Examining the issue raised in the present constitutional petition, the Constitutional Court declares on the grounds mentioned above that the provisions of Article 11.1.11 of the Law (which permit the police to photograph, make audio recordings of, film, make video recordings of, and fingerprint persons arrested on the suspicion of vagrancy) are incompatible with the Constitution. It is for this reason that the said Article is considered unconstitutional under Article 61.3 of the Law on the Constitutional Court.

DECISION NO. 2-RP/2016 OF 1 JUNE 2016

The conformity with the Constitution of Ukraine (constitutionality) of the provision of the third sentence of Article 13.1 of the Law “On Psychiatric Care” (a case on judicial control over the hospitalisation of disabled persons where they are sent to a psychiatric institution)

According to the Fundamental Law, all people are free and equal in their dignity and rights; human rights and freedoms are inalienable and inviolable; constitutional rights and freedoms are guaranteed and shall not be abolished; everyone has the right to respect for his/her dignity; each person has the right to freedom and personal inviolability; human and citizens’ rights and freedoms are protected by courts; everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Articles 21, 22.2, 28.1, 29.1, 55.1, 55.2).

The Constitutional Court considers that the restrictions of the realisation of constitutional rights and freedoms may not be arbitrary and unfair, they have to be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate aim, be conditioned by public need to achieve this aim, be proportionate and reasonable; in case of the restriction of a constitutional right or freedom, the legislator shall introduce such a legal regulation that will make it possible to optimally achieve the legitimate aim with minimal interference in the implementation of this right or freedom and not to violate the essential content of such a right.

The Constitution stipulates that citizens deemed by a court to be incompetent do not have the right to vote (Article 70). In this regard, the said persons are subject to restrictions provided for in Articles 72, 76, 81, and 103 of the Fundamental Law. In the opinion of the Constitutional Court, declaring a person to be incapable cannot deprive him/her of other constitutional rights and freedoms or restrict him/her in the manner that undermines their essence.

According to the Civil Code, a natural person may be declared by a court to be legally incapable if he/she is not able to perceive and/or control his/her actions due to a chronic and stable mental disorder; a natural person shall be declared to be legally incapable from the effective date of a court decision thereon; a natural person shall be placed in a ward; a legally incapable natural person shall be not entitled to take any legal actions; the guardian shall take legal actions on behalf and in favour of a legally incapable natural person; the guardian shall bear liability for the damage inflicted by a legally incapable natural person (Articles 39.1, 40.1, 41). The procedure for declaring a natural person to be legally incapable is established in Articles 236–241 of the Code of Civil Procedure.

A systematic analysis of the legislation gives grounds for stating that legally incapable persons are a special category of individuals (natural persons) who temporarily or permanently are not able, at their own discretion, to implement property and personal non-property rights, to perform duties and bear legal liability for their actions due to a chronic and stable mental disorder. Incapable persons should be provided with the legal possibilities of satisfying individual needs, implementing and protecting their rights and freedoms. Although, due to health reasons, disabled persons are not able personally to implement certain constitutional rights and freedoms,
including the right to freedom and personal integrity, they may not be completely deprived of these rights and freedoms; therefore, the state is obliged to create effective legal mechanisms and guarantees for their maximum implementation.

The Constitutional Court of Ukraine proceeds from the fact that the fundamental values of the effective constitutional democracy include freedom, the availability of which is a prerequisite for the development and socialisation of an individual. The right to freedom is an integral and inalienable constitutional human right and provides for a possibility of selecting one’s own behaviour with the purpose of free and comprehensive development, for a possibility of acting independently according to one’s own decisions and plans, prioritising, doing whatever is not prohibited by law, freely and at one’s own discretion moving throughout the state, choosing the place of residence, etc. The right to freedom means that a person is free in his/her activity from outside interference, except for the restrictions established by the Constitution and laws.

The Constitutional Court of Ukraine takes account of the requirements of the effective international treaties ratified by the Verkhovna Rada of Ukraine and the practice of interpretation and application of these treaties by international bodies the jurisdiction of which is recognised by Ukraine, including the European Court of Human Rights. Since Article 29 of the Constitution of Ukraine corresponds to Article 5 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”), then, according to the principle of friendly attitude to international law, the practice of the interpretation and application of the said article of the Convention by the European Court of Human Rights should be taken into account when considering this case.

An analysis of the above-mentioned international documents leads to the conclusion on the need for judicial review of the interference with the right to freedom and the personal inviolability of a person with mental disorder during his/her hospitalisation at a psychiatric institution without his/her consent.

According to the first and third sentences of Article 13.1, Article 13.2 of the Law “On Psychiatric Care” No. 1489-III, dated 22 February 2000 with subsequent amendments (hereinafter referred to as “the Law”), a person is hospitalised at a psychiatric institution voluntarily – at his/her request or upon his/her conscious consent; a person declared to be legally incapable in the manner prescribed by law is hospitalised at a psychiatric institution at the request or upon the consent of his/her guardian; the hospitalisation of a person in cases stipulated by paragraph one of this article is carried out upon the decision of the psychiatrist.

According to Article 1.9 of the Law, the conscious consent of a person is a consent freely expressed by a person able to understand information provided in accessible way, about the nature of his/her mental disorder and forecast of its possible development, objective, procedures and duration of psychiatric care, diagnostic methods, treatment and medicines that can be used during psychiatric care, their side effects and the alternative methods of treatment.

The hospitalisation of a legally incapable person by sending him/her to a psychiatric institution at the request or with consent of his/her guardian upon the decision of the psychiatrist provides long-term psychiatric care in hospital. A legally incapable person hospitalised at a psychiatric institution in the manner provided for in Article 13 of the Law stays in such an institution around the clock without the possibility of leaving its territory voluntarily, and his/her actions are constantly monitored by the medical personnel.

Given the above, it appears that the hospitalisation of an incapable person by sending him/her to a psychiatric institution under Article 13 of the Law is a restriction on the right to freedom and personal inviolability of a person enshrined in Article 29 of the Constitution of Ukraine; therefore, such hospitalisation should meet the criteria set out in this decision.
The procedure of the hospitalisation of a legally incapable person by sending him/her to a psychiatric institution at the request or with the consent of his/her guardian upon the decision of the psychiatrist, which is established by law, does not provide for judicial control over such hospitalisation, since the legislator has actually considered it voluntary, even though the hospitalisation of an incapable person is carried out without his/her conscious consent.

The Constitutional Court of Ukraine considers that such hospitalisation, by its very nature and because of its consequences, is a disproportionate restriction on the constitutional right of incapable persons to freedom and personal inviolability; therefore, such hospitalisation should be carried out in compliance with the constitutional guarantees of the protection of human and citizens’ rights and freedoms, with account of the above-mentioned international legal standards, the legal positions of the Constitutional Court and exclusively upon a court decision pursuant to Article 55 of the Fundamental Law.

Judicial control over the hospitalisation of an incapable person where he/she is sent to a psychiatric institution in the manner provided for in Article 13 of the Law is a necessary guarantee of the protection of his/her rights and freedoms enshrined, in particular, in Articles 29, 55 of the Fundamental Law. After an independent and impartial consideration of the hospitalisation of an incapable person where he/she is sent to a psychiatric institution, a court has to adopt a decision about the legitimacy of restricting the constitutional right to freedom and personal inviolability of such a person.

The Constitutional Court finds that the State, in performing its main duty – promoting and ensuring human rights and freedoms (Article 3.2 of the Constitution) – must not only refrain from the violations or disproportionate restrictions of human rights and freedoms, but also take appropriate measures to ensure their full implementation by everyone under its jurisdiction. To this end, the legislator and other public authorities should ensure an effective regulation that meets the constitutional norms and principles, and should create mechanisms necessary to meet human needs and interests. At the same time, particular attention should be focused on especially vulnerable categories of individuals, including, in particular, persons with mental disorders.

The Constitutional Court, the sole body of constitutional jurisdiction in Ukraine, the task of which is to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the State throughout the territory of Ukraine, considers that the legal regulation of the hospitalisation of an incapable person by sending him/her to a psychiatric institution established in Article 13 of the Law does not comply with the requirements of Article 3 of the Constitution regarding the duty to establish a proper legal mechanism for the protection of the constitutional rights and freedoms of individuals, including those legally incapable, from arbitrary restrictions on his/her constitutional right to freedom and judicial protection.
IV. CERTAIN REFLECTIONS ON THE APPLICATION OF THE PRINCIPLES OF THE RULE OF LAW*

* Presented at the Vilnius Forum by President of the Constitutional Court of the Republic of Lithuania Dainius Žalimas. The analysis is based on the replies of the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine to the Questionnaire on the application of the principles of the rule of law drafted by the Constitutional Court of the Republic of Lithuania.
1. The concept of the rule of law

a) The entrenchment of the concept of the rule of law in the legal system

The concept of the rule of law1 is mentioned in the Constitutions of all the states concerned,2 and the main elements of the content of this constitutional principle are disclosed in the jurisprudence of the responding Constitutional Courts. In the legal systems of all the states, the rule of law is perceived as a fundamental principle, which generally implies the supremacy of law in all the areas of the functioning of the state and constitutes the foundation of the Constitution and the constitutional legal order. As such, it is viewed as inherent in various provisions of the Constitution, i.e. not only those where it is entrenched expressis verbis. For example, it stems from the constitutional provisions consolidating the supremacy of the Constitution, the separation of powers, as well as the provisions on the recognition and protection of fundamental human rights and freedoms as supreme values. At the same time, the concept of the rule of law has no exhaustive definition and is open-ended, leaving space for further development through constitutional jurisprudence.

The responses to the Questionnaire clearly demonstrate that the legal systems of the states concerned embrace a “thick” or substantive concept of the rule of law. That is, this principle comprises not only formal standards of legality (i.e., observance of the hierarchy of legal acts, foreseeability, prohibition of retroactivity, etc.) but also substantive requirements, embracing the protection of human rights. Furthermore, the principle of the rule of law is inseparably interrelated with the principle of democracy.

Among the states, certain specificities can be noted in relation to the concept of the principle of the rule of law. For instance, in the Constitutions of Georgia and Ukraine, this principle is closely linked to the principle of a social state. In the Constitution of Lithuania, it is associated with the principle of an open, just, and harmonious civil society. The Moldovan constitutional jurisprudence places a particular emphasis on the establishment and enhancement of a real and authentic democracy as an inseparable element of the rule of law. The Constitutional Court of Ukraine, seeking to clearly demarcate the concept of the rule of law from the rule of statute law, held that the law is not restricted to legislation as one of its forms, but that it also comprises other social regulatory means such as ethical norms, traditions, and customs legitimised on a certain cultural level of society, as they have been worked out during its historical development. In addition, the Ukrainian constitutional jurisprudence makes it clear that the principle of the rule of law comprises the conception of justice as fairness (equity).

On the other hand, all the aforementioned specificities reveal the existence of certain common features: i.e., the principle of the rule of law is not isolated from other fundamental constitutional principles and values, and it is intrinsically linked to the idea of a free and harmonious society.

The scope of the content of the principle of the rule of law, as well as the nature of this principle as a fundamental principle underlying the direction of the development of the state, determines that this principle is recurrently invoked in the judgments3 of the responding Constitutional Courts. Integrating various constitutional values, this principle has considerable significance for the systemic interpretation of the respective Constitution. Furthermore, it can be maintained that this principle implies the necessity to be not confined to a narrow literal

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1 Or a law-governed state (a state under the rule of law) according to the terminology of the German concept of Rechtstaat.
2 In this text, “the states concerned” or “the states” refer to Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine.
3 This term is used as a general term to refer to the final acts adopted by the responding Constitutional Courts.
interpretation of the Constitution but to interpret the Constitution as a harmonious integrity. It is also obvious that this principle is not a mere theoretical concept; as a result of constitutional jurisprudence, it amounts to a practical instrument enabling the efficient protection of human rights and justice.

b) The main elements of the principle of the rule of law

In the jurisprudence of the responding Courts, the elements of the content of the principle of the rule of law are disclosed to a varying extent. In the constitutional jurisprudence of Georgia, the supremacy of the Constitution, the protection of basic human rights and freedoms, the principle of legal security, proportionality, and the right to an independent trial are consolidated as the fundamental elements of the rule of law. The Lithuanian official constitutional doctrine, in addition to the general elements of this principle (such as the protection of human rights, the supremacy of the Constitution, the right to an independent and impartial trial, the protection of legitimate expectations, legal certainty, and legal security), also identifies the detailed requirements applicable to the legislature and other law-making entities (i.e., the clarity, consistency, stability, and non-retroactivity of a legal regulation, the prohibition to restrict the rights of the person more than necessary in order to achieve the pursued objectives, the necessity to ensure the equality of persons before the law, etc.), as well as the requirements applicable to law-applying entities (i.e., non bis in idem, impartiality and independence, proportionality, etc.). In Moldova, the principle of the rule of law covers the principles of the separation of powers, genuine democracy, the protection of human rights and freedoms of citizens, the coherency of the legal order, and the principle of legality. In the official constitutional jurisprudence of Ukraine, the specific elements forming the core of this principle (justice as fairness, good faith, reasonableness, legal certainty, proportionality, and the limitation of discretionary authority) are explicitly identified as constituting the content of this principle, whereas other elements (respect for human rights and freedoms, the supremacy of the Constitution, equality, the separation of powers, legality, and the independence of courts and judges), though not explicitly defined as components of the rule of law, are applied in the contexts associated with the rule of law.

Thus, in the constitutional jurisprudence of all the states, the concept of the rule of law is linked to such fundamental elements as the supremacy of the Constitution and the necessity to observe the hierarchy of legal acts, the protection of human rights and freedoms, the limitation of the powers and discretion of authority, proportionality, legal clarity, and legal security. At the same time, the concept of the rule of law is considered as broad and non-exhaustive, and the Constitutional Courts keep developing its content in the process of constitutional adjudication.

c) The impact of international law on the concept of the rule of law

International law has certain influence on formulating the official constitutional doctrine in relation to the concept of the rule of law. The Constitutional Courts of all the states concerned take into account relevant international hard law and soft law instruments when deciding constitutional justice cases. In particular, international law and, especially, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention on Human Rights or the Convention) and the case-law of the European Court of Human Rights (hereinafter referred to as the ECtHR) serve as a source of inspiration for the Constitutional Courts in formulating constitutional standards in the field of human rights. Another area in dealing with which references are frequently made to international standards is the independence of the judiciary.
For example, the Lithuanian official constitutional doctrine has explicitly recognised the principle of respect for international law as an element of the principle of the rule of law. This entails the openness of the Lithuanian official constitutional doctrine to international law. In addition, the constitutional protection of international obligations is consolidated in the Lithuanian constitutional doctrine formulated in relation to the constitutionality of constitutional amendments. According to this doctrine, the adoption of constitutional amendments incompatible with international obligations is not allowed as long as these obligations are not renounced in accordance with the international legal norms. In this way, the international obligations of Lithuania become an essential part of legality, as an element of the principle of the rule of law, and the minimum necessary constitutional standard for national law, in particular, in the sphere of human rights.

Openness towards international obligations is also evident from the jurisprudence of the Constitutional Court of Moldova. Although respect for international commitments is not consolidated as a constitutional principle and an element of the rule of law, the necessity to observe voluntarily assumed international obligations is perceived as a legal tradition of the state. Constitutional case-law is regarded as “an efficient and dynamic agent” of the international law assimilation and implementation procedures. The case-law of the ECtHR and the provisions of the European Convention on Human Rights have relevance in guiding the judgments of the Constitutional Court. The case-law of the ECtHR is perceived as establishing the minimum level of the protection of human rights and fundamental freedoms.

In view of the fact that the concept of the rule of law comprises the requirements of human rights protection, international standards for the protection of human rights assume particular importance in developing the substantive content of the principle of the rule of law.

2. The rule of law as a practical legal concept

a) The relevance of the principle of the rule of law in the field of the protection of human rights

The material provided by the responding Courts shows that, since the Constitutions of the states concerned contain explicit catalogues of human rights and freedoms, there is usually no necessity to invoke the principle of the rule of law in order to substantiate the existence of a certain right or freedom. However, due to its multi-faceted and substantive nature, this principle definitely has the potential of providing grounds for particular rights not expressly entrenched in the Constitutions. The principle of the rule of law also performs a supporting role in the course of the development of the content of specific constitutionally consolidated rights, such as the right to the liberty and security of a person or the right to a fair trial. For example, the Constitutional Court of Ukraine, guided by the principles of the rule of law, legal certainty, and universally recognised international standards, excluded the risk of the arbitrary detention of individuals suspected of vagrancy. The principle of the rule of law (in particular, its components of proportionality and justice as equity) also constituted the basis for declaring the unconstitutionality of the legislative norm that made it impossible to apply more lenient punishments than those established by law to individuals who committed minor offences. In addition, as the principle of the rule of law comprises such elements as legal clarity and the protection of legitimate expectations, it is considered relevant in defending the rights and guarantees not directly provided for in the Constitution but enshrined in particular legislative acts. For instance, according to the jurisprudence of the Lithuanian and Ukrainian Constitutional Courts, it is inadmissible, in an arbitrary manner, for the state to refuse the fulfilment of its social obligations to the citizens.
b) The relevance of the principle of the rule of law in the area of constitutional limits on the exercise of authority by state powers

The principle of the rule of law determines constitutional limits on the exercise of authority by state powers: this principle generally requires that all state institutions and officials act in compliance with the Constitution and law. This means that state institutions and officials are under the obligation to follow the requirements stemming from the principle of the rule of law, such as the requirements of legal clarity, proportionality, the protection of human rights, action within the limits of constitutional competence, etc. The Constitutional Courts of all the states concerned have more than once adjudicated on matters related to the functioning of the principle of the separation of powers, the system of checks and balances, or the scope of constitutional functions of a certain institution.

At the same time, the principle of the rule of law is inseparable from the responsibility of state authorities. For example, the Lithuanian Constitutional Court has emphasised the necessity of public democratic control, comprising the possibility of removing from office those state officials who violate the Constitution and law, or bring their personal interests or the interests of a group above public interests, or disgrace state power by their actions. One of the ways to realise public democratic control is through the impeachment procedure, in the course of which the Constitutional Court gives conclusions on whether the concrete actions of state officials against whom impeachment proceedings have been instituted are in conflict with the Constitution. So far, the Constitutional Court has given conclusions regarding the actions of four persons (a former President of the Republic and three members of the Seimas). The impeachment procedure is considered an important mechanism for removing from office highest state officials who have grossly violated the principle of the rule of law.

The issues concerning democratic control and the responsibility of highest-level officials are also present in the jurisprudence of the Moldovan Constitutional Court. For example, this Constitutional Court has stressed the significance of the constitutional principle of the transparency of parliamentary activity, which implies the right of every citizen to information about the activity of all members of the Parliament and, thus, creates the preconditions for citizens to supervise the activities, including the legislative activity, of the Parliament. The Constitutional Court of Moldova has also held that it is inadmissible to disregard and ignore a decision of the Parliament that expressed the vote of no confidence in the Government led by its Prime Minister for corruption, at least as long as not proven otherwise and suspicions are not dismissed. Staying in office by a Prime Minister dismissed for reprehensible acts is judged to be in defiance of the principle of the rule of law and the principles of integrity, and is considered to endanger the stability of democratic institutions.

Thus, the principle of the rule of law not only implies the limits on the exercise of state authority, but it also entails the necessity of mechanisms for the realisation of constitutional responsibility and democratic control over state authority institutions.

3. Challenges to the rule of law

a) Major past and current threats to the rule of law

The rule of law did not exist in the Soviet Union. Following the liberation of Lithuania from the occupation and the declaration of independence by Georgia, Moldova, and Ukraine, all these countries faced a serious challenge to build a democratic state based on the rule of law. Different political circumstances existing in the states determined a different extent of challenges
posed to the rule of law. Nevertheless, for example, in the responses of all the states, corruption is indicated as one of such challenges. For Lithuania, this problem was particularly acute during the transitional period; Georgia and Ukraine highlight corruption as a continuing problem or even as one of the major threats to the rule of law. Threats posed by corruption to the rule of law, democracy, and human rights are also acknowledged in the constitutional jurisprudence of Moldova.

In principle, it can be maintained that all the states encounter threats to the rule of law every time their legislature adopts norms that contradict the Constitution, as well as in cases where state institutions exceed the limits of their constitutionally established competence, or human rights and freedoms are disregarded, or constitutional principles and norms are otherwise undermined.

At the same time, it is necessary to mention that Ukraine is experiencing the ongoing situation incompatible with the rule of law as a result of, among other things, the gross violations committed by the Verkhovna Rada of the Autonomous Republic of Crimea in 2014, after it breached fundamental constitutional principles, including the territorial indivisibility of Ukraine.4

b) Challenges related to collisions between national and international law

In view of the existing challenges to the rule of law, the Constitutional Courts have a special role in protecting the supremacy of the Constitution and the rule of law. While protecting the supremacy of the Constitution, the Constitutional Courts are not free from challenges determined by inconsistencies between constitutional provisions (including the official constitutional doctrine) and international obligations undertaken by the state.

The Constitutional Courts of Lithuania and Moldova had to deal with the situations in which the interpretation by the Constitutional Courts differed from that handed down by the ECtHR with regard to the right to free elections, as consolidated in Article 3 of Protocol No. 1 to the Convention. Both Constitutional Courts adopted the positions that paved the way to the implementation of the respective judgments given by the ECtHR. Following the judgment of the ECtHR in the case of Paksas v. Lithuania (in which the ECtHR recognised that a permanent disqualification of a person removed from office following impeachment proceedings from standing in parliamentary elections was disproportionate and, thus, constituting a violation of Article 3 of Protocol No. 1 to the Convention), the Constitutional Court of Lithuania refused to reinterpret the Constitution (such reinterpretation would have compromised the constitutional institute of an oath); however, the Constitutional Court emphasised that the constitutional principle of pacta sunt servanda implies the duty of the Republic of Lithuania to remove the incompatibility of the provisions of Article 3 of Protocol No. 1 to the Convention with the Constitution, i.e. it obliges the Republic of Lithuania to adopt relevant amendment(s) to the Constitution. In its turn, following the judgment of the ECtHR in the case of Tănase v. Moldova (in which the ECtHR found that the law that prohibited the members of the Parliament with multiple citizenship from holding the position of a member of the Parliament was disproportionate and, thus, violated Article 3 of Protocol No. 1 to the Convention), the Constitutional Court of Moldova considered it necessary to revise its own case-law, namely its judgement No. 9 of 26 May 2009, and declared unconstitutional the legal provisions that prohibited persons in public positions from holding multiple citizenship.

4. Particular challenges to guaranteeing respect for the rule of law within constitutional justice

Constitutional courts implement their mission to guarantee the supremacy of the Constitution by verifying the constitutionality of enacted legislation and acting as “negative legislators”, as well as by conducting preliminary constitutional review (inasmuch as this competence is assigned to the constitutional court). The official constitutional doctrine formulated by the constitutional court also serves the preventive purpose, since it must be taken into account by all law-making and law-applying state institutions and officials. Constitutional courts are able to properly implement their mission only if they are independent; therefore, any attempts to interfere with the activity of constitutional courts or to exert on them impermissible influence should be treated as a serious challenge to the rule of law.

However, certain challenges of a greater or lesser extent in this respect were encountered by the responding Constitutional Courts, especially following the adoption of particular judgments. The material provided by the Constitutional Courts makes it clear that the attempts to exert pressure on them have taken various forms: first of all, through launching campaigns of intimidation against the constitutional court and its justices; secondly, through introducing and enacting legislation aimed at impeding the administration of constitutional justice; and, finally, by other means aimed at obstructing or even blocking the work of the constitutional court.

In the course of 20 years of activities, serious challenges of the first type have been experienced by the Constitutional Court of Ukraine. For example, in 2007, the Constitutional Court faced brutal pressure, including the removal of four judges, forcing the Chairman into resignation, also the subjection of the judges and their families to defamation and threats of violence, and the staging of multi-day rallies and manifestations at the building of the Court. These attacks were related to the case considered by the Constitutional Court concerning the constitutionality of the Decree of the President of Ukraine on early termination of the powers of the Verkhovna Rada of Ukraine. A similar campaign against the Constitutional Court of Ukraine took place in 2009. In addition, in 2015, shortly before the beginning of the consideration of the case concerning the Law on Purification of Government, the media circulated the statements of some Ukrainian parliamentarians, public figures, and members of law enforcement agencies with the accusations of bias of the judges of the Constitutional Court of Ukraine, with threats of criminal prosecution, and with calls on the public to rally at the building of the Constitutional Court of Ukraine on the day of the beginning of the consideration of the aforementioned case. In 2015, violent demonstrations by those unsatisfied with the outcome of some constitutional justice cases also took place in Georgia.

As regards legislation aimed at impeding the administration of constitutional justice, it should be mentioned that, in 2013, the Moldovan Parliament attempted to adopt the legislative provisions establishing “the loss of trust” as a ground for dismissing a judge of the Constitutional Court. According to these provisions, all judges of the Constitutional Court, irrespective of the institution that had appointed them, could be removed from office by the Parliament if the legislature established that it lost trust in them. Additionally, the two-fold reduction of the terms of examination of complaints lodged with the Constitutional Court was envisaged in the same law, along with the exclusion of the possibility of applying the suspension of the validity of a challenged act. However, after a presidential veto and the decision adopted in the process of *a priori* review by the Constitutional Court on the unconstitutionality of the law, this law was not repeatedly enacted.

A law providing for a very short time frame (maximum 45 days) for the Constitutional Court to deliver its judgment in cases where it would suspend the force of a disputed norm was
passed in Georgia. The law established that, in the event of failure to decide a case within the prescribed maximum time limit, the validity of the disputed norm had to be restored. In 2014, the Constitutional Court of Georgia declared the said provisions unconstitutional on the grounds that they could prevent the Constitutional Court from thoroughly examining the case and could lead to irreparable damage to the appellant.

In Lithuania, certain legislative initiatives aimed at limiting the powers of the Constitutional Court or otherwise encumbering its activities were mostly registered during 2013–2014. To mention just a few examples, these initiatives included: the proposal to introduce a quorum of 8 out of 9 justices required for considering cases and adopting rulings, conclusions, or decisions; the proposal to announce publicly the results of voting on the final acts of the Constitutional Court; and the proposal to establish that the rulings of the Constitutional Court and its decisions on the interpretation of the rulings of the Constitutional Court come into force only after their implementation. However, as none of these initiatives was implemented, they did not constitute a direct threat to the institutional independence of the Constitutional Court.

Interference with the activity of the responding Constitutional Courts also occurred in other forms. For instance, in 2005–2006, the Constitutional Court of Ukraine was unable to perform its activity, because the Verkhovna Rada of Ukraine did not appoint four judges of its quota and did not follow the procedures of swearing in the appointed judges of the Constitutional Court of Ukraine. Thus, there was no quorum of 12 judges necessary for plenary sessions of the Constitutional Court. This situation persisted until August 2006.

Finally, it should be noted that disregard for decisions given by the constitutional court or the repeated enactment of the legislative provisions declared unconstitutional (as it happened in Ukraine in 2009) are equally incompatible with the supremacy of the constitution and the rule of law.