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This publication is a compendium of reports for the International Conference of the Justices of the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine (Vilnius Forum) of 25–26 October 2018 and the relevant material – the doctrine of the Constitutional Court of the Republic of Lithuania, the jurisprudence of the Constitutional Courts of Georgia, the Republic of Moldova, and Ukraine, and the latest jurisprudence of the Constitutional Court of the Republic of Lithuania concerning the principles of the rule of law.
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FOREWORD

Having met, in October 2017, at the Preparatory Meeting of the Vilnius Forum, we outlined the issues of major concern to the constitutional courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine participating in the Project. This Meeting was organised in 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 Context of Regional Challenges” (hereinafter referred to as the Project), financed under the Development Cooperation and Democracy Promotion Programme of the Ministry of Foreign Affairs of the Republic of Lithuania. On the basis of these issues, we prepared the questionnaire, which subsequently was extensively answered by the participants of the Project. Such is a brief retrospective background to this publication, which provides a comprehensive analysis of challenges to the independence of the constitutional courts based on their case law and includes the jurisprudence of these courts related to the interpretation of the constitutional principle of responsible governance and constitutional safeguard with regard to the use of democratic standards against democracy.

The independence of constitutional courts is not just an essential principle of a democratic state governed by the rule of law. The independence of these courts should be self-evident and indisputable, since a constitutional court dependent on other branches of state power should not be considered a court at all. Such a court would be unable to perform its primary function of ensuring human rights and freedoms.

However, the independence of constitutional courts remains an issue of relevant concern to many countries. Threats to the independence of constitutional courts were intensely discussed by the members of constitutional justice institutions at the 4th Congress of the World Conference on Constitutional Justice in September 2017 in Vilnius. The intentions by politicians to exert pressure on the constitutional courts of their countries have also more than once been addressed at the meetings of the members of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions. Established in 2015, this Association is carrying out its activities at the time when countries are facing challenges to the rule of law, international law, as well as to their own independence and security. It is, therefore, particularly important that, while working jointly in this Project, we can identify the problems we are confronted with in our activity and can likewise work together in order to reach solutions.

With a view to the more effective protection of human rights and freedoms, the Constitutional Court has developed the official constitutional doctrine on responsible governance. The Constitutional Court has noted in its jurisprudence that the Constitution is supreme law limiting state power; the Constitution consolidates the principle of responsible governance, which implies that all state institutions and officials must exercise their functions in accordance with the Constitution and law, act in the interests of the Nation and the State of Lithuania, and properly fulfil the powers assigned to them under the Constitution and laws. Most
importantly, the principle of responsible governance obliges all state authorities to be conscious of their responsibility and to undertake reasonable and fair decisions. Besides the Lithuanian constitutional jurisprudence, this publication brings to attention the jurisprudence developed by the other Project partner countries, which will be of insightful value to all of us.

We approach the use of democratic standards against democracy primarily through freedom of expression, by looking at how it is ensured in the national constitutions, how it is interpreted in the case law of the constitutional courts, and how it is secured in the lives of the states. However, we cannot fail to overlook in this context that the institutions of direct democracy can also at times be used against democracy. Therefore, in the light of such a possibility, it is important how constitutional courts should interpret their respective national constitution and, in particular, the concept of democracy capable of defending itself. This crucial point was analysed by all the countries participating in the Project and is duly reflected in this publication.

Resulting from our project, this publication proves – which I am pleased to note – that joint work can produce outstanding results. The present publication will allow the constitutional courts of our countries – Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine – to share their experience in dealing with the same problems related to the implementation and protection of the principles of the rule of law. This is precisely the major objective pursued through this Project and our collaborative efforts: avoiding the same mistakes, building on the existing good practices of other countries, and facilitating right solutions.

Moreover, it would be pertinent to draw attention to the symbolic meaning of numbers: the 25th anniversary of the activity of the Constitutional Court coincides with the implementation of the second project aimed at strengthening the relationships with the constitutional courts of the countries of the Eastern Partnership of the European Union and the release of the second joint publication within the framework of these projects. At the same time, we are delighted that the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions has been joined this year by the fifth member – the Constitutional Tribunal of the Republic of Poland. Thus, this year, the number 25 marks not only the anniversary of the Constitutional Court of the Republic of Lithuania, but also highlights our commitments to foster the shared values – the rule of law, democracy, human rights, as well as the independence and territorial integrity of our countries.

Dainius Žalimas
President of the Constitutional Court
of the Republic of Lithuania
Consistently strengthening relationships with the constitutional courts of the Eastern Partnership countries of the European Union, the Constitutional Court is implementing 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 Context of Regional Challenges” (hereinafter referred to as the Project), financed under the Development Cooperation and Democracy Promotion Programme of the Ministry of Foreign Affairs of the Republic of Lithuania. The Project was launched in 2017.

The aim of the Project is, by sharing experience gained by the Constitutional Court of the Republic of Lithuania, to strengthen the role of the constitutional justice institutions of the EU’s Eastern Partnership countries – Georgia, the Republic of Moldova, and Ukraine – in ensuring the implementation and protection of the principles of the rule of law.

The activities carried out within the framework of the Project

- **The Preparatory Meeting of the Vilnius Forum.** On 24–25 October 2017, the Constitutional Court of the Republic of Lithuania organised the Preparatory Meeting of the Vilnius Forum, during which the delegations of the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine discussed the role of constitutional courts in ensuring the rule of law.

  The purpose of the meeting was to identify those issues in relation to ensuring the rule of law that were of major concern to the Project partners, and to clarify the areas calling for wider discussions and more comprehensive analysis. With regard to the further stage in the implementation of the Project, the representatives of the Constitutional Courts agreed to actively share the gained experience in the area of ensuring the rule of law and focus special attention on the issues related to the independence of constitutional courts, human rights limitations, and responsible governance. The relevant regional challenges were also discussed with researchers from the Vilnius Institute for Policy Analysis.

  The heads of the delegations of the Constitutional Courts met with H. E. President of the Republic of Lithuania Dalia Grybauskaitė. During the meeting, the discussion addressed the importance of constitutional courts in building a state governed by the rule of law, the legal framework reforms under way, the reinforcement of the system of courts, as well as assistance by the Republic of Lithuania in strengthening the constitutional courts of the countries participating in the Project and enhancing the processes of democracy therein.
The group photos of the participants of the Preparatory Meeting of the Vilnius Forum, 2017
Participants of the Preparatory Meeting of the Vilnius Forum (from left): 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 Tudor Panțîru (2017–2018), and President of the Constitutional Court of Ukraine Stanislav Shevchuk.

Justice of the Constitutional Court of the Republic of Lithuania Gediminas Mesonis and the guest speaker Marius Laurinavičius.
Issues concerning the ensuring of the rule of law were discussed in a meeting with the representatives of the Office of the Prosecutor General. The delegations from the Constitutional Courts of Georgia, the Republic of Moldova, and Ukraine were introduced with the activity of the Office of the Prosecutor General; the Prosecutor General, his deputies, and other prosecutors shared their experience of international legal cooperation in criminal cases, and presented the international projects involving the joint participation of the representatives of the Office of the Prosecutor General and colleagues from Georgia, the Republic of Moldova, and Ukraine.

The Project partners also joined the events held on the occasion of the 25th anniversary of the Constitution of the Republic of Lithuania – the ceremony of unveiling the commemorative plaques on the facade of the Constitutional Court and the solemn sitting of the Seimas. At the solemn sitting, reports were delivered by Dainius Žalimas, President of the Constitutional Court of the Republic of Lithuania, and Tudor Panţiru, President of the Constitutional Court of the Republic of Moldova.

- **The questionnaire.** As the court implementing the Project, the Constitutional Court of the Republic of Lithuania prepared a questionnaire on ensuring and protecting the principles of the rule of law and circulated it to the Project partners asking them to fill it out. The questionnaire was aimed to create the preconditions for determining the issues of particular importance to the constitutional justice institutions of the partner countries in the area of the implementation and protection of the principles of the rule of law in the context of regional
challenges. The questionnaire included questions of topical relevance to the Project partners, which were formulated in the areas outlined at the Preparatory Meeting of the Vilnius Forum – the independence of constitutional courts, the use of democratic standards against democracy, and responsible governance. The responses to the questionnaire were employed for identifying the issues of concern to the Project partners and summarising the relevant experience of the Constitutional Court.

- **The joint publication** – the publication on ensuring the implementation and protection of the principles of the rule of law, based on the jurisprudence of the Project partners (Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine) (published in 2018).

- **The Vilnius Forum** – the conference of the justices of the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine – of 25–26 October 2018, aimed at sharing the relevant experience of the Project partners on the implementation of the principles of the rule of law.
I. THE INDEPENDENCE OF CONSTITUTIONAL COURTS
CONSTITUTIONAL STANDARDS OF JUDICIAL INDEPENDENCE: RESPONSE TO THE ARISING CHALLENGES

Dainius ŽALIMAS
President of the Constitutional Court of the Republic of Lithuania,
Professor of the Law Faculty of Vilnius University

Introduction

In a democratic state governed by the rule of law, independence is an integral part of the concept of a court: a court dependent on the executive or legislature may not be considered a court at all. It is clear that courts would be unable to perform their role if they were not independent. The independence of courts is an essential guarantee for ensuring human rights and freedoms. If the independence of courts is not ensured in a state, it is pointless to discuss the possibility for individuals to defend themselves against the arbitrariness of state authorities.

In ensuring the principle of the independence of the Constitutional Court and its judges as in the case of ordinary courts, it is important to guarantee the independence of the Constitutional Court as an institution and the independence of the judges of the Constitutional Court as inseparable elements. The independence of the Constitutional Court as an institution mainly comprises such guarantees as its financial and material (organisational) independence. The independence of the judges of the Constitutional Court mostly comprises such guarantees as their procedural independence, the inviolability of their term of office, the inviolability of the person of a judge, and the social and material guarantees of judges.

In fact, European states face various challenges in regard to the enumerated guarantees of the independence of judges and courts: for instance, influence over courts or their judges by way of interfering in the process of the selection of candidates for judicial office and the appointment of judges; influence over the establishment of the remuneration and other social guarantees of judges; public statements expressing the aims to limit the powers of courts; and, in particular, which is most threatening – non-compliance with or disregard for court judgments. The Constitutional Courts of Georgia, the Republic of Moldova, and Ukraine have also experienced the attempts of other state powers to influence the functioning of the Courts or even put pressure on their activities (for example, in the case of Moldova, it was the pressure exercised by the President of the Republic of Moldova and his interference with the activity of the Constitutional

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The Constitutional Court of the Republic of Lithuania has also encountered certain attempts leading to the creation of obstacles to its activity (i.e. there have been certain legislative initiatives); however, they have not been implemented. In Lithuania, the global economic and financial crisis, which occurred in 2008, and, as a consequence, the anti-crisis (austerity) measures applied in the state by the politicians were the most serious challenge for the independence of judges and courts, including the Constitutional Court. These measures aimed at reducing public expenditure and lowering the level of social guarantees, including the funding necessary to perform state functions (thus, also in the area of the administration of justice), remuneration, pensions and other social benefits. Under such circumstances, it is natural that the material guarantees of judges were most vulnerable.

In its rather broad jurisprudence, the Constitutional Court of the Republic of Lithuania revealed the content of these and other guarantees of the independence of judges and courts, including the Constitutional Court. The Court had a chance to develop the set of constitutional requirements (imperatives, guidelines for the legislature and the Government, also prohibitions and limitations applicable to judges), i.e. the explicit and implicit constitutional standards, which are oriented to ensure the independence of judges and courts in a democratic state under the rule of law and socially oriented state (i.e. related to ensuring social and economic human rights). The aim of my report is to reveal the requirements that have been formulated by the Constitutional Court of the Republic of Lithuania in response to the challenges posed to judicial independence (including the independence of the Constitutional Court as an institution and the independence of the judges of the Constitutional Court). These requirements concern five guarantees of judicial independence such as (1) procedural independence of judges; (2) inviolability of the term of office of judges; (3) inviolability of the person of a judge; (4) social and material guarantees of judges; and (5) guarantees of the financial and material provision of courts.
1. Constitutional requirements concerning the procedural independence of judges

Challenges arising to the procedural independence of the judges of constitutional courts relate to various ways of influence exerted on them in the process of administering justice, as well as concern non-compliance with or disregard for court judgments.

The principle of the independence of the judges of the Constitutional Court is consolidated not only in the provision of the Constitution, which is mainly applied to ordinary courts, namely that the judge and courts are independent while administering justice (Paragraph 2 of Article 109 of the Constitution). This principle is specifically enshrined in Article 104 of the Constitution, wherein it is stated that, while in office, the judges of the Constitutional Court are independent of any other state institution, person or organisation, and follow only the Constitution of the Republic of Lithuania.

As regards the limitations placed on judges with the aim to guarantee their independence from political and other external factors, I could provide the principled position of the Constitutional Court. The Court has more than once noted that the official constitutional doctrine cannot be changed subject to accidental (from the legal point of view) factors (e.g. change in the composition of the Constitutional Court6), following the arguments of political expediency, the documents of political parties or different public organisations, opinions of and assessments by politicians, political science or sociological research, or results of public opinion polls.7 Otherwise, as the Constitutional Court has stated, preconditions for doubting the impartiality of the Constitutional Court may arise and a threat to its independence and the stability of the Constitution itself, inter alia, the official constitutional doctrine,8 may emerge. This is a self-limitation requirement aiming to ensure consistent and foreseeable work of the Constitutional Court, which would not be dependent on any factors of external pressure.

In this context, an example expressing certain attempts of politicians to influence the Constitutional Court is noteworthy. In 2014, the Seimas established the ad hoc Investigation Commission for the Restoration of the Civil and Political Rights of President Rolandas Paksas. This Commission had to figure out how civil and political rights of Rolandas Paksas could be restored after the adoption of the judgment of 6 January 2011 by the European Court of Human Rights in the case of Paksas v Lithuania,9 as well as how this judgement should be implemented. After the said Commission had finished its work, the Seimas approved its concrete proposals, confirming that they were appropriate and would be followed in the process of the adoption of relevant legal regulation. One of these proposals was to establish the duty of the Constitutional Court to review its previous acts (inter alia in this particular case – the acts concerning the impeachment of Rolandas Paksas) with regard to the relevant decisions of international courts. In its ruling of 22 December 2016, the Constitutional Court acknowledged the unconstitutionality

6 The doctrinal provisions stating that any change of the precedents of the Constitutional Court or modification of the official constitutional doctrine may not be determined by accidental (in the aspect of law) factors (for instance, the modification of the official constitutional doctrine may not be determined only by a change in the composition of the Constitutional Court), were consolidated, e.g. in the Constitutional Court’s decision of 21 November 2006, as well as rulings of 22 October 2007 and 5 September 2012.

7 The doctrinal provisions stating that the Constitutional Court may not interpret its final acts by following accidental (from the legal point of view) factors (e.g. change in the composition of the Constitutional Court), that the Constitutional Court may not interpret its final acts by following, inter alia, the arguments of political expediency, the documents of political parties or different public organisations, opinions of and assessments by politicians, political science or sociological research, or results of public opinion polls, were consolidated, e.g. in the Constitutional Court’s decisions of 13 March 2013, 16 January 2014 and 7 March 2014.

8 The Constitutional Court’s decision of 13 March 2013.

9 Case of Paksas v Lithuania (No 34932/04).
of this proposal. The Constitutional Court held that the Seimas may not approve the proposals of any possible content made by an ad hoc commission of the Seimas that would be incompatible with the Constitution. In particular, this proposal was incompatible with the constitutional principles of responsible governance, rule of law, and the separation of powers. Such a proposal should be deemed encroachment on the independence of the Constitutional Court.

2. Constitutional requirements related to the inviolability of the term of office of judges

As to the other guarantee of the independence of the judges of constitutional courts, which is the guarantee of their term of office, there could mainly be such challenges as interference in the process of the selection of candidates for judicial office and the appointment of judges, as well their unconstitutional release from office.1

In the context of the judges of ordinary courts, it is important to emphasise some doctrinal provisions from the case law of the Constitutional Court in relation to the term of office of judges. The Constitutional Court has held more than once that only an independent court, thus only such a court whose judges are guaranteed the inviolability of their term of office, may be considered to be a court administering justice as required by the Constitution. The guarantee of the inviolability of the term of office of a judge is also important because of the fact that a judge, whatever political forces are in power, must remain independent and not conciliate to the possible change of political forces. The principle of the independence of a judge, consolidated in the Constitution, implies only such legislative regulation of the term of office of a judge that, when appointing a judge, he/she would know the term of his/her office (until the time established by law or until he/she reaches the retirement age established by law). Thus, the term of office of a judge cannot become dependent upon free discretion of the state institutions that have appointed him/her to office.

Some of the mentioned requirements could be applicable to the judges of the Constitutional Court. For instance, the powers of judges may not be terminated prior to the expiry of their term of office (with the exception of the case provided by the Constitution, i.e. under the procedure of impeachment). The Constitutional Court also revealed the requirements applicable to the persons due to their appointment as the Constitutional Court’s judges. In its ruling of 2 June 2005, the Constitutional Court dealt with the situation when the judge of the Supreme Court was released from the office due to his appointment as a judge of the Constitutional Court. The

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11 In the decision of 15 May 2009 of the Constitutional Court of the Republic of Lithuania the Court has dealt with the situation when the President of the Supreme Court was not released from office by a resolution of the Seimas upon the expiry of the term of powers. In its rulings of 16 January 2007 and of 17 December 2007 the Constitutional Court dealt with the situation when the judges were released from the office of a judge of a regional court and the offices of the presidents of local courts because they had discredited the name of judges by their conduct.


15 In Article 74 of the Constitution of Lithuania it is, inter alia, stated that the President and judges of the Constitutional Court, the President and judges of the Supreme Court, the President and judges of the Court of Appeal, who grossly violate the Constitution or breach their oath, or are found to have committed a crime, may be removed from office or have the mandate of a member of the Seimas revoked by a 3/5 majority vote of all the members of the Seimas. This is performed according to the procedure for impeachment proceedings, which is established by the Statute of the Seimas.
Constitutional Court considered the constitutionality of the legal regulation according to which the Seimas appointed a judge of the Supreme Court as a judge of the Constitutional Court without his prior release from the office of a judge of the Supreme Court. The Court acknowledged that this legal regulation was not contrary to the Constitution. No other procedures, including dismissal of the judge from the previous office, may preclude the appointment of a judge of the Constitutional Court.

While deciding the issue of this constitutional justice case, the Constitutional Court defined the guarantees for the persons in the process of their appointment to the Constitutional Court. First, the procedure of appointment of the judges of the Constitutional Court is expressis verbis established in the Constitution. Paragraph 3 of Article 103 of the Constitution provides that citizens of the Republic of Lithuania who comply with specific requirements for their reputation, legal education and experience of their legal work, may be appointed as judges of the Constitutional Court. Under Paragraph 1 of Article 103 of the Constitution, the President of the Republic, the Speaker of the Seimas, and the President of the Supreme Court present candidates for judges of the Constitutional Court; every three years, one-third of the Constitutional Court is reconstituted. Second, under the Constitution, when judges of the Constitutional Court are being appointed, only the following subjects expressis verbis specified in the Constitution enjoy the respective powers: (1) the state official (the President of the Republic, the Speaker of the Seimas, and the President of the Supreme Court) who presents a candidate for a judge of the Constitutional Court to the Seimas, and (2) the Seimas, which adopts a decision concerning the appointment of the presented candidate as a judge of the Constitutional Court. Thus, according to the Constitution, no institution and no official enjoys the powers to deny or limit the constitutional right of the aforementioned state officials to present to the Seimas a candidate to judges of the Constitutional Court. Also, no institution and no official enjoy the powers to deny or limit the constitutional right of the Seimas either to appoint the presented person as a judge of the Constitutional Court, or not to appoint him/her. The Constitutional Court emphasised that if such powers were established by means of a law or another legal act, preconditions would be created to impede reconstitution of the Constitutional Court – one of the institutions of state power consolidated in the Constitution – under the procedure established in the Constitution.

It also arises from the Constitution that, in the case of the situation when the term of office of a judge of the Constitutional Court is about to expire and no person is appointed as a judge of the Constitutional Court instead of him/her, the office of the judge of the Constitutional Court is held by the judge of the Constitutional Court whose term of office is about to expire until this situation changes. Such a guarantee is necessary in order to avoid the situations when the work of the Constitutional Court is paralysed due to the fact that, upon the expiry of the term of office of the outgoing judges of the Constitutional Court, the new judges of the Constitutional Court have not yet been appointed. This guarantee is also expressis verbis consolidated in the provision of the Law of the Constitutional Court of the Republic of Lithuania: in the case where a new judge was not appointed on the fixed time (when the composition of the Constitutional Court has to be renewed), the judge whose term of office has expired acts for him until the new judge is appointed and takes an oath.

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3. Constitutional requirements related to the inviolability of the person of a judge

Generally, the most evident challenges related to the immunity of constitutional judges arise in situations where judges are arrested, their liberty is restricted, or they are brought to criminal liability without the consent of the required state officials, which is contrary to the guarantee of the independence of judges.

According to the Constitutional Court, the guarantee of the inviolability of the person of a judge means, first of all, the immunity against bringing to liability; however, also to a great extent it means protection of his/her person against attempts of external influence upon him/her. The inviolability of the person of a judge of the Constitutional Court is consolidated in Paragraph 2 of Article 114 of the Constitution, which is applicable to all judges, wherein it is established that a judge may not be held criminally liable, arrested or have his freedom restricted otherwise without the consent of the Seimas, or, in the period between the sessions of the Seimas, without the consent of the President of the Republic. The inviolability of the person of a judge of the Constitutional Court is also enshrined in Paragraph 4 of Article 104 of the Constitution wherein it is stated that judges of the Constitutional Court have the same rights concerning the inviolability of their person as members of the Seimas.

The immunity of a judge of the Constitutional Court from administrative liability is not established in the Constitution, save the cases when administrative liability is related to the restriction of liberty. On the other hand, an unfounded attempt to bring a judge to administrative liability may in certain circumstances actually mean an interference with his/her activities with an attempt to make an impact on the decisions of the judge, or take revenge for decisions already made by him/her. As it was noted in the ruling of 17 December 2007 of the Constitutional Court, an obligation arises from the Constitution for the legislature to establish the procedure for bringing a judge to administrative liability, which could provide the maximum protection to the judge from unreasonable attempts to bring him/her to administrative liability. According to the Constitutional Court, a procedure for bringing a judge to administrative liability, in which institutions of the judiciary would be allowed to participate, for example, a court of higher level or the institution of self-governance of judges, would give a consent for bringing the judge to administrative liability so that no influence prohibited by the Constitution would be exerted upon his/her activities, would be in compliance with the Constitution. The Constitutional Court emphasised that the purpose of such a consent is securing that no impact, prohibited by the Constitution (Paragraph 1 of Article 114 of the Constitution), is made on the activities of the judge; however, this does not mean creation of preconditions for a judge who committed an administrative violation to evade administrative liability.

Disciplinary actions may not be brought against a judge of the Constitutional Court. The questions of service-related liability of a judge of the Constitutional Court and those of non-performance or improper performance of duties are decided by the Constitutional Court itself.

17 The special institution of judges, which is provided for in Paragraph 5 of Article 112 of the Constitution and which is established by law, other self-government institutions of the judiciary.
18 In the Paragraph 1 of Article 114 of the Constitution it is stated that interference by any institutions of state power and governance, members of the Seimas or other officials, political parties, political or public organisations, or citizens with the activities of a judge or court is prohibited and leads to liability provided for by law.
4. Constitutional requirements related to the social and material guarantees of judges

The challenges related to reduction in the remuneration of the judges of constitutional courts and their pension provision upon the termination of their office are of special importance, especially in times of economic crisis, as this reduction could seriously damage the independence of judges.

The Constitutional Court of the Republic of Lithuania emphasised the general significance of the social and material guarantees of judges. According to its repeated position, expressed also in the decision of 14 January 2015, the social and material guarantees of judges are not an objective in themselves and are not considered privileges under the Constitution. The establishment of these guarantees is related to the special constitutional status of judges and, primarily, to the requirement of the independence of judges, which is established in the Constitution.

Therefore, the Constitutional Court made it clear that the social and material guarantees of judges must be real. According to the Court, only the provision of real rather than nominal social (material) guarantees in line with the constitutional status of judges and their dignity may ensure that, in administering justice, judges are not exposed to any influence by decisions of the legislative or executive branch of power, or to any interference with their activities by the institutions of state power and governance or their officials or other persons. The provision of real social (material) guarantees may protect judges against such possible decisions of the legislative, executive, or public administration subjects that could put pressure on the decisions of judges in the course of administering justice. In addition, the provision of social (material) guarantees to judges may reduce the risk of corruption. It is obvious that, in order to ensure the independence of courts, under the conditions of an economic crisis, from the influence of the political authority institutions applying austerity measures, it is essential to maintain a sufficient level of the social and material guarantees of courts and judges.

The Constitutional Court has also more than once noted that the imperative of the constitutional protection of the remuneration and other social (material) guarantees of judges derives not only from the very principle of the independence of judges, but also from the peremptory prohibition, stipulated in Article 113 of the Constitution, on receiving any remuneration other than remuneration established for judges or payment for educational or creative activities. If this prohibition is compared against the dignity and high professional requirements applicable to the profession of judges, it follows that the Constitution is the source of the imperative to secure not only the social guarantees of judges but also the reality of such guarantees.

The social (material) guarantees of judges stemming from the Constitution and the principle of the independence of judges entail the fact that the state is under the duty to ensure such social (material) provision of judges that is commensurate with their status both at the time of acting in judicial capacity and upon the termination of their term of powers.

The official constitutional doctrine on the remuneration of judges, as formulated by the Constitutional Court, is based, inter alia, on the following four main requirements. First, the remuneration of judges must be laid down exclusively by means of a law. Second, the Constitution prohibits reduction in the remuneration of judges, except in the event of a severe economic and financial situation in the state, and unless such reduction is imposed by means of a law and on a temporary basis and is in compliance with the constitutional principle of proportionality, which

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20 The Constitutional Court’s ruling of 29 June 2010.
21 The Constitutional Court’s rulings of 29 June 2010 and 14 February 2011.
22 The Constitutional Court’s ruling of 22 October 2007.
23 The Constitutional Court’s ruling of 15 January 2009.
implies that the remuneration of judges may not be reduced to the extent that would make courts incapable of fulfilling their constitutional function and duty – to administer justice. In this context, as regards the judges of the Constitutional Court, it is important that the proportionality also implies the proportions of the amount of the remuneration of different positions of judges, i.e. judges of the Constitutional Court, judges of courts of general jurisdiction or specialised courts. Third, these constitutional guarantees of the remuneration of judges are determined by the constitutional status of judges acting in their capacity as judicial power. And fourth, this constitutional status of judges derives from the constitutional function of the administration of justice.

The requirements that are applied in limiting social rights under the conditions of an economic downturn are equally applicable to the social guarantees of judges. In relation to ensuring the independence of courts, this doctrine contains two principal provisions. First, judges do not represent any exceptional social group that should remain immune from austerity measures. Just like other individuals remunerated from the state or municipal budget and just like other recipients of state pensions, judges should be subject to reduction in remuneration and pensions at the time of an economic crisis. Just like any other area of the activity of the state, the judiciary should also be subject to proportionate reduction in appropriations allocated from the state budget. In its ruling of 1 July 2013, the Constitutional Court held that the constitutional principle of social solidarity implies the proportionate distribution of losses arising from a severe economic and financial situation in the state among the members of society, inter alia, among civil servants and judges. Second, reduction in the level of social guarantees of judges and the worsening of the material provision of courts in the absence of an economic crisis, as well as any disproportionate and discriminatory reduction or the worsening of such social (material) guarantees during an economic crisis, should be regarded as an encroachment upon the independence of courts (and judges). As regards the judges of the Constitutional Court, the reducing of their remuneration was disproportionate as it was reduced twice as much as that of other judges. This led to the situation in which the remuneration of the judges of the Constitutional Court and the remuneration of other judges were made equal. Such reducing was unconstitutional, as it was an obvious encroachment on the independence of the Constitutional Court.

Other guarantees that are important for the independence of judges are the social guarantees of judges upon the termination of their powers. When interpreting the provisions contained in Article 109 of the Constitution, the Constitutional Court formulated the requirement for the legislature to establish such a legal regulation that would ensure the independence of judges and courts, inter alia, the social and material guarantees of judges not only while they are in office, but also upon the termination of their term of powers. However, the legislature has certain discretion in this area, as the social (material) guarantees of judges upon the termination of their powers may be varied, inter alia, they may include payments made periodically (i.e. the state pension of judges), as well as single payments, etc. The constitutional basis for establishing such guarantees is the exceptional constitutional status of judges, which is determined by the function of the administration of justice. Therefore, the said guarantees may depend only upon such circumstances that are related to the constitutional status of judges, but they may not be regarded as replacing other social (material) guarantees that must be ensured to former judges.

24 The Constitutional Court’s ruling of 1 July 2013.
26 The Constitutional Court’s ruling of 1 July 2013.
27 The Constitutional Court’s ruling of 29 June 2010 and decision of 14 January 2015.
on other grounds, including those that are common to all working persons. The social (material) guarantees of judges after their powers cease must be real and not merely nominal. Having regard to the Constitution, the legislature, regulating the relations connected with the state pension of judges, must establish, by means of a law, the grounds and conditions for granting this pension.  

In the ruling of 29 June 2010, the Constitutional Court investigated, inter alia, the right of the judges of the Constitutional Court to receive the state pension of judges, the amount of which depends upon the work record of a judge, when calculation is made on the basis of a five-year interval (the amount of the state pension of judges becomes different depending on whether the judge has worked for 5, 10, 15 years, and so on). Since the judges of the Constitutional Court are appointed only for a single nine-year term of office, under the then valid legislative regulation, they used to acquire the right to receive the minimum state pension of judges (the same as received by the judges who had worked in the courts of the lowest level for five years). The Constitutional Court noted that the judges of the Constitutional Court differ from the judges of other courts in regard to their constitutional status, inter alia, the term of their powers; therefore, the legislature, while regulating the relations of the social (material) guarantees of judges upon the expiry of their term of office, must take account of this fact. Therefore, the said legal regulation was declared in conflict with the Constitution, since it had created the preconditions for making totally equal the amounts of the state pensions of judges who had gained the work record as a judge of a considerably different duration (i.e. five and nine years), and for granting the state pension of judges of a considerably different amount to judges whose work record as a judge differed insignificantly (i.e. nine and ten years). The Constitutional Court paid regard to the specific term of office of the judges of the Constitutional Court and the limitation to be appointed only for a single term of office. These facts determine that the state pension of these judges should be calculated in a different manner so as to ensure that this guarantee is real. In this context, attention should be paid to the fact that the ruling of 29 June 2010 still awaits implementation. This can be considered as disregard for the requirement to respect the independence of the Constitutional Court.

The Constitutional Court made it clear that it was necessary to review the social (material) guarantees of judges upon the termination of their judicial powers so that these guarantees would not become only nominal. According to the Constitutional Court, such guarantees (in particular, the guarantees related to certain periodic payments such as pensions) could become (under a different economic or social situation) not only unreal but, in fact, even nominal, i.e. fictitious, if for judges whose powers had already ceased they were not appropriately reviewed and granted in the amount established previously, although (upon the change of the economic and social situation) these guarantees would be established in a higher amount for other judges of the same system and the same level of courts whose powers would cease in the future.

The Constitutional Court has also noted that the state pensions of judges may be reduced by paying regard to the common criteria of limitation, i.e. only by means of a law, only on a temporary basis for the period of time when the economic and financial situation in the state is severe, only when such reduction is necessary in order to ensure the stability of public finances, and only if it is compliant with the principle of proportionality. Such reduction in the state pensions of judges must not give rise to any preconditions for violating the independence of courts by any other state institutions or their officials.

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28 The Constitutional Court’s ruling of 29 June 2010.
29 The Constitutional Court’s ruling of 29 June 2010 and decision of 14 January 2015.
30 The Constitutional Court’s ruling of 1 July 2013 and decision of 14 January 2015.
5. Constitutional requirements related to the guarantees of the financial and material provision of courts

The guarantees of the financial and material provision of courts and, as a consequence, the independence of courts, could be challenged through influence made in the course of establishing this kind of provision. This also concerns constitutional courts. It is of special importance in times of economic crisis in the state.

The Constitutional Court has noted that the financial and material conditions established by law for the functioning of courts may be worsened only by means of a law and only on a temporary basis for the period of time when the economic and financial situation in the state is severe and only when such reduction is necessary in order to ensure the stability of public finances, and only if it is in compliance with the principle of proportionality. It is clear that such worsening must not create any preconditions for violating the independence of courts.

The Constitutional Court laid the beginnings for the official doctrine of the organisational independence of courts in its ruling of 21 December 1999, in which the principle of the independence of judges and courts was interpreted as also encompassing the organisational independence of courts. It means that no institution or official of the executive may interfere with the exercise of the functions of courts or with the organisation of the internal work of courts; the activity of courts is not and may not be assigned to the governance of any ministry.

In its decision of 8 November 2017, the Constitutional Court reiterated its doctrinal statements from its previous rulings, including the above-mentioned ruling of 21 December 1999 (as well as its decision of 12 January 2000). Under these final acts, state budget appropriations must be provided for each court separately on the basis of the law on the state budget upon the approval of the Seimas. Therefore, the Constitutional Court is a separate manager of budget appropriations.

These and other financial and material guarantees of the Constitutional Court are also specified in Article 5(1) of the Law on the Constitutional Court. According to this article, the freedom of the Constitutional Court, as well as its independence from other institutions, is ensured by the financial, material–technical, and organisational guarantees as secured by law. The Constitutional Court is financed from the state budget by ensuring the possibility for the Constitutional Court to independently and properly perform the functions of constitutional supervision. The estimate of expenditure is approved by the Constitutional Court, which also independently makes use of the funds that are allocated to it. The buildings and other assets used by the Constitutional Court are state-owned property transferred to the Constitutional Court on trust into possession and use. These assets may not be taken over or transferred to other subjects without the consent of the Constitutional Court.

Conclusions

From time to time different challenges arise to judicial independence, including the independence of our constitutional courts in our states. Along with the explicit constitutional provisions on judicial independence, it is constitutional courts that act as safeguards of this independence. They ensure their independence while acknowledging the unconstitutionality of such legal acts that exert influence on constitutional courts. They gradually formulate the consistent official constitutional doctrine on judicial independence. Moreover, constitutional

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31 Ibid.
32 The Constitutional Court’s ruling of 21 December 1999.
courts develop the self-limitation doctrine in order to ensure their independence from political and other factors.

The effective protection of the principle of the independence of courts and their judges, including the independence of the Constitutional Court and its judges, implies that this independence could not be an object of any compromise made at the expense of the Constitution and the rule of law. The guarantees of this independence are freedom from pressure, the guarantee of the term of office of judges, their sufficient material guarantees (especially remuneration and pension provision upon the termination of office), as well as the organisational and budgetary autonomy of the Constitutional Court. The effective ensuring of these constitutional requirements is response to the arising challenges in this sphere. It does correspond to the aims of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions, asserting its intention to strengthen constitutional justice in the countries of the Baltic and Black Sea regions, and recognising the need to strengthen the independence of constitutional courts and equivalent institutions as an essential factor in guaranteeing democracy and the rule of law, as well as the supremacy of the constitution.
CONSTITUTIONAL FOUNDATION AND NORMATIVE RATIONALE OF THE JUDICIAL INDEPENDENCE

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It has been famously argued that, in a modern liberal democratic polity, the judiciary draws its legitimacy from at least four different sources. Namely, the foundational values of the separation of powers, the rule of law, sovereignty and the impartial nature of courts are normally common features to present-day constitutionalism, and yet in different systems some of these normative grounds vary in effectuating different doctrinal principles, institutional arrangements and models of accountability, they serve as the underlying rationale behind the idea of judicial independence.

It is important to note, however, that the independence of the judiciary is not an end in itself, or a personal privilege of the judges, but the main function of the independence is to guarantee the right of an individual to have his/her rights and freedoms determined, protected and implemented by an independent and impartial judge. It can thus be argued that the judicial independence as a whole enables judges to fulfil their role of guardians of the rights and freedoms of the people. Therefore, the independence of judges is an indispensable premise of the rule of law. In this context, notably enough the close relation between the judiciary’s independence and the rule of law suggests that the basic principles ensuring the independence of judges ought to be set up at the constitutional level so that the fundamental principles cannot be amended by an ordinary law, and perform a role of binding guidance of the ordinary laws in the matter.

Based on the foregoing, it has been widely accepted that the close relationship between the independence of the judiciary, the safeguard of rights and freedoms of the people, and the rule of law, the judicial independence can be viewed from two perspectives:¹

• External independence implying the relations of the judiciary as a whole and of the single judges with the political power – notably the government, the legislative power, the political parties, the economic power centres, etc.;

• Internal independence that involves the relations of each judge with other judges, and their independence and autonomy in carrying out the judicial functions in respect to the structure to which the judge belongs.

There have been a number of detailed standards adopted at the European level. It should be mentioned from the outset that the standards with respect to the constitutional courts or equivalent bodies differ significantly from the rules that exist in relation to the ordinary judiciary, which is predicated upon the distinctive nature of constitutional adjudication and the role of constitutional control bodies in modern democracy. For instance, the Judicial Council that

¹ “European Standards on the Independence of the Judiciary. A systematic Overview” (CDL-JD(2008)002), under the subtitle “Independence within the Judiciary”.
performs the role of a self-governing body of common courts does not relate to the constitutional
court and is not normally involved, unless constitutionally mandated, to influence the legal status
of judges (appointment, promotions, transfers, disciplinary measures, dismissals, etc.\(^2\)). While
the main objective of the Judicial Council is to avoid undue influence and pressures of the
political power on the judges, the judicial corps of constitutional judges operates separately and
does not relate to the judges of ordinary judiciary. It would seem an invariable characteristic of
every constitutional court, due to its institutional mandate of constitutional review, to always
remain in somewhat tense relations with political institutions of the state. It is no surprise that,
by eliminating normative acts issued by inherently political organs of the state, the constitutional
court confronts the will of a decision-making majority, which may be conceived as having a
negative connotation of a political character.

Therefore, different rules exist at the national level of various countries as to the appointment,
promotions, transfers, disciplinary measures, and dismissals of constitutional judges, whereby
the underlying principles of the separation of powers, the rule of law and the impartiality are
effectuated in a distinctive form. Nevertheless, there is a clear consensus in the European states
that, in any case, the decision concerning the appointment of judges, whether constitutional or
ordinary judges, should be based on merit by applying objective criteria within the framework
of law.

Another important feature that is worth mentioning is the irremovability of a judge, meaning
that until the mandatory retirement age or the expiry of the term of office, a judge should be able
to perform their duties freely. Normally, the constitutional judges are appointed/elected for a
specific period of time, which presupposes the guarantee of integrity and job security throughout
the entire tenure in office.

A further important issue is the remuneration of judges, which should correspond to the
dignity of the profession and should be adequate for protecting judges from undue outside
interference. It thereby needs to be guaranteed by law. Moreover, the idea of judicial independence
requires that the courts should be financed on the basis of objective and transparent criteria
established by law, and not on the basis of discretionary decision of the executive or legislative
power. In particular, the judiciary should be given the opportunity to express its views about the
proposed budget. Notably, in some countries, explicit legal provisions exist guaranteeing the
minimum threshold of budgetary appropriations for higher courts, which should not be less than
the budget of the previous year unless agreed with the judges.

As noted above, the internal dimension of judicial independence also exists in order to ensure
the principle of the natural judge established by law, meaning the right of everybody to a lawful
judge. This involves the idea that the judge who rules a specific case must be identified on the
basis of objective criteria predetermined by law, and not on the basis of discretionary choices. In
order to remedy the risk of discretionary choices, the rule has been adopted that the natural judge
is identified – where specific exceptions are also provided for by law or by special regulations – on
the basis of objective and general criteria, as for instance the alphabetical or chronological order of
the cases, the categories of cases, a computerised system. The exceptions should take into account
the workload, the specialisation of the judges, the complexity of legal issues, etc.

The foregoing guarantee is closely linked to the constitutional principle of equality between
judges. On the one hand, the principle implies the refusal of a hierarchical power of control of
upper judges on lower judges, on the other, it means that judges can be distinguished only by

\(^2\) Recommendation (94)12 provides that “All decisions concerning the professional career of judges should be based
on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications,
integrity, ability and efficiency.”
In some context of constitutional courts, normally, two or more chambers exist with each adjudicating on different cases, unless the case is heard by the plenary session. It is also characteristic of the constitutional courts, similar to the ordinary judiciary, to elect a president (a Chief Judge), who is normally tasked with administrative functions in addition to their judgeship duties. This, of course, in no way should be understood or done in a way that would present a presiding judge superior to his/her colleagues while deciding on a given constitutional case.

In short, it can be argued that the judicial independence is not only an objective phenomenon, but it also implies a subjective component as the right of an individual to have their rights and freedoms determined by an independent judge. Admittedly, the independence of the judges and the reputation of the judiciary in a given society would depend on many factors. In addition to the institutional rules guaranteeing independence, the personal character and the professional quality of the individual judge deciding a case are of major importance.

The information presented below aims to underscore some of the challenges associated with the independent functioning of the Constitutional Courts in Georgia, the Republic of Lithuania, the Republic of Moldova and Ukraine.

The independence of Constitutional Courts in Member States

Georgia

In the Georgian context, tensions with the parliamentary majority arose when, in June 2016, the Parliament passed the law amending specific aspects of procedural rules on constitutional adjudication, which became a bone of contention between the parliamentary majority and other political and non-governmental institutions. The Parliament was criticised for adopting the legislative changes in an unusually prompt manner, casting doubts on the neutral legislative process that is free from political pretexts. The question eventually was brought by a group of opposition MPs and citizens before the Constitutional Court, which adopted its decision on 29 December 2016 and declared some parts of the revised legislative rules unconstitutional. It is important to note that, after the Constitutional Court’s decision, the parliamentary majority as well as other political groups accepted the Court’s judgement as final and has not made any attempts since then to revise the Court’s ruling.

Specifically to the appointment procedure of constitutional judges, according to the Constitution of Georgia, the Constitutional Court consists of 9 judges, out of whom three members of the Court are appointed by the President of Georgia, three members are elected by more than half of the full list of MPs, and three members are appointed by the Supreme Court. The term of office of a constitutional judge is 10 years. The President of the Constitutional Court is elected by the judges for a period of five years.

3 Please further see https://bit.ly/2jPAs9h.
4 In particular, the Constitutional Court, among others, declared unconstitutional the rule regarding the end of the term of office of a judge once his/her 10-year term expires. The Court considered unconstitutional the end of a mandate in case the relevant state body fails to appoint/elect a new judge within the time required by the law and it is impossible for the Constitutional Court to exercise its authority due to absence of the necessary quorum. The Court also declared unconstitutional the provision that provided for the necessity of consent by the majority of the full composition of the plenary session (9 members) for granting a constitutional complaint, and also the rule imposing the necessity of consent of at least 6 members of the plenary session to uphold the constitutional complaint for the annulment of organic laws. The Constitutional Court also declared unconstitutional the legal norm whereby the authority to take an interlocutory measure on the suspension of the disputed provision until the final decision was vested only with the plenary session of the Constitutional Court. For further details, please see the Press Release of the Decision in English, https://bit.ly/2rAvAZM.
The foregoing rule of the designation of the constitutional judges, arguably, serves the purpose of ensuring that different state institutions participate in the formation of the Constitutional Court, thereby maintaining an institutional balance during the appointment process. The original idea behind such a model was to ensure that all branches of government – the legislature, the executive and the judiciary – were equally involved in the formation of the Constitutional Court. The initial constitutional framework in Georgia, whereby the President held the executive powers, served this purpose. However, subsequent to the 2010 constitutional reform that resulted in adopting a semi-presidential system, the President has lost much of their executive powers for the government. Accordingly, under the existing constitutional setting, the President does not, in principle, belong to any branch of government and acts more as a neutral arbiter between state bodies. It thus can be argued that the presidential appointments in the Constitutional Court represent a deviation from the original rationale behind the rules of designation of the constitutional judges, albeit it would be incorrect to conclude that this in any way undermines the principle of the rule of law or negatively affects the functioning of the Constitutional Court. There have not been any attempts to modify or disregard the established procedure as prescribed by law.

The implementation of constitutional case law has not been always easy at times, which was influenced by external actors. There have been a few high profile cases in the practice of the Constitutional Court of Georgia that attracted close media attention. Namely, the Court has considered and decided the case submitted by one of the largest private TV companies in the country – Rustavi 2. As regards the substance of the case, the complainant requested Articles 546 and 557 of the Civil Code to be declared unconstitutional based on the argument that these provisions created a legal basis for invalidating a contract due to disproportionality in the contractual consideration. In parallel to constitutional proceedings, Rustavi 2 was involved in a legal battle over the broadcaster’s ownership dispute in general courts, specifically, the case went up to the Supreme Court of Georgia.

It would be fair to note that the complainant in the present case had made use of its authority as one of the largest and the most popular media channels in the country to attempt influence the decision-making in the Constitutional Court. This influence was showcased in sometimes biased and inaccurate reporting that had drawn high public attention in an effort to pressure the Court to swiftly adopt the final decision. Nevertheless, the Constitutional Court adopted a cautious approach not to submit to the alleged undue pressure and moved to pass on the final decision after thorough consideration of the presented arguments in the case.

In the course of the decision-making on the mentioned case, in order to try to counter untrue factual information disseminated by the media outlets, the Constitutional Court made several public statements. The content of such statements was confined to calling upon the media representatives to refrain from imparting any information that was based on unconfirmed facts and could have damaged the reputation of the Constitutional Court.

With respect to the execution of judgements, according to Georgian legislation, the legal provision(s) declared unconstitutional by the Constitutional Court lose legal effect once the

5 The consideration of the case on the merits was held on 24 February 2016 and again on 16 June 2016, whilst the final decision was adopted on 29 December 2017.

6 The provision reads as follows: “An agreement that violates the rules and prohibitions laid down by law or that contravenes the public order or principles of morality shall be void” [translation from Georgian].

7 The provision reads as follows: “An agreement may be deemed void if the performance stipulated by the agreement is clearly disproportionate to the consideration in exchange for this performance, and the agreement has been made solely because one of the parties to the contract maliciously abused his/her market power or exploited the hardship or inexperience (naivety) of the other party” (effective as of 27 March 2012) [translation from Georgian].
decision is officially published by the Court on its website. Therefore, the execution of the constitutional decisions, in principle, does not require any additional implementing measures by other state bodies. In certain circumstances, in accordance with procedural legislation on constitutional proceedings, the Constitutional Court is entitled to postpone the execution of its decision, i.e. to indicate a later date after which the unconstitutional legal norm(s) will be invalidated. The Court normally resorts to this mechanism when the immediate invalidation of unconstitutional regulation is likely to cause a legal vacuum that cannot be promptly remedied by the legislature. Hence, the Constitutional Court grants reasonable time to the legislature to elaborate an alternative legislative solution, which is in line with the Court’s ruling and ensures a clear and smooth transition from the old regulatory model to the newly modified system. It should be noted positively that, over the past two years, the cooperation with the legislature with the aim of ensuring proper implementation of constitutional court decisions has become effective.

The Republic of Lithuania

When appointing the judges, during budgeting or during the consideration of constitutional justice cases, the Constitutional Court has not experienced any clearly expressed pressure from the other state powers.

As to legislative initiatives leading to the creation of obstacles to the activity of the Court, it could be specified that, since 2016, a single draft law with the aim of encumbering the Court’s activities (considering cases and adopting rulings, conclusions, or decisions) has been registered, i.e. the Draft Law Amending Article 19 of the Law on the Constitutional Court, which proposed changing the present quorum of 2/3 of the justices required for considering cases and adopting rulings, conclusions, or decisions by increasing it to eight justices. This draft Law Amending Article 19 of the Law on the Constitutional Court also included the requirement changing the present majority vote of all justices of the Constitutional Court required for the adoption of rulings and conclusions of the Court and its decisions on the interpretation or review of a specific ruling, conclusion, or decision of the Court by increasing the majority vote of all justices of the Court to unanimous vote.

It should be noted in this respect that, in several previous years, especially in 2013—2014, a number of draft laws with the aim of limiting the powers of the Constitutional Court or otherwise encumbering its activities were registered. Among these proposals, the following can be mentioned:

In June 2015, the Committee on Budget and Finance of the Seimas proposed that the Government draw up amendments prohibiting the Constitutional Court from handing down decisions on national financial and economic matters.

In relation to the existing system of the selection and appointment of constitutional justices, it could be argued that it creates the preconditions for ensuring the implementation of the principles of the rule of law, especially ensuring impartiality of the Court and its justices, continuity of the Court activities, which likely result in the trust of society in the Court as a

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9 http://lzinios.lt/lzinios/Lietuva/konstitucinio-teismo-laukia-nedidelis-pokyciai/208194
neutral arbiter. The main guarantee of the impartial and stable functioning of the Court in the state under the rule of law is the *expressis verbis* constitutional entrenchment of the principles of the Court’s formation, including the rotation of justices and the procedure of their appointment.

According to the Constitution of the Republic of Lithuania, the Constitutional Court consists of 9 justices, who are appointed for a single nine-year term of office. Under the Constitution, when every three years, one-third of the Constitutional Court is reconstituted (Paragraph 1 of Article 103), this rotation of the justices ensures constant renewal of the composition of the Constitutional Court and continuity of its activities.

According to the established procedure of appointment of constitutional justices, the Constitutional Court is formed by democratically elected representatives of the Nation. In detail, the Seimas appoints an equal number of justices to the Constitutional Court from the candidates nominated by the President of the Republic of Lithuania, the Speaker of the Seimas, and the President of the Supreme Court. Thus, the Court is formed by the three branches of power, representing the executive, the legislative, and the judicial powers. Such order of the appointment of justices (by the three branches of power) secures a balanced composition of the Court as well. Additionally, according to the Constitution, the Seimas also appoints the President of the Constitutional Court from among the justices thereof upon the nomination by the President of the Republic (Paragraph 2 of Article 103). It could be added that the candidates for the positions of the justices should comply with the requirements set by the Constitution (Paragraph 3 of Article 103), *inter alia*, legal qualifications and professional experience in order to ensure a competent and impartial court composition.

In practice, there have not been any negative reflections on the activity of the Court emanating from the procedure of the selection and appointment of constitutional justices. The Court in its jurisprudence also tries to prevent to a certain extent factors that could negatively affect its activity. For example, as to the consideration (examination) of cases, attention can be drawn to the position of the Court that only by a change in the composition of the Constitutional Court (as well as by other accidental (in the aspect of law) factors) the modification of the official constitutional doctrine may not be determined (modifications to the doctrine are made

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10 According to the opinion poll of residents of Lithuania carried out by Baltijos tyrimai, a company specialising in the market and public opinion research, on 29 August–9 September 2017, 66 per cent of the respondents trust the Constitutional Court (whereas trust in other Lithuanian courts remains relatively low (44 per cent of the respondents)), https://www.delfi.lt/news/daily/lithuania/apklausa-auga-gyventojus-pasitikejimas-kariosemene.d?id=75825663. In the evaluation of a longer period, it is also positively claimed that confidence in the Constitutional Court over the past 4 years has more than doubled – according to the data of 2017, almost two thirds of the population of the country trusted it, https://www.lrp.lt/lt/spaudos-centras/pranesimai-spaudai/npriklausomi-konstituciniai-teismai-saugiklis-nuot-nihilizmo/28676.


12 According to the Law on the Constitutional Court, the expiration of the justices’ term of office shall be the 3rd Thursday of March of the corresponding year; the state officials who present candidatures of the Constitutional Court justices in accordance with the Constitution of the Republic of Lithuania must not later than 3 months prior to the expiration of justices’ ordinary term of office present new candidatures of justices to the Seimas (Paragraph 2 of Article 4), http://www.lrk.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/193.

13 The Constitutional Court noted in its jurisprudence that the procedure of appointment of justices of the Constitutional Court is *expressis verbis* established in the Constitution. See the Constitutional Court’s ruling of 2 June 2005 on the appointment of R. K. Urbaitis as a justice of the Constitutional Court; the ruling of 28 March 2006 on the powers of the Constitutional Court to review its own decisions and dismiss the instituted legal proceedings, as well as on reviewing the financing of courts. For these and other acts of the Constitutional Court translated into English, see http://www.lrk.lt/en/court-acts/rulings-conclusions-decisions/171/y2017 (except the texts of the acts which are being translated into English).
only in the cases when it is unavoidably and objectively necessary, constitutionally grounded and reasoned).  

With respect to the external influence on the Constitutional Court’s work, the cases considered by the Court are often discussed in the media, especially, the so-called high profile cases, e.g. two conclusions of the Court on the actions of Seimas members against whom impeachment cases were instituted). Various assessments of lawyers, politicians, and representatives from other groups of society about the issues raised in particular constitutional justice cases are quite often published in the media. However, such attention of the media (including during the consideration (examination) of constitutional justice cases) may not be regarded as an attempt to influence the implementation of constitutional justice, or as excessive or exerting pressure, since, as a rule, the media presents information in a proper manner by simply describing the problem of a concrete case at issue and/or different opinions of representatives from various groups of society about possible ways of solving the case. Besides that, it can be mentioned that, in order to make decisions of the Constitutional Court more understandable and more easily cited (including by the media), in 2016, the structure of the Court rulings was improved (continuous numbering of their fact-finding and reasoning parts and the titles of these parts that describe the essence of their content were introduced).

According to the common guarantees entrenched in the Constitution and detailed in the Law on the Constitutional Court, the decisions of the Constitutional Court on the issues assigned to its competence by the Constitution are final and not subject to appeal (Paragraph 2 of Article 107 of the Constitution); rulings passed by the Constitutional Court are binding on all state institutions, courts, all enterprises, establishments, and organisations, as well as officials and citizens (Paragraph 2 of Article 72 of the Law on the Constitutional Court).

The Law on the Constitutional Court also provides that the restriction of the legal, organisational, financial, informational, material–technical, and other conditions for the activities of the Constitutional Court is prohibited (Paragraph 5 of Article 5(1)). Interference with the activities of a justice or the Constitutional Court by institutions of state power and administration, members of the Seimas and other officials, political parties, political and public organisations, or citizens is prohibited and incurs liability provided for by law (Paragraph 3 of Article 17).

It is noteworthy that the tendency in the implementation of the rulings of the Constitutional Court shows respect for those decisions, which is characteristic of a state under the rule of law. It should be noted that only a small part of the rulings of the Constitutional Court remains not implemented – only 12 (about 6 per cent) out of 186 rulings of the Constitutional Court in which certain legal acts were ruled in conflict with the Constitution and/or laws were not implemented at the end of 2017 (3 out of these non-implemented rulings were adopted in 2017).  

The Republic of Moldova

The Constitutional Court of Moldova has been subject to undue pressure in the last years, related to its case law, emerging from politicians, as well as from the presidency of the state. In particular, manifestations of pressure were felt in 2017, emerging from a constitutional case law with an impact on politics, when the Court delivered on the procedure of government

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14 For example the Constitutional Court’s ruling of 28 March 2006 on the powers of the Constitutional Court to review its own decisions and dismiss the instituted legal proceedings, as well as on reviewing the financing of courts.  
15 The Constitutional Court’s conclusion of 19 December 2017 on the actions of Seimas member Kęstutis Pūkas; the conclusion of 22 December 2017 on the actions of Seimas member Mindaugas Bastys.  
reshufflings and sharing of competences in this field between the President and Prime Minister of Moldova. It thus decided that the President may decline PM’s proposal on the appointment of a person for a vacant office of minister and is entitled to ask for another nomination, however, without it being a source of institutional breakdown or repealing PM’s competences within the co-decision procedure in government reshuffling. Therefore, the President may only reject once the nomination of the candidate made by the PM for a vacant office of minister and this must be grounded on legal requirements for the exercise of the office of a Government member. In case the President does not accept the nomination, the PM is entitled to reiterate the same nomination, and the President is under the obligation to make the appointment.17

Subsequently, the Court interpreted the Constitution in a case where the President failed to meet his constitutional duties, subsequent to the non-execution of the above-mentioned judgment. Thus, the Court held that the political will of the President may not constitute a source of institutional breakdown, recalling that the violation of oath amounts to a serious breach of the Constitution. Accordingly, the serious nature of such a violation may raise an issue of incompatibility of the President with his office.

Therefore, the Court found that by a deliberate refusal to meet one or more of his constitutional duties, the President had removed himself from the execution thereof. This inaction, in its turn – in the light of Article 91 of the Constitution – amounted to temporary impossibility based on a subjective reasoning (the lack of will) to meet his duty in this respect, which justified for the interim office to be established in order that this constitutional duty of the President could be exercised. However, establishing an interim office of the President shall take place in each case individually by a Court decision. Accordingly, the Speaker of Parliament or the PM, in the given order, shall fulfil the duties as an ad interim President and issue the decrees that the office holder failed to issue, thus deliberately refusing to meet his constitutional duties.18

A third case on establishing an interim office of the President has been decided by the Court in January 2018, when the office holder declined for a second time to promulgate a law amending the Broadcasting Code (“anti-propaganda law”).19

This case law of the Court generated dissatisfaction and tough comments by the Presidency, accusing the members of the Court of holding dual citizenship (Moldovan and Romanian), unprofessionalism, and “legal acrobatics”, alleging that they may be charged with usurpation of state power when delivering such “abusive judgments”.

With respect to the appointment procedure of constitutional judges, a straightforward attempt to deviate from the legally established procedure in appointing a justice occurred in the same year, when the Parliament voted a legislative amendment providing for the removal of Court’s judges in cases of “loss of trust.” This was seen by international arena as an attempt to


obstruct constitutional justice in Moldova.\textsuperscript{20,21,22,23} Subsequently, the President of the country did not promulgate the voted amendment.

The procedure of selection and appointment of constitutional judges was also commented upon by a Peer Assessment mission to Republic of Moldova on the Constitutional Court, in late 2015. According to it, the recommendation was a slight increase of the number of judges [from 6] to 7 or 9, “with a view to increase the credibility and the weight of the CC’s judgements.”\textsuperscript{24} On the other hand, what should be avoided categorically in the future, however, is the option of appointing judges of the CC for a second term. Instead, the mission recommended for their term to be slightly extended.\textsuperscript{25}

As regards the external influence, the Court stated in its acts that the mass media is a fundamental element of a democratic society. It is an instrument of exercising power and influencing the opinion.\textsuperscript{26} The Court is open in its communication with the media and, starting as of April 2017, the sittings are streamed live on the Court’s webpage in order to ensure more transparency in the making of constitutional justice.

Nevertheless, there were situations of misinformation by certain broadcasters on the activity of the Court. In such cases, it issues rebuttals and clarifications. For instance, in a press release of 31 January 2018,\textsuperscript{27} the Court issued a rebuttal on the news broadcast by some media outlets alleging that a decision of inadmissibility related to provisions on the electoral system, following a complaint lodged with the Court by a parliamentary political group, was adopted “in secret”. The Court explained that, under the procedure governing the examination of complaints made before the Court, the decisions on complaints’ admissibility are adopted in a closed sitting in the deliberation chamber, where the authors do not participate.

In another case, the Court denied speculations posted by a former politician on a social network and published by the media alleging that a judge of the Court used a private jet to travel from Romania to Moldova in order to attend a sitting of the Court with a political impact. The judgment declared constitutional a presidential decree on the nomination of a candidate for the office of Prime Minister.\textsuperscript{28} In its rebuttal, the Court emphasised that the information

\textsuperscript{23} Jagland, Th. (Council of Europe), Secretary General concerned over political situation in Moldova, Strasbourg, France, 6 May 2013, http://constcourt.md/libview.php?l=en&idc=7&id=433&t=/Media/News/Secretary-General-concerned-over-political-situation-in-Moldova.
\textsuperscript{25} Ibid., p. 21.
\textsuperscript{27} Rebuttal issued by the Constitutional Court on 31 January 2018 (in Romanian), http://www.constcourt.md/libview.php?l=ro&idc=7&id=1129&t=/Media/Noutati/Dezmintire.
did not correspond to reality and was part of coordinated attacks against the authority of the Constitutional Court. It thus urged all the interested parties and the press to request the official position of the Court with regards to published articles and to verify the information from the source in order to provide accurate and objective information to the public.29

Further to the difficulties of the functioning of constitutional justice, a powerful attack against the immovability of judges of the Court took place in May 2013, when the Parliament voted a law allowing for the removal of judges of the Constitutional Court by a 3/5 vote of its members, in case the judges would lose Parliament’s “trust.” This triggered a chain of international reactions, including from the European Union and Council of Europe. The voting of this law followed a decision of April 2013 of the Court declaring unconstitutional a presidential decree for the nomination of a former Prime Minister to the same office, holding that “it is contrary to the principle of the rule of law to nominate for a high office persons having doubts about their integrity hovering upon them or who were dismissed for reasons of corruption”.30 However, given the context, the law was not promulgated by the President.

The acts of the Court have an erga omnes effect and are opposable to all the subjects, including high-ranking state authorities. According to Article 281 of the Law on the Constitutional Court, the Government shall, within a 3-month period following the date of Court’s judgment publication, submit to the Parliament the draft law on the amendment or repeal of the normative act or some parts thereof declared unconstitutional. The draft law at issue shall take priority within the Parliament examination.

Subsequently, the lack of a legislative intervention from Parliament in enforcing the Court’s decisions amounts to a non-execution of its law-making competence provided by the Constitution. Therefore, although in latest years there is a high degree of enforcement of the Court’s decisions, there is still a number of unexecuted decisions and addresses [acts addressing legislative loopholes derived from the non-implementation of constitutional provisions]. For instance, one of them is a decision of 2014, declaring unconstitutional certain provisions of the Law on salaries of the civil servants from courts of law and of the judges.

Ukraine

The Constitution of Ukraine provides for a set of guarantees of independence of judges of the Constitutional Court of Ukraine. One of the political guarantees of the independence of judges of the Constitutional Court is the procedure for the appointment and dismissal of judges. According to Article 148 of the Constitution, the President of Ukraine, the Verkhovna Rada and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine. Selection of candidates for the office of judge of the Constitutional Court of Ukraine is conducted on competitive basis under the procedure prescribed by the law.

The essential guarantee of the independence of judges of the Constitutional Court is also the procedure for their dismissal from office. Pursuant to Article 149.1 of the Constitution of Ukraine, dismissal of a judge of the Constitutional Court of Ukraine from his or her office is decided by not less than two-thirds of its constitutional composition. The grounds for the dismissal of a judge of the Constitutional Court from office are, in particular, inability to exercise his or her authority for health reasons, violation by him or her of incompatibility requirements,


commission of a serious disciplinary offence, flagrant or permanent disregard of his or her duties, which is incompatible with the status of judge of the Court or has proved non-conformity with being in the office, submission by a judge of statement of resignation or of voluntary dismissal from office. The recently adopted Rules of Procedure of the Constitutional Court of Ukraine provide for special procedures for investigating in the court of the grounds for possible dismissal.

Among other guarantees of the independence of judges of the Constitutional Court stipulated by the law, it is necessary to mention the high level of their financial support and social security, as well as a number of procedural issues (collegial nature of the consideration of cases and decisions, excluding the possibility of providing explanations on the merits of cases pending before the Court, etc.).

Notably, in May 2017, the report submitted to the BBCJ by the Constitutional Court drew attention to the pressure exerted on the Constitutional Court on the part of the Verkhovna Rada of Ukraine when the latter provided political assessment in February 2014 of a decision taken by the Constitutional Court on 30 September 2010 regarding violation of the constitutional procedure when adopting the Law No 2222 amending the Constitution of Ukraine. According to the opinion expressed in the said report, the Parliament had really violated the constitutional procedure of amending the Constitution, it had not used the possibility to amend the Constitution in the constitutional manner later, yet, the politicians had shouldered the guilt precisely on the Constitutional Court, and criminal proceedings was initiated against a number of the judges who had voted for the said decision and the investigation is still ongoing.

As regards the selection criteria of the constitutional judges, one of the requirements for a candidate for the position of a judge of the Constitutional Court is the requirement of his impeccable reputation. The problem is, on the one hand, it seems difficult to determine the criteria for such a reputation, on the other, the candidate for such a high and responsible public position should be aware of them. Accordingly, there appears a need to rely on the concept of reputation of a public official generally recognised in a civilised, democratic society. The recognition of high qualifications in the field of law is achieved through years of professional work and is ensured not only by the diploma of education of the corresponding level, but also by a scientific or other rank, which involves recognition of appropriate qualifications and professional experience. In determining the qualification of a candidate for the position of a judge of the Constitutional Court of Ukraine, they must prove that they have the necessary professional experience to remain in that position. This is required directly by the Constitution of Ukraine, in accordance with Article 148 of which a citizen of Ukraine who has command of the state language, attained the age of forty on the day of appointment, has a higher legal education and professional experience in the sphere of law no less than fifteen years, has high moral values and is a lawyer of recognised competence may be a judge of the Constitutional Court of Ukraine.

In the development of this article of the Constitution of Ukraine, Article 12 of the Law of Ukraine “On the Constitutional Court of Ukraine” establishes more specific requirements for candidates for the position of a judge of the Constitutional Court, namely: motivation to be appointed a judge of the Constitutional Court of Ukraine; availability of necessary documents confirming Ukrainian citizenship, professional experience in the field of law, income, family ties, integrity, education level, results of inspection in accordance with the laws of Ukraine “On Government Cleansing” and “On Prevention of Corruption”.

As for the outside media influence, the work of the Constitutional Court is often subjected to critical assessments (in particular, in cases when time limits for the Court to consider petitions exceed the term specified by law). However, it cannot be argued that such assessments are systematic, have the nature of campaigns, and may have a real effect on the independent nature of its work.
With respect to the execution of the judgements, according to the provisions of Article 151.2 of the Constitution, decisions and opinions adopted by the Constitutional Court shall be binding, final and may not be challenged. The Law of Ukraine “On the Constitutional Court of Ukraine” stipulates that the Court in its decision or opinion may establish the procedure for and terms of the execution thereof and oblige relevant government authorities to provide monitoring of the execution of such decision or compliance with such opinion. The Court may demand a written confirmation of the execution of a decision or compliance with an opinion from the relevant authorities. Failure to execute decisions or comply with opinions of the Court shall entail liability under the law (Articles 97, 98). Notably, the new Law of Ukraine “On the Constitutional Court of Ukraine” contains more rigorous formulations regarding the control over the implementation of its decisions and opinions than the previous law (in terms of the right to oblige the relevant state authorities to ensure the control over the fulfilment and right to claim written confirmation of execution of the decision, observance of the opinion from these bodies). There are grounds to believe that, in the future, the Constitutional Court of Ukraine, in order to ensure the observance of the rights and freedoms of citizens, which appeared to be protected by the Court, will use more actively the possibilities given to it to control the implementation of its decisions than it was before (in the past, the Court, as a rule, limited itself to relevant recommendations).

There are appropriate statistics data available at the Constitutional Court of Ukraine on the implementation of the Court’s decisions by state bodies, in which the Court made certain recommendations for their implementation. Yet, it may not be appropriate to provide it at the moment, as it relates to a significant period of time since 2007. Some of the cases decided by the Court that require legislative changes have not been fully implemented.
DOCTRINE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA ON THE INDEPENDENCE OF CONSTITUTIONAL COURTS

The constitutional status of the Constitutional Court (the institution of constitutional justice) — The Constitutional Court’s ruling of 6 June 2006

The courts that, under the Constitution, implement judicial power in Lithuania must be categorised as belonging not to one, but to two or more (if this, taking account of the Constitution, is established in certain laws) systems of courts. Under the Constitution and laws, there are three systems of courts in Lithuania at present: (1) the Constitutional Court carries out constitutional judicial control; (2) the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts, and local courts, which are specified in Paragraph 1 of Article 111 of the Constitution, constitute the system of courts of general jurisdiction; (3) under Paragraph 2 of Article 111 of the Constitution, for the consideration of administrative, labour, family, and cases of other categories, specialised courts may be established according to the law; one system of specialised courts, i.e. administrative ones, which is composed of the Supreme Administrative Court of Lithuania and regional administrative courts, is established and is functioning at present (the Constitutional Court’s rulings of 13 December 2004, 16 January 2006, 28 March 2006, and 9 May 2006).

[...] The Constitution defines the procedure of the formation of the Constitutional Court, establishes the grounds and guarantees of the implementation (activity) of the powers of the Constitutional Court, consolidates the status of the justices of the Constitutional Court, etc.

Thus, under the Constitution, the Constitutional Court is the institution of constitutional justice, which carries out constitutional judicial control (the Constitutional Court’s rulings of 28 March 2006 and 9 May 2006). The Constitutional Court has held in its acts on more than one occasion that, when deciding, under its competence, on the compliance of lower-ranking legal acts (parts thereof) with higher-ranking legal acts, inter alia (and, first of all), with the Constitution, as well as when exercising its other constitutional powers, the Constitutional Court – an individual and independent court – administers constitutional justice, as well as guarantees constitutional legality and the supremacy of the Constitution in the legal system (the Constitutional Court’s rulings of 12 July 2001, 29 November 2001, 13 December 2004, and 28 March 2006).

It needs to be noted that the title – the Constitutional Court – of the constitutional justice institution for which the exercise of constitutional judicial control is assigned is expressis verbis entrenched in the Constitution itself.

It should be emphasised that, in its constitutional nature, a state power institution that is named as a court in the Constitution itself must be regarded as a court, i.e. as a judicial institution.
The mere fact that there are separate Chapters “Courts” and “The Constitutional Court” in the Constitution is not and may not be grounds for providing such interpretation that [...] the Constitutional Court is not a court – part of the judicial power – and exists somewhere beyond the limits of the judicial system. Such a presumption [...] is essentially wrong and not reasoned constitutionally at all. On the contrary, the fact that, in the Constitution, there are two separate chapters – Chapter VIII “The Constitutional Court” and Chapter IX “Courts” – does not deny the fact that the Constitutional Court, which, under the Constitution, carries out constitutional judicial control, is part of the judicial system, but it rather emphasises its particular status in the system of judicial power, as well as in the system of all state institutions exercising state power; in this way, the particularities of the constitutional mission and competence of the Constitutional Court are emphasised.

At the same time, it needs to be noted that there are significant links between courts of general jurisdiction and specialised courts (established under Paragraph 2 of Article 111 of the Constitution) on the one hand, and, on the other hand, the Constitutional Court, the institution of constitutional justice, inter alia: every court of general jurisdiction (its judge) and every specialised court (its judge), as a petitioner, has the right to initiate constitutional justice cases at the Constitutional Court on the grounds established in the Constitution (Paragraphs 1, 2, and 3 of Article 106 and Paragraph 2 of Article 110); all courts of general jurisdiction – the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts, and local courts – as well as specialised courts (the Supreme Administrative Court of Lithuania and regional administrative courts), are bound by the fact that, under Article 107 of the Constitution, the decisions on the issues assigned to the competence of the Constitutional Court are final and not subject to appeal; all courts of general jurisdiction and specialised courts are bound by the official constitutional doctrine, which is formed in the jurisprudence of the Constitutional Court, etc. However, as regards the organisational and administrative aspects, the said judicial systems – the Constitutional Court, when carrying out constitutional judicial control, as well as courts of general jurisdiction and specialised courts (established under Paragraph 2 of Article 111 of the Constitution) – are separated in the Constitution.

It should be emphasised that the presumption [...] that the Constitutional Court is not a court and does not implement state power is not at all in line with the concept of power and the powers of the Constitutional Court established in the Constitution. The fact that, under the Constitution, the Constitutional Court has the powers to declare legal acts of other institutions that implement state power – the Seimas, the President of the Republic, the Government – to be in conflict with higher-ranking legal acts, first of all, with the Constitution, and, thus, to abolish the legal force of such unconstitutional legal acts and to remove them from the Lithuanian legal system for good, the fact that only the Constitutional Court has the constitutional powers to interpret the Constitution officially – to present the concept of the provisions of the Constitution where such a concept is binding on all law-making and law-applying institutions, including the Seimas, the representation of the Nation, clearly show that the Constitutional Court is an institution implementing state power.

**The constitutional status of the Constitutional Court**

*The Constitutional Court’s decision of 13 March 2013*

It needs to be noted that the Constitutional Court carries out constitutional judicial control; the Constitutional Court is the institution of constitutional justice; the Constitutional Court – an individual and independent court – administers constitutional justice and guarantees
Doctrine of the Constitutional Court of the Republic of Lithuania on the independence of Constitutional Courts

constitutional legality and the supremacy of the Constitution in the legal system (inter alia, the Constitutional Court’s rulings of 6 June 2006 and 29 June 2010, as well as its decision of 19 December 2012). It also needs to be noted that the Constitutional Court, while invoking the official constitutional doctrine and precedents that it itself formulated, must ensure the continuity of the constitutional jurisprudence (its coherence and consistency) and the predictability of its decisions (the Constitutional Court’s decision of 21 November 2006 and its rulings of 22 October 2007, 24 October 2007, and 5 September 2012).

Thus, the Constitutional Court is a legal, but not a political institution. The Constitutional Court decides the legal issues assigned to its competence by the Constitution only by invoking legal arguments, inter alia, the official constitutional doctrine and precedents that it itself formulated. While taking account of this, it needs to be noted that the interpretation of the final acts of the Constitutional Court may not be determined by accidental (from the legal point of view) factors (for example, change in the composition of the Constitutional Court); the Constitutional Court may not interpret its final acts by following, inter alia, the arguments of political expediency, the documents of political parties or other public organisations, opinions of and assessments by politicians, political science or sociological research, or results of public opinion polls. Otherwise, the preconditions for doubting the impartiality of the Constitutional Court may arise and a threat to its independence and the stability of the Constitution itself, inter alia, the official constitutional doctrine, may emerge.

The independence of judges and courts and the guarantees of their independence1

The independence of judges and courts

The Constitutional Court’s ruling of 21 December 1999

Paragraph 2 of Article 109 of the Constitution prescribes: “When administering justice, judges and courts shall be independent.”

The independence of judges and courts is one of the essential principles of a democratic state under the rule of law. The role of the judiciary in such a state means that, when administering justice, courts must ensure the implementation of the law that is expressed in the Constitution, laws, and other legal acts; they must guarantee the superiority of law and protect human rights and freedoms.

It needs to be noted that the independence of judges and courts is not an objective in itself – it is a necessary condition of the protection of human rights and freedoms. Paragraph 1 of Article 30 of the Constitution provides that a person whose constitutional rights or freedoms are violated has the right to apply to a court. Paragraph 2 of Article 31 of the Constitution consolidates the right of a person charged with committing a crime to a public and fair hearing of his/her case by an independent and impartial court. Therefore, the fact that independence is not a privilege but one of the most important duties of judges and courts, which stems from the human right guaranteed in the Constitution to have an impartial arbiter of a dispute and which is a necessary condition for an impartial and fair consideration of a case, is the most important criterion that must be followed when assessing the independence of judges and courts (the Constitutional Court’s ruling of 6 December 1995).

Taking account of the striving, entrenched in the Preamble to the Constitution, for an open, just, and harmonious civil society and a state under the rule of law, Article 5 of the Constitution,

1 Due to the fact that the Constitutional Court is a court (as stated in the already mentioned Constitutional Court’s ruling of 6 June 2006), official constitutional doctrine on the independence of judges and courts and the guarantees of their independence may also be to a certain extent (taking into account the peculiarities of constitutional status of the institution and the specific status of constitutional justices) relevant when referring to the independence of constitutional courts.
as well as the norms of other articles thereof establishing the separation of powers, it is possible to distinguish two inseparable aspects of the principle of the independence of judges and courts.

This principle, first of all, means the independence of both judges and courts that administer justice. Under Article 109 of the Constitution, when considering cases, judges are independent and obey only the law. Paragraph 1 of Article 114 of the Constitution provides that interference by any institutions of state power and governance, members of the Seimas or other officials, political parties, political or public organisations, or citizens with the activities of a judge or court is prohibited and leads to liability provided for by law. The procedural independence of judges is a necessary condition of an impartial and fair consideration of a case.

On the other hand, judges and courts are not sufficiently independent if the independence of courts as the system of the institutions of the judiciary is not ensured. 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 judiciary may implement its function, which is the administration of justice, only while being autonomous and independent of the other branches of power.

The fact that the judiciary is fully fledged and independent implies its self-government. The self-government of the judiciary also includes the organisation of the work of courts and the activities of the professional corps of judges.

The organisational independence of courts and their self-government are the main guarantees of the actual independence of the judiciary. The constitutional duty of other state institutions is to respect the independence of courts, which is established in the Constitution. It needs to be noted that the activities of courts are guaranteed by the Constitution, as well as by laws and other legal acts that are in conformity with the Constitution. The state is under the duty to create proper work conditions for courts. However, this does not mean that it is allowed, in the course of establishing particular powers of other state institutions as regards their relations with the judiciary, to deny both the separation of powers established in the Constitution and the essence of the judiciary as a fully fledged branch of power, which acts independently from other branches of power.

While ensuring the independence of judges and courts, it is very important to clearly separate the activity of courts from that of the executive. The Constitution prohibits the executive from interfering with the administration of justice, from exerting any influence on courts or from assessing the work of courts regarding the consideration of cases, let alone giving instructions as to how justice must be administered. The supervision of courts and the application of disciplinary measures to judges must be organised in such a manner that the actual independence of judges would not be undermined.

Under the Constitution, the activity of courts is not and may not be considered an area of the administration by any institution of the executive. Only the powers designated to create conditions for the work of courts may be granted to institutions of the executive. Courts are not accountable for their activities in administering justice to any other state institutions or any officials. It is only an independent institutional system of courts that may guarantee the organisational independence of courts and the procedural independence of judges.

The material basis of the organisational independence of courts is their financial independence of any decisions of the executive. It needs to be noted that the financial independence of courts is ensured by such legal regulation where finances for the system of courts and every court are allocated in the state budget that is approved by law. The guarantee of the organisational independence of courts is one of essential conditions for ensuring human rights.
Judges are also obligated to be independent by their oath that they must take before entering office under Paragraph 6 of Article 112 of the Constitution. Judges take an oath to be faithful to the Republic of Lithuania, to administer justice only according to the law, to defend human rights, freedoms, and legitimate interests, to act honestly and humanely all the time, and to never let their conduct discredit the name of judges.

Under Article 115 of the Constitution, the judges of the courts of the Republic of Lithuania are released from their duties according to the procedure established by law when their conduct discredits the name of judges, and upon the entry into effect of court judgments convicting them. Articles 74 and 116 of the Constitution also provide that for a gross violation of the Constitution or a breach of the oath, or when they are found to have committed a crime, the President and justices of the Supreme Court, as well as the President and judges of the Court of Appeal, may be removed from office by the Seimas according to the procedure for impeachment proceedings. A judge’s conduct – both related to the direct performance of his/her office and not related to his/her official duties – should not raise any doubts about his/her impartiality and independence.

The qualification of judges is another guarantee that judges will administer justice in a proper manner: only persons with high legal qualification and considerable life experience may be appointed as judges. Their reputation must be impeccable.

This means that judges are subject to special professional and ethical requirements. Judges must bear great responsibility for how they administer justice, i.e. perform the obligation established for them in the Constitution.

The independence of judges and courts (Article 109 of the Constitution)

The Constitutional Court’s ruling of 12 July 2001

When analysing the principle of the independence of judges and courts, it must be noted that independence is not a privilege, but one of the most important obligations of judges and courts, which stems from the right of a person, which is guaranteed in the Constitution, to an independent and impartial arbiter of a dispute. All state institutions must respect and ensure this right of a person guaranteed by the Constitution. This circumstance must be taken into account when guarantees of the independence of judges and courts are assessed.

The independence of judges is ensured by establishing the inviolability of the term of their office, the inviolability of the person of a judge, the guarantees of a social (material) character of a judge, by consolidating the self-government of fully fledged judicial power and its financial and technical provision (the Constitutional Court’s rulings of 6 December 1995, 18 April 1996, 19 December 1996, 5 February 1999, 21 December 1999, and 21 December 1999, as well as its decision of 12 January 2000).

[...]

The principle of the independence of judges and courts, which is enshrined in the Constitution, means that the legislature is under the duty to provide for such guarantees of the independence of judges and courts that would ensure the impartiality of courts in adopting decisions and that would not permit anyone to interfere with activities of judges or courts when they administer justice.

The specific function of courts and the principle of the independence of judges and courts, which are consolidated in the Constitution, also determine the legal status of judges. It needs to be noted that the judiciary is formed on a professional, but not on a political basis. “According to the duties performed, judges may not be deemed to be state servants. No one may demand that they follow a certain political guideline. The judicial practice (case law) is formed only by courts while applying the norms of law. Judges ensure human rights and freedoms in that they
administer justice on the grounds of the Constitution and laws” (the Constitutional Court’s ruling of 21 December 1999).

The legal regulation governing the relations of the remuneration of judges (Paragraph 1 of Article 113 of the Constitution)

*The Constitutional Court’s decision of 8 August 2006*

[...] The notion “remuneration of judges” includes all payments paid to a judge from the state budget (the Constitutional Court’s decision of 12 January 2000). Under the Constitution, the remuneration of judges must be established by means of a law, its amount, as well as the material and [other] social guarantees established for judges, must be such that they would be in line with the constitutional status of judges and their dignity, the remuneration of judges, the material and social guarantees established for them may be differentiated according to clear criteria that are known *ex ante* and are not related to the administration of justice when cases are decided (for example, according to the length of time during which a person works as a judge), and the remuneration of judges may not depend upon the results of their work. It should be noted that, as the Constitutional Court has emphasised in its rulings more than once, the Constitution prohibits the reduction of the remuneration and [other] social guarantees of judges; any attempts to reduce the remuneration of judges or their other social guarantees, or any limitation upon the financing of courts should be treated as an encroachment upon the independence of judges and courts (the Constitutional Court’s rulings of 6 December 1995 and 21 December 1999, its decision of 12 January 2000, and its rulings of 12 July 2001 and 28 March 2006).

Reducing the remuneration of judges upon the occurrence of a very difficult economic and financial situation in the state

*The Constitutional Court’s ruling of 1 July 2013*

[...] the reduction of the remuneration of judges must not be disproportionate or discriminatory; *inter alia*, the remuneration may not be reduced exclusively for judges, or exclusively for judges of certain courts, or exclusively for judges performing certain duties; the proportions of the amounts of remuneration established at the time prior to the occurrence of a very difficult economic and financial situation in the state for judges performing different duties (for judges of different systems of courts and/or of different levels of courts), as well as the proportions of the amounts of remuneration established for different categories of judges and other persons (*inter alia*, state servants, politicians, and officials) who are paid for their work from the funds of the state or municipal budget, must be retained. Any failure to observe the said requirements should be regarded as an encroachment upon the independence of judges and courts, thus, *inter alia*, also as a violation of Paragraph 2 of Article 109 of the Constitution and the constitutional principle of a state under the rule of law.

The independence of judges and courts

*The Constitutional Court’s decision of 10 March 2014*

The principle of the independence of judges and courts, which is enshrined in the Constitution, obliges the legislature to establish such guarantees of the independence of judges and courts that would ensure the impartiality of courts in adopting a decision and would not permit any interference with the activities of judges and courts in administering justice (the Constitutional Court’s ruling of 28 March 2006). In the jurisprudence of the Constitutional Court, it has been held that the independence of judges and courts, as well as their impartiality, may be ensured by means of various measures, *inter alia*, by establishing by law their procedural independence,
the organisational independence and self-government of courts, the status of judges, and social (material) guarantees of judges (the Constitutional Court’s rulings of 21 December 1999, 27 November 2006, and 22 October 2007).

The assessment of the entirety of the guarantees of the independence of judges and courts makes it possible to assert that the said guarantees are closely interrelated (the Constitutional Court’s ruling of 6 December 1995). In general, the independence of judges and courts cannot be assessed according to any single, even very significant, feature. Therefore, it is universally recognised that, if any of the guarantees of the independence of judges and courts are violated, the administration of justice might be compromised, there would be a risk that neither human rights and freedoms will be ensured nor the supremacy of law will be guaranteed (the Constitutional Court’s ruling of 21 December 1999).

The protection of social (material) guarantees of judges, *inter alia*, the prohibition on reducing the level of such guarantees in cases where the system of the state pensions of judges is reorganised

*The Constitutional Court’s decision (No KT1-S1/2015) of 14 January 2015*

[...] the state pension of judges that is established by law is one of the types of pensions that are not directly specified in Article 52 of the Constitution; it is linked with a special status of a person – it is granted to judges for their service after their powers cease. It should also be noted that the legislature has a certain degree of discretion to establish the conditions for granting and paying the said pensions and their amounts, *inter alia*, when the system of pensions is reorganised; however, when doing so, it must pay regard to the Constitution.

In this context, the provisions of the Constitutional Court’s ruling of 29 June 2010 that are related to the independence of judges and courts, which is consolidated in the Constitution (*inter alia*, Article 109 thereof), should also be noted:

– the independence of judges and courts is not a privilege, but one of the most important duties of judges and courts, stemming from the right (guaranteed by the Constitution) of every person, who believes that his/her rights or freedoms have been violated, to have an impartial arbiter of a dispute who would, under the Constitution and laws, settle a legal dispute on the merits (the Constitutional Court’s rulings of 6 December 1995, 21 December 1999, 12 July 2001, 9 May 2006, and 22 October 2007);

– a judge, who is obligated to consider conflicts arising in society as well as those between a person and the state, must be not only highly professionally qualified and of impeccable reputation, but also materially independent and feel secure as to his/her future (the Constitutional Court’s rulings of 12 July 2001 and 22 October 2007); the imperative of the constitutional protection of the remuneration and other social (material) guarantees of judges stems from the principle of the independence of judges and courts, which is consolidated in the Constitution (*inter alia*, Article 109 thereof); through this principle, attempts are made to protect judges administering justice against both any influence of the legislative and executive branches and that of other state establishments and officials, political and public organisations, commercial economic structures, and other legal and natural persons;

– the social (material) guarantees of the principle of the independence of judges that stem from the Constitution (which, actually, are also consolidated in the law of other democratic states, as well as in various international acts) mean that the state has the duty to ensure such social (material) provision for judges that would be in conformity with the status of judges while they are in office, as well as upon the expiry of their term of office (the Constitutional Court’s rulings of 21 December 1999 and 22 October 2007). Under the Constitution, the material and
social guarantees established for judges must be such that they are in line with the constitutional status of judges and their dignity (the Constitutional Court’s decision of 8 August 2006 and its ruling of 22 October 2007);

– the legislature must establish such a legal regulation that would ensure the independence of judges and courts, inter alia, the social (material) guarantees of judges, not only when they are in office, but also after their powers cease; in doing so, the legislature must pay regard to the norms and principles of the Constitution; after the powers of judges cease, social (material) guarantees of judges may be varied, inter alia, periodic payments, as well as one-off payments, etc.; the constitutional basis for establishing such guarantees is the exceptional constitutional status of judges, which is determined by the function of the administration of justice; therefore, the said guarantees may depend only upon such circumstances that are related to the constitutional status of judges, but they may not be regarded as replacing other social (material) guarantees that must be ensured to former judges on other grounds, including those that are common to all working persons; the social (material) guarantees of judges after their powers cease must be real and not merely nominal (the Constitutional Court’s ruling of 22 October 2007);

– the legislature, while regulating the relations linked with the state pension of judges, must establish by law the grounds and conditions for granting this pension; the legislature must pay regard, inter alia, to the fact that the state pension of judges is a social (material) guarantee of judges after their powers cease, stemming from the Constitution, which is defended not only under Article 109 of the Constitution, but also under Article 52 thereof, that this social (material) guarantee must be in line with the constitutional status of judges and their dignity, and that such a constitutional social (material) guarantee of judges must be real and not merely nominal. Otherwise, the essence and purpose of the state pension of judges as a social (material) guarantee of judges after their powers cease, which stems from the Constitution, would be denied; thus, the preconditions for deviating from the requirements arising from the Constitution, inter alia, Paragraph 2 of Article 109 thereof, as well as from the constitutional principle of a state under the rule of law, would be created.

Thus, it should be noted that the state pension of judges, which is established by law, is not an objective in itself and, under the Constitution, is not regarded as a privilege; the establishment of such a guarantee is related to the special constitutional status of judges and, in particular, with the requirement for the independence of judges, which is established in the Constitution, inter alia, Article 109 thereof. In other words, the state pension of judges, which is established by law, is one of the social (material) guarantees of the principle of the independence of judges, which is consolidated in the Constitution, i.e. such a social (material) guarantee of judges that is established (applied) after their powers cease and is defended under Article 109 of the Constitution.

It needs to be emphasised that the social (material) guarantees of judges that are established (applied) to judges after their powers cease are one of the measures for ensuring the independence of judges. Only the provision of real rather than nominal social (material) future guarantees (inter alia, the pensions of judges), which are in line with the constitutional status of judges and their dignity, may ensure that, when administering justice, judges are not exposed to any influence of the decisions of the legislative or executive branch of power, or to any interference with their activities by the institutions of state power and governance or officials or other persons; the provision of real social (material) guarantees may also protect judges against such possible decisions of the legislative, executive, or public administration subjects that could put pressure on the decisions of judges in the course of administering justice; in addition, the provision of the said social (material) guarantees to judges may reduce the risk of corruption.
Consequently, although the state pension of judges, which is established by law, is one of the types of pensions that are not directly specified in Article 52 of the Constitution, and the legislature has a certain degree of discretion to establish the conditions for granting and paying the said pensions and their amounts, *inter alia*, while reorganising the system of pensions, the discretion of the legislature to regulate the state pensions of judges is narrower than the one in respect of other state pensions, since, among other requirements stemming from the Constitution, the legislature is also bound by the principle of the independence of judges and courts, which is consolidated in the Constitution, *inter alia*, by the imperative of the reality of the social (material) guarantees of judges.

[...] it should be noted that the prohibition on reducing the level, established by law, of the social (material) guarantees of judges, *inter alia*, of those which are established (applied) to judges after their powers cease, stems from the principle of the independence of judges and courts, which is consolidated in the Constitution. On the other hand, this prohibition is not absolute: the level of the social (material) guarantees that are established for (applied to) judges after their powers cease may be reduced only by law and it is allowed to do so only on a temporary basis for the period of time when the economic and financial condition of the state is extremely difficult; however, such reduction must not give rise to any preconditions for the violation of the independence of courts by any other state authority institutions and their officials.

It needs to be emphasised that, otherwise, if the level of the social (material) guarantees of judges could be reduced in other cases as well, i.e. when there is no extremely difficult economic and financial situation in the state, the independence of judges would be endangered; in other words, the preconditions for exerting influence on judges, by means of the decisions of the legislative or executive branch, the preconditions for institutions of state power and governance or their officials or other persons to interfere in the activities of judges, the preconditions for taking the decisions of the legislative, executive, or public administration subjects, by means of which social (material) guarantees of judges would be reduced by putting pressure on the decisions taken while administering justice, as well as the preconditions for increasing the risk of corruption, would be created.

In the light of the foregoing arguments, the conclusion should be drawn [...] that, when the legislature reorganises the system of the state pensions of judges, no regulation reducing the level (established by law) of social (material) guarantees of judges may be established.

**The right of judges to receive remuneration for participation in projects for international cooperation and democracy promotion where such projects are related to improving the system of justice and the activity of courts**

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

[...] 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 that is aimed at contributing to the partnership of other states with the European Union or with NATO, or at contributing to the integration of the said states into 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 fundamental freedoms, and, *inter alia*, the dissemination of the said values and principles in the spheres of the improvement of the systems of justice and the activity of courts.

[...] courts are one of the institutions exercising state power; the judiciary may fulfil its constitutional obligation and function, which is the administration of justice, only while being autonomous and independent of the other branches of power. In this context, it should be mentioned that the Constitutional Court has held that the autonomy and independence of judicial power does not mean that it and other state powers – legislative power and executive power – may not cooperate, of course, without interfering into the exercise of the powers of other branches of power (the Constitutional Court’s ruling of 9 May 2006).

This, among other things, means that, under the Constitution, the role of courts is not limited exclusively to the administration of justice; as well as other institutions of state power, courts, within their constitutional competence, either independently or in cooperation with other state institutions, may participate in carrying out the general tasks and functions of the state; *inter alia*, courts may also participate in the activity of achieving the constitutional objectives of the foreign policy of the Republic of Lithuania and in the activity of fulfilling international obligations and those related to full membership in the European Union and NATO, including the participation in projects for international cooperation and democracy promotion. As mentioned before, this geopolitical orientation, which has been chosen by the Republic of Lithuania and is a constitutional value, also implies such an activity performed by the State of Lithuania, by its institutions, and by individuals employed therein that is aimed at contributing to the partnership of other states with the European Union or with NATO, or at contributing to the integration of the said states into these international organisations by promoting the dissemination of universal and democratic values, the principles of EU law, *inter alia*, the dissemination of such values and principles in the spheres of the improvement of the system of justice and the activity of courts.

Thus, it is possible to implement the participation of the State of Lithuania and its institutions, *inter alia*, courts, in the said activity, among other things, when judges take part in support projects funded by international organisations or foreign states, or in projects financed under the Lithuanian Development Cooperation and Democracy Promotion Programme, where such projects are related to improving the system of justice and the activity of courts.

In the context of this decision, it also needs to be mentioned that the Constitutional Court has noted that the appropriate preparation of judges, the improvement of their knowledge and in-service training are an important precondition for ensuring proper activities of courts (the Constitutional Court’s ruling of 21 December 1999 and its decision of 10 March 2014). The qualification of judges, their professionalism, and their ability to decide cases following not only the laws, but also law, are among the factors determining public confidence in courts (the Constitutional Court’s ruling of 27 November 2006).

It should be noted that one of the preconditions for the effective improvement of the qualification of judges is an opportunity for judges holding higher qualification, with greater work experience as a judge, and possessing specific knowledge related to a certain area of law, to share their knowledge and experience with other judges, *inter alia*, on the international level, as, for instance, when judges participate in projects for international cooperation and democracy promotion, thus contributing to the implementation of the aforesaid constitutional objectives of the foreign policy of the Republic of Lithuania, *inter alia*, to the fulfilment of the international obligations arising from the membership in the European Union and NATO, which include assistance to other states in the processes of their partnership with or integration
into the European Union or NATO, as well as to the fulfilment of other international obligations undertaken by the State of Lithuania.

It has been mentioned that, under the Constitution, courts are allowed to participate in the activity of achieving the constitutional objectives of the foreign policy of the Republic of Lithuania and in the activity of fulfilling international obligations and those related to full membership in the European Union and NATO, including the participation in projects for international cooperation and democracy promotion. This means, among other things, that courts and judges may participate in an activity aimed at contributing to the improvement of the qualification of judges, *inter alia*, judges from other states, and at promoting the dissemination of universal and democratic values, as well as the principles of EU law, *inter alia*, the dissemination of the said values and principles in the spheres of the improvement of the systems of justice and the activity of courts.

[…]* under Paragraph 1 of Article 113 of the Constitution, judges may not receive any remuneration other than the remuneration established for judges and payment for educational or creative activities. Thus, judges may receive payment for participating in the aforementioned international projects only if they are engaged in educational or creative activities while participating in the said projects.

At the same time, it needs to be noted that […] the constitutional mission of courts is to administer justice. Thus, any other activity of judges, *inter alia*, their participation in support projects funded by international organisations or foreign states, or in projects financed under the Lithuanian Development Cooperation and Democracy Promotion Programme, where such projects are related to improving the system of justice and the activity of courts, may not interfere with the fulfilment of the main constitutional judicial obligation, arising from the Constitution, *inter alia*, Article 109 thereof, to administer justice in a proper and effective manner. On the other hand, it should also be noted that judges may participate only in such activity that is in line with the impartiality and independence of judges.

[…]

In view of what has been stated above, the conclusion should be drawn that the provision “Judges may receive only the remuneration of a judge paid from the state budget. Judges may not receive any remuneration other than the remuneration established for them and payment for educational or creative activities” [….] of the Constitutional Court’s ruling of 12 July 2001 means, *inter alia*, that judges may receive payment for participating in support projects funded by the European Union, by other international organisations, or by foreign states, or for participating in projects financed under the Lithuanian Development Cooperation and Democracy Promotion Programme, where such projects are related to improving the system of justice and the activity of courts only if they are engaged in educational or creative activities while participating in the said projects […].

**The right of judges to hold the duties of a judge of an international court and to receive remuneration for holding such duties**

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

In the Constitutional Court’s ruling of 12 July 2001, the interpretation of the provision of which is requested, it was noted that the incompatibility of the office of a judge with another office or employment is determined by the special legal situation of both judges and the judiciary as one of the branches of state power; the established prohibition is aimed at ensuring the independence and impartiality of judges, which are necessary conditions for the implementation of justice.
It is clear from this provision that the prohibition imposed on judges on holding any other elective or appointive office, or working in any business, commercial, or other private establishments or enterprises is not an objective in itself – this prohibition is aimed at ensuring the independence and impartiality of judges and the proper administration of justice.

In this context, it should be noted that [...] the question whether the prohibition preventing a judge from receiving any remuneration other than that established for judges and payment for educational or creative activities includes the prohibition preventing a judge from receiving remuneration for holding the duties of a judge of an international court (in cases where the duties of a judge of a national court and those of a judge of an international court are combined) must be assessed in the context of the constitutional grounds of the international cooperation of the Republic of Lithuania, which are consolidated in various provisions of the Constitution, *inter alia*, in Paragraph 1 of Article 135 thereof, as well as in the context of the international obligations undertaken by the State of Lithuania of its own free will.

As mentioned before, 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 Republic of Lithuania participates in international organisations provided that this is not in conflict with the interests and independence of the State; 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.

It should also be noted that the general grounds, which are consolidated in the Constitution, for international cooperation carried out by the state are characterised, *inter alia*, by the establishment of the geopolitical orientation of the State of Lithuania – the membership of the Republic of Lithuania in the European Union and NATO and the necessity to fulfil the international obligations related to the said membership; the geopolitical orientation of the Republic of Lithuania is related to such an activity performed by the State of Lithuania, by its institutions, and by individuals employed therein that is aimed at contributing to the partnership of other states with the European Union or with NATO, or at contributing to the integration of the said states into 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, the independence of courts and judges, respect for human rights and fundamental freedoms, *inter alia*, the dissemination of such values and principles in the spheres of the improvement of the system of justice and the activity of courts.

As mentioned before, one of the preconditions for the effective improvement of the qualification of judges is an opportunity for judges holding higher qualification, with greater work experience as a judge, and possessing specific knowledge related to a certain area of law, to share their knowledge and experience with other judges, *inter alia*, on the international level, as, for instance, when judges participate in projects for international cooperation and democracy promotion, thus contributing to the implementation of the constitutional objectives of the foreign policy of the Republic of Lithuania and to the fulfilment of the international obligations arising from the membership in the European Union and NATO.

[...] as mentioned before, under the Constitution, the role of courts is not limited exclusively to the administration of justice – they are allowed to participate in the activity of achieving the constitutional objectives of the foreign policy of the Republic of Lithuania and in the activity of fulfilling international obligations and those related to full membership in international organisations, *inter alia*, in the European Union.
Thus, the fact that the Republic of Lithuania carries out international cooperation and complies with the assumed international obligations may also be interpreted as meaning that the Republic of Lithuania fulfils its international obligations towards the international community in the sphere of the administration of justice, *inter alia*, its obligation to participate in the activity of international courts. The said obligations imply the duty of the state to appoint suitable and highly qualified representatives (*inter alia*, judges of national courts) to international institutions or international judicial institutions.

It should be noted that judges of international courts are subject to requirements of high professional qualification, expert knowledge, and/or proficiency in foreign languages. The recognition of the right of a judge of a national court to hold the duties of a judge of an international court (in cases where the duties of a judge of a national court and those of a judge of an international court are combined) means the recognition of high professional qualification held by him/her, as well as his/her ability to properly administer justice both on the national and international level and, thus, to contribute to achieving the constitutional objectives of the foreign policy of the Republic of Lithuania, *inter alia*, to complying with the international obligations in the sphere of the administration of justice.

Thus, the established requirements for judges relating to high professional qualification and expert knowledge are aimed at ensuring the authority of courts as judicial power that is independent and impartial, as well as the proper and effective fulfilment of judicial functions.

[...] Paragraph 1 of Article 113 of the Constitution provides, *inter alia*, that judges may not hold any other elective or appointive office, or work in any business, commercial, or other private establishments or enterprises. This prohibition is aimed at ensuring the independence and impartiality of judges, as well as the proper fulfilment of the function of the administration of justice, which is attributed to courts under the Constitution, *inter alia*, Article 109 thereof. It should also be noted that the prohibition preventing judges from working in business, commercial, or other private establishments or enterprises does not apply to their educational, creative, *inter alia*, scientific, activity in educational or scientific establishments: under the Constitution, the said activity is allowed.

In this context, it should also be mentioned that the Constitution, *inter alia*, Paragraph 2 of Article 103 and Article 112 thereof, explicitly provides for other positions in courts that may be held only by a judge of a particular court, namely, the positions of the President of the Constitutional Court, the President of the Supreme Court, the President of the Court of Appeal, as well as the presidents of regional, local, and specialised courts.

It should be noted that Paragraph 5 of Article 112 of the Constitution explicitly provides that a special institution of judges, as provided for by law, advises the President of the Republic on the appointment, promotion, and transfer of judges, or their release from duties. The Constitutional Court has held that this state institution must be comprised only from judges, since, under the Constitution, no other institution, official, or other person may have the powers to advise the President of the Republic on the appointment, promotion, and transfer of judges, or their release from duties (the Constitutional Court’s ruling of 9 May 2006).

Thus, under the Constitution, judges may perform certain other judicial duties specified *expressis verbis*, including duties in judicial self-government bodies, *inter alia*, those in a special institution of judges, which is provided for in Paragraph 5 of Article 112 of the Constitution.

It should also be noted that, under Paragraph 4 of Article 111 of the Constitution, the formation and competence of courts is established by the Law on Courts of the Republic of Lithuania. The Constitutional Court has held that the Constitution not only obliges the legislature to lay down, by means of a law, the establishment and competence of all the courts of the Republic of Lithuania (thus, including the status, formation, exercise of powers (activity), and guarantees
of courts of general jurisdiction, the status of judges of these courts, etc.), which are 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, 9 May 2006, and 22 October 2007, as well as its decision of 15 May 2009).

Thus, other positions that judges are also allowed to hold may be established in the Law on Courts, which is *expressis verbis* specified in the Constitution, as, for instance, the deputy president of a court, or the chairperson of a particular division of a court.

[...] it should be noted that judges of national courts may also perform the duties of judges of international courts (in cases where they combine the duties of a judge of a national court and those of a judge of an international court) if such a possibility is provided for in the obligations consolidated in international treaties of the Republic of Lithuania to participate in the activity of international courts and implies the duty of the state to appoint highly qualified representatives (*inter alia*, judges of national courts) to international institutions or international judicial institutions. It should also be noted that the activity of such representatives, where they combine the duties of a judge of a national court and those of a judge of an international court, contributes to the achievement of the constitutional objectives of the foreign policy pursued by the Republic of Lithuania, *inter alia*, to the fulfilment of the international obligations in the sphere of the administration of justice, as well as to the creation of the international order based on law and justice. In addition, the said activity where the duties of a judge of a national court and those of a judge of an international court are combined must not be continuous – it may be carried out only on a temporary basis.

The performance of the duties of a judge of an international court may not be considered the activity of a judge prohibited by Paragraph 1 of Article 113 of the Constitution, since the mission of the duties of a judge of a national court and that of the duties of a judge of an international court is to administer justice: judges are subject to the same requirements of the independence and impartiality of courts and judges, they are granted a special status, *inter alia*, the term of powers of judges is inviolable and any interference with the activity of judges and courts is prohibited. It should be noted that a judge of a national court, when holding the duties of a judge of an international court (in cases where the duties of a judge of a national court and those of a judge of an international court are combined), may not lose his/her powers of a national judge solely on such grounds. At the same time, it should also be noted that combining the duties of a judge of a national court and those of a judge of an international court in itself does not give rise to doubts as to the impartiality and independence of a judge.

In view of this fact, it should be held that, under the Constitution, judges are allowed to perform certain other specified duties in courts and in judicial self-government bodies, whereas international treaties of the Republic of Lithuania may also provide for situations where judges may perform, *inter alia*, the duties of judges of international courts (in cases where they combine the duties of a judge of a national court and those of a judge of an international court). Such an activity may not interfere with the fulfilment of the main constitutional judicial duty, arising from Article 109 of the Constitution, to administer justice in a proper and effective manner.

It should also be held that the right of judges to perform the duties of judges of international courts (in cases where they combine the duties of a judge of a national court and those of a judge of an international court) also implies their right to receive remuneration for the performance of such duties. At the same time, it needs to be noted that [...] according to Paragraph 1 of Article 113 of the Constitution, judges may not receive any remuneration other than the remuneration established for judges and payment for educational or creative activities; therefore, the conclusion should be drawn that, when performing the duties of judges of international courts (in cases where the duties of a judge of a national court and those of a judge of an international court are
combined), judges are not allowed to receive the remuneration of a judge of a national court and that of a judge of an international court at the same time.

In view of what has been stated above, the conclusion should be drawn that the provision “Judges may receive only the remuneration of a judge paid from the state budget. Judges may not receive any remuneration other than the remuneration established for them and payment for educational or creative activities” […] of the Constitutional Court’s ruling of 12 July 2001 means, inter alia, that […] judges […] may receive the remuneration of a judge of an international court (in cases where the duties of a judge of a national court and those of a judge of an international court are combined); however, they must not receive the remuneration of a judge of a national court at the same time.
On 29 December 2016, the Plenum of the Constitutional Court of Georgia decided on cases Nos 768, 769, 790, 792 (Group of Georgian Parliamentarians and Citizens of Georgia) and declared unconstitutional the rule set out in Article 18 of OLCC (Organic Law of Georgia on the Constitutional Court of Georgia) regarding the end of the term of office of a judge once his/her 10-year term expires. The Constitutional Court considered unconstitutional the end of a mandate in case the relevant state body fails to appoint/elect a new judge within the time required by the law and it is impossible for the Constitutional Court to exercise its authority due to absence of the necessary quorum. It is highlighted in the decision of the Constitutional Court that the disputed norm would have created a danger for proper functioning of the court.

Moreover, the Constitutional Court of Georgia declared unconstitutional Article 44.3 of OLCC which provided for the necessity of consent by the majority of the full composition of the plenary session (9 members) for granting a constitutional complaint, and also the rule set forth therewith in Paragraph 4, imposing the necessity of consent of at least 6 members of the plenary session to uphold the constitutional complaint for the annulment of organic laws (an organic law has a higher normative value in the Georgian legal system – below the Constitution, but above an ordinary law). The Constitutional Court noted that its decisions are based on an objective, impartial interpretation of the Constitution and legislation, and that, as a constitutional standard, the decisions by the Constitutional Court in principle are adopted by the majority of the judges present. At the same time, the Constitutional Court noted that certain exceptions may as well exist in legislation relating to the issues of systemic constitutional importance. It follows that Article 44.2 of OLCC, which provides for the need to review a certain type of cases only by the Plenum of the Constitutional Court with at least 7 judges present, was found to be in line with the Constitution.

The Constitutional Court also declared unconstitutional Article 25.5 of OLCC, whereby the authority to take an interlocutory measure on the suspension of the disputed provision until the final decision was vested only with the plenary session of the Constitutional Court. It was found to be in contradiction with the right to a fair trial, since the subject matter was in fact to be reviewed twice – by the plenary session and by the board, which would have needlessly prolonged the deliberation and put the effectiveness of petitioning to the Constitutional Court in doubt.

In addition, the Constitutional Court declared the rule set out in Article 29.4 of LCLP (Law on Constitutional Legal Proceedings) unconstitutional, which required that the Constitutional Court announce the full text of its decision in the courtroom. The Constitutional Court indicated that the disputed norm prevents the decision of the Constitutional Court from entering into force in an unjustified and unreasonable manner and thereby puts it at odds with the right of an individual to timely administration of constitutional justice. Conversely, the requirement of the law concerning an immediate publication of the full text of the decision by the Constitutional Court on its website was considered to be in compliance with the Constitution.
The Constitutional Court of Georgia also recognised unconstitutional Article 10.5³ of OLCC, which prohibited the same person to be re-elected for the positions of the President and the Vice President of the Constitutional Court. Besides, the rule set out in Article 10.3 of OLCC, valid until 1 October 2016, was also declared unconstitutional. According to the disputed norm, the candidate for the President of the Constitutional Court was nominated by an agreed proposal of the President of Georgia, the President of the Parliament of Georgia and the Chairperson of the Supreme Court of Georgia. The above-stated norms were considered to be an unreasonable limitation of the right to hold public office and unjustified restriction of the independent functioning of the Constitutional Court.

Furthermore, the rule, set out in Article 21¹.3 of OLCC, that empowers a single judge of a board to request the transfer of a case to the plenary session for review was found to be in compliance with the Constitution. However, the rule that required a two-thirds majority of the plenary session to give a reasoned decision to reject such request was found unconstitutional. In addition, Article 21.1 of OLCC, whereby the authority to decide on the constitutionality of the organic law is granted only to the plenary session of the Constitutional Court, was considered to be in line with the Constitution. It is indicated in the decision that the plenary session of the Constitutional Court with its composition and competences represents the highest qualified judicial institution, which is tasked with deciding on important issues. It thus follows that its competence to pass on the constitutionality of organic law is in conformity with the Constitution.

The given decision of the Constitutional Court of Georgia comes with two dissenting opinions. The Justices of the Constitutional Court, Ms Irene Imerlishvili and Ms Maia Kopaleishvili, expressed their dissent with the part of the decision that declared unconstitutional the rule prohibiting re-election of the same person for the position of the President and the Vice President of the Constitutional Court. Furthermore, Ms Justice Maia Kopaleishvili expressed a dissenting opinion regarding the part of the decision declaring unconstitutional the disputed norm that grants any single member of a board with the authority to request the transfer of a case to the plenary session for review.

It is noteworthy that the Constitutional Court of Georgia gave a due regard to the Venice Commission’s opinion¹ when deciding on the mentioned cases. Moreover, the Constitutional Court assessed and declared unconstitutional the legal norms that were not raised either in the Commission’s opinion or addressed by the President of Georgia in his reasoned remarks.² In particular, the Constitutional Court of Georgia invalidated the high decision-making quorum with respect to all types of cases, thereby setting high standard of constitutional adjudication in line with European traditions. Alternatively, the Constitutional Court indicated that only the presence of at least 7 judges may be justified under exceptional circumstances relating to the subject matter of systemic constitutional importance. In addition, the requirement of the law that an interlocutory decision was to be taken only by the plenary session was found unconstitutional. The Constitutional Court followed the logic developed in the Commission’s opinion³ and emphasised that the review of the subject matter twice – by the plenary session and by the board – would have needlessly prolonged the deliberation and put the effectiveness of petitioning to the Constitutional Court in doubt.

² The President of Georgia has vetoed the initial version of the bill and subsequently, the Parliament by adopting the Presidential objections passed the bill into law. Please further see http://bit.ly/2i1uKyA.
³ Paragraph 34: “It is not logical that an interlocutory decision which is urgent by its very nature should be taken in a more complicated procedure, which includes a transfer of the case from the board to the plenary session and then back to the board for the decision on the merits.”
THREE-YEAR PROBATIONARY PERIOD FOR THE JUDGES WHO HAVE SERVED AT LEAST THE FOREGOING TIME IN OFFICE IS DECLARED UNCONSTITUTIONAL

On 15 February 2017, the Constitutional Court of Georgia granted a constitutional complaint of the citizen of Georgia, Omar Jorbenadze, a former judge, and declared unconstitutional Article 36.41 of the organic law on “Common Courts of Georgia”. The unconstitutional normative content of that provision provides for an appointment as a judge in appellate, city and district courts for three-year period for individuals who are former or incumbent judges and have served in office no less than three years.

As a result of the 2010 constitutional reform in Georgia, the Constitution introduces life tenure for judgeship in trial and appellate courts and provides for a provisional three-year period subsequent to which a judge may be appointed for life term. The appointment is made by the High Council of Justice, which is an institutionally independent body in charge of overseeing the judicial system.

The disputed legal provision envisages an appointment of judges for a three-year period, after which the High Council of Justice is empowered to decide whether to designate a judge for life term.

The Constitutional Court has indicated in the judgment that an appointment for a fixed three-year period intends to investigate the qualities of a person for judgeship, examination of which is intrinsically related to the analysis of his/her practical experience as a judge. Due to the fact that there are judges who have already accumulated three years of work experience, it is thereby possible to evaluate their past experience and determine whether a particular candidate meets the high qualifications of a judge’s post. It thus follows that, with respect to the judges who have served at least three years in office and it is objectively feasible to examine their work experience, an imposition of additional time period creates an unjustified barrier and violates the constitutional right to hold a public office (Article 29 of the Constitution).

Moreover, the Constitutional Court points out that, for the purposes of life term appointment, the category of judges who have at least three years of experience and the others who do not cannot be regarded as two comparable groups. Since the disputed provision provides for the same treatment, as it establishes a general three-year rule for all the judges, it violates the right to equality guaranteed by the Constitution (Article 14).

The Constitutional Court accounts for the possibility that, in certain cases, it could not be easily possible to evaluate work experience of the judges due to passage of substantial time since a judge served in office or there are other objective circumstances that make it difficult to properly examine their job performance in practice. The Constitutional Court emphasises that further legislative regulations are needed to ensure work experience of candidates for judgeship is duly investigated. Therefore, the Constitutional Courts deems it necessary to give a reasonable time to the legislator in order to adopt legislation that will protect the constitutional rights of individuals and, on the other hand, will not allow for the possibility of designating people as judges who are not appropriate for the post. The Constitutional Court postponed the execution of its judgment until 1 July 2017, after which the provision in question will be formally invalidated.
Summary to the Decision of the Constitutional Court of Ukraine No 13-rp/2008, dated 26 June 2008, on the case upon the constitutional petition of 47 People’s Deputies of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of the provision of Item 3.1 of Section IV of the Law of Ukraine “On the Constitutional Court of Ukraine” (case on the authorities of the Constitutional Court of Ukraine)

A subject of the right to constitutional petition – 47 People’s Deputies of Ukraine – applied to the Constitutional Court with a petition on the conformity with the Constitution of Ukraine (constitutionality) of the Law “On introducing amendments to Section IV ‘Final and Transitional Provisions’ of the Law of Ukraine ‘On the Constitutional Court of Ukraine’” (hereinafter referred to as “the Law”).

The Law introduced an amendment to Item 3.1 of Section IV “Final and Transitional Provisions” of the Law of Ukraine “On the Constitutional Court of Ukraine” under which decisions on the conformity of the laws of Ukraine on introducing amendments to the Constitution of Ukraine that entered into force with the Constitution of Ukraine (constitutionality) were withdrawn from the Constitutional Court’s jurisdiction.

According to Article 6.2 of the Constitution, bodies of legislative, executive and judicial power exercise their authorities within the limits established by the Constitution and in accordance with the laws of Ukraine.

Under Article 147 of the Constitution, the Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine, it decides on the conformity of laws and other legal acts with the Constitution, provides official interpretation of the Constitution of Ukraine.

The extent and limits of such authorities of the Constitutional Court are determined by the provisions of Article 150 of the Constitution, and factually reproduced in Article 13 of the Law “On the Constitutional Court of Ukraine”. The procedure for the organisation and operation of the Constitutional Court, as well as the procedure for consideration of cases by the Court, are determined by law (Article 153 of the Constitution).

The Constitutional Court in its decisions has formulated its legal positions on specification of the authorities of state bodies, which are as follows:

– redistribution of constitutional authorities is only possible by way of introducing amendments to the Constitution in accordance with Chapter XIII of the Constitution (Decision No 7-zp, dated 23 December 1997, on the case on the Chamber of Account);

– exceptions from the constitutional norms are established by the Constitution itself and not by other normative acts (Decision No 5-zp, dated 30 October 1997, on Ustymenko case);

– jurisdiction of the Constitutional Court extends to the resolution of all issues stipulated by Article 150 of the Constitution (on conformity with the Constitution of laws and other legal acts)
acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea, official interpretation of the Constitution and laws of Ukraine) as well as by other articles of the Constitution, particularly Article 159 (regarding conformity of a draft law on introducing amendments to the Constitution with the requirements of Articles 157 and 158 of the Constitution). Whereas in the first case the so-called subsequent control of the Constitutional Court takes place, i.e. the Court examines the constitutionality of legal acts that are in force, it applies preventive constitutional control in the latter (Decision No 8-rp/98, dated 9 June 1998, on the case on introducing amendments to the Constitution).

The Constitutional Court considers that, in performing law-making activities, the Verkhovna Rada of Ukraine may regulate issues regarding the sole body of constitutional jurisdiction in Ukraine only within the limits of its constitutional authorities envisaged by Article 153 of the Constitution, namely determine the procedure and organisation of the Constitutional Court and procedure for consideration of cases by the Court.

Changing the Constitutional Court’s authorities determined by the Constitution may be realised only by way of introducing amendments to the Constitution.

A draft law on introducing amendments to the Constitution is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court on the conformity of the draft law with the requirements of Articles 157 and 158 of the Constitution (Article 159).

The Constitution (Article 150) does not contain restrictions concerning possibility for the Constitutional Court to exercise subsequent constitutional control of the law on introducing amendments to the Constitution of Ukraine after it has been adopted by the Verkhovna Rada. The jurisdiction of the courts extends to all legal relations that arise in the State (Article 124 of the Constitution). The Constitutional Court considers that it is exactly the Court that is to exercise subsequent constitutional control of a law on introducing amendments to the Constitution of Ukraine that entered into force, since absence of judicial control of the procedure for its consideration and adoption determined in Chapter XIII of the Constitution may result in restriction or abolition of human and citizen’s rights and freedoms, liquidation of the independence, violation of territorial indivisibility or change of the constitutional order in the way that is not envisaged by the Fundamental Law of Ukraine.

On the grounds of the above-stated the Constitutional Court concludes that the Verkhovna Rada of Ukraine adopted the Law with the infringement of provisions of Articles 147, 150 of the Constitution.

Thus, the Constitutional Court of Ukraine held:

1. To recognise as non-conforming with the Constitution of Ukraine (unconstitutional) provision of Item 3.1 of Section IV of the Law of Ukraine “On the Constitutional Court of Ukraine” No 422/96-BP, dated 16 October 1996 (in the wording of the Law of Ukraine No 79-V, dated 4 August 2006), according to which the jurisdiction of the Constitutional Court does not extend to decisions concerning the constitutionality of laws on introducing amendments to the Constitution of Ukraine that entered into force.

2. The constitutional proceedings in the case in the part of examination the Law “On introducing amendments to Section IV “Final and Transitional Provisions” of the Law of Ukraine “On the Constitutional Court of Ukraine” No 79-V, dated 4 August 2006, on conformity with Article 126 of the Constitution of Ukraine are to be terminated.

3. The provision of Item 3.1 of Section IV of the Law of Ukraine “On the Constitutional Court of Ukraine” No 422/96-BP, dated 16 October 1996 (in the wording of the Law of Ukraine No 79-V, dated 4 August 2006), deemed to be unconstitutional loses its effect from the day the Constitutional Court of Ukraine adopts this decision.
Summary to the Opinion of the Constitutional Court of Ukraine No 1-v/2016, dated 20 January 2016, in the case upon the appeal of the Verkhovna Rada of Ukraine for providing an opinion on compliance of the draft law on introducing amendments to the Constitution of Ukraine (on justice) with the provisions of Articles 157 and 158 of the Constitution

Pursuant to the Resolution “On including the draft law on introducing amendments to the Constitution of Ukraine (on justice) to the agenda of the third session of the Verkhovna Rada of Ukraine of the eighth convocation and its submitting to the Constitutional Court of Ukraine” No 895-VIII, dated 22 December 2015, the Verkhovna Rada of Ukraine filed with the Constitutional Court of Ukraine an appeal to provide an opinion regarding the conformity of the draft law on introducing amendments to the Constitution (on justice) registration No 3524 (hereinafter referred to as “the Draft law”) to the provisions of Articles 157 and 158 of the Constitution.

Pursuant to Article 85.1.1 of the Fundamental Law, the authority of the Verkhovna Rada of Ukraine includes introducing amendments to the Constitution of Ukraine within the limits and by the procedure envisaged by Chapter XIII of this Constitution.

Under Article 159 of the Fundamental Law, the draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution.

Under Article 158 of the Fundamental Law, the draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law (Article 158.1); within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution (Article 158.2).

The Verkhovna Rada of the eighth convocation has not considered the Draft law during the year and has not amended the indicated provisions of the Constitution during its term of office. Thus, the Draft law conforms to the requirements of Article 158 of the Constitution.

Under Article 157.2 of the Fundamental Law, the Constitution shall not be amended in conditions of martial law or a state of emergency.

The Constitutional Court of Ukraine notes that, at the moment of providing this opinion, the decision on the introduction of martial law or state of emergency in Ukraine or in its particular areas according to the procedure defined by the Constitution has not been taken, therefore, there are no legal grounds that make it impossible to amend the Constitution. The Constitutional Court of Ukraine assumes that the draft law conforms to the requirements of Article 157.2 of the Constitution.

According to Article 157.1 of the Fundamental Law, the Constitution cannot be amended if the amendments envisage the abolition or restriction of human and citizens’ rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. While examining whether the Draft law contains provisions that foresee the abolition or restriction of human and citizens’ rights and freedoms, the Constitutional Court of Ukraine assesses each of its provisions.

The proposed wording of Article 124.3 of the Constitution suggested in the Draft law stipulates that the jurisdiction of the courts shall cover any legal dispute and any criminal charge and also other cases in matters prescribed by the law. The Constitutional Court assumes that the jurisdiction of categories of cases to the courts, specified in the wording proposed by the Draft
law of the first sentence of Article 124.3 of the Fundamental Law, corresponds to the other norms on judicial protection of human and citizens’ rights and freedoms, in particular to Articles 55.1, 55.2, 62.1 of the Constitution. The definition, provided in the draft law, in the law of other cases of jurisdiction of cases to courts is aimed at improving the efficiency of the implementation and protection of human and citizens’ rights and freedoms.

The wording of Article 124.4 of the Constitution proposed in the Draft law, provides that mandatory pretrial dispute resolution procedures may be provided for in the law. Analysing the proposed wording of this article in the Draft law, the Constitutional Court of Ukraine proceeds from the fact that the consolidation of the provision on possible definition in the law of mandatory pretrial dispute resolution procedure in the Constitution is an additional legal remedy for an individual, which does not eliminate the possibility of further appeal to the court.

The Draft law proposes that Article 124 of the Constitution provide that the people shall directly participate in the administration of justice through jurors. The Constitutional Court of Ukraine assumes the proposed wording of Article 124 of the Constitution contained in the Draft law without the phrase “people’s assessors and” to be substantiated given the fact that the wording of this article proposed in the Draft law retains the institute of the jury as a form of direct participation of the people in the administration of justice.

Article 124.6 of the Constitution proposed by the Draft law provides for the possibility to recognise the jurisdiction of the International Criminal Court as provided for by the Rome Statute of the International Criminal Court. The Constitutional Court of Ukraine assumes that the proposed amendment allows the recognition of the jurisdiction of the International Criminal Court on the conditions stipulated by the Statute.

The proposed wording of Article 124 of the Fundamental Law does not provide for the provisions according to which the judicial proceedings are exercised by the Constitutional Court of Ukraine and courts of general jurisdiction. These provisions are contained in Article 124.3 of the Constitution. The Constitutional Court of Ukraine notes that the draft law proposes putting the norms defining the principles of the activity of the courts of general jurisdiction and the Constitutional Court in the articles that are contained in different chapters of the Constitution – Chapter VIII “Justice” and Chapter XII “Constitutional Court of Ukraine” respectively.

The proposed wording of Article 124 of the Fundamental Law also does not provide for the provisions enshrined in Article 124.5 of the Constitution, according to which judicial decisions are adopted by the courts in the name of Ukraine and are mandatory for execution throughout the entire territory of Ukraine. The Constitutional Court of Ukraine notes that the proposed wording of Article 124 of the Constitution, which does not contain Article 124.5, is accounted for the proposed supplement of the Fundamental Law by Article 1291, which contains similar provisions. Given the above, the Constitutional Court of Ukraine finds that the proposed wording of Article 124 of the Fundamental Law does not provide for the abolition or restriction of human and citizens’ rights and freedoms.

Under Article 125.1 of the Constitution, the system of courts of general jurisdiction is formed in accordance with the territorial principle and the principle of specialisation. The Constitutional Court of Ukraine assumes that the proposed word “Judiciary”, used instead of the phrase “courts of general jurisdiction”, does not affect the content and scope of the human and citizens’ rights and freedoms, and the proposed specification that the judicial system in Ukraine is determined by law is consistent with Article 92.1.14 of the Constitution.

The proposed wording of Article 125.2 of the Constitution provides for the introduction of a new procedure of establishment, reorganisation and elimination of courts, according to which the court shall be established, reorganised and dissolved by the law, the draft of which is submitted
by the President of Ukraine to the Verkhovna Rada of Ukraine after consultation with the High Council of Justice. The Constitutional Court of Ukraine notes that in the proposed wording of Article 125.2 of the Constitution the role of the President in the establishment, reorganisation and elimination of the courts implies his implementation of the right to legislative initiative by introducing to the Verkhovna Rada an appropriate draft law after consultation with the High Council of Justice.

According to Article 125.2 of the Constitution the Supreme Court is the highest judicial body in the system of courts of general jurisdiction. The draft law provided that Supreme Court shall be the highest court in the system of judiciary. In addition, the draft law proposes using the word “court” instead of the words “judicial body” in Article 125 of the Constitution, the words “the system of judiciary in Ukraine” instead of the words “the system of courts of general jurisdiction”, and applying the title “Supreme Court of Ukraine” without the word “Ukraine”.

According to Article 125.3 of the Constitution, the respective high courts shall be the highest judicial bodies of specialised courts. The draft law proposes introducing the provision that the higher specialised courts may function in accordance with the law. The proposed wording of Article 125.3 provides for the possibility of establishment of the higher specialised courts in accordance with the law that will provide an opportunity for the legislator, by setting the system of judiciary, to independently determine the necessity or expediency of establishment of the higher specialised courts as separate courts in the system of the judiciary.

The proposed wording of Article 125 of the Constitution provides for the norm according to which the administrative courts shall function in order to protect the rights, freedoms and interests of a person in public legal relations. The Constitutional Court of Ukraine assumes that the specified provision is provided for as a legal guarantee of the protection of the rights, freedoms and interests of a person from violations on the part of public authorities, their officials and officers.

According to Article 125.4 of the Constitution, the courts of appeal and local courts operate in accordance with the law. The proposed wording of Article 125.4 does not contain the specified provision, which is accounted by the new wording of other constitutional provisions under which it is the competence of the Verkhovna Rada to determine which courts operate in the judicial system (Articles 92.1.14, 125.1, 125.2, 125.4 and 129.2.8 of the Constitution in the proposed wording). In view of the above, the Constitutional Court of Ukraine assumes that the proposed wording of Article 125 of the Fundamental Law does not provide for the abolition or restriction of human and citizens’ rights and freedoms.

According to Article 126.3 of the Constitution, a judge shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine until a guilty verdict is rendered by a court. The proposed wording provides for the competence of the High Council of Justice to give consent on detention of a judge or keeping in custody or arrested until a guilty verdict is rendered by a court, except for detention of a judge detained in flagrante delicto or immediately after it. The amendments to Article 126.3 of the Constitution were the subject matter of proceedings of the Constitutional Court of Ukraine. Analysing the compliance of the draft law on amendments to the Constitution regarding the immunity of People’s Deputies of Ukraine and judges with Articles 157 and 158 of the Constitution, the Constitutional Court of Ukraine stated that the consent to the temporary restriction of freedom and the right to free movement of judges does not provide for the abolition or restriction of human and citizens’ rights and freedoms.

The Draft law proposes consolidating in the Fundamental Law the provision that makes it impossible to bring a judge to liability for decisions rendered by him or her, except the cases of committing a crime or a disciplinary offence. The Constitutional Court of Ukraine assumes that
The proposed wording of Article 126 of the Constitution enshrines impossibility of bringing a judge to liability for decisions rendered by him or her and does not provide for the abolition or restriction of human and citizens’ rights and freedoms.

The Draft law proposes consolidating in the Fundamental Law the perpetuity of a person in the office of a judge. The term of office of a judge of the Constitutional Court of Ukraine is a subject of regulation of the proposed wording of Article 148.6 of the Fundamental Law.

The Draft law proposes consolidating in the Constitution an exhaustive list of grounds for dismissal of a judge from the office and for the termination of his or her powers. The Constitutional Court of Ukraine assumes that the proposed grounds for dismissal of judges from the office are consistent with Items 50, 52 of the annex to the Recommendation, according to which the appointment to the office on a permanent basis should be suspended only in cases of significant violations of disciplinary or criminal provisions established by law, or if the judge can no longer carry out his/her duties; early resignation of a judge should be possible only at the request of the judge or in connection with the state of health; a judge cannot get a new appointment or be transferred to another judicial office without his/her consent, except for cases when the disciplinary sanctions are applied against him or her or reformation of the organisation of the system of the judiciary is implemented. In view of the above, the Constitutional Court of Ukraine finds that the proposed wording of Article 126 of the Constitution does not provide for the abolition or restriction of human and citizens’ rights and freedoms.

Article 127.1 of the Constitution establishes that justice is administered by professional judges and, in cases determined by law, people’s assessors and jurors. The proposed wording of Article 127.1 provides that justice shall be administered by jurors as prescribed by law. The proposed wording of Article 127.1 is consistent with the proposed wording of Article 124.5 of the Fundamental Law, which provides that people shall directly participate in the administration of justice through jurors.

The proposed amendments to Articles 127.2–127.4 of the Constitution concern the requirements for judges.

The Draft law provides for the increase in the age limit for candidates to the office of a judge to thirty years and sets the upper age limit when a person can be appointed to the office of a judge, which is sixty-five years.

The Draft law proposes the amendments concerning the requirements for work experience necessary for the appointment of a person to the office of a judge, provides for the abolition of the requirement of residence in Ukraine for no less than ten years, which prevented the appointment of citizens of Ukraine who had worked outside Ukraine for a long time, and establishes such requirements as competence and virtue. The Draft law wording of Articles 127.3, 127.4 of the Constitution provides for the possibility of establishing additional/other requirements for appointment to the office of a judge.

Article 127 of the Constitution in the proposed wording does not contain Articles 127.5, 127.6 of the Constitution, which stipulate that the additional requirements for certain categories of judges in terms of experience, age and their professional level shall be prescribed by law; the protection of judges’ professional interests shall be exercised according to the procedure prescribed by law. Absence of these provisions is stipulated by the proposed amendments to other constitutional provisions concerning the requirements for a person who may be appointed to the office of a judge (Articles 127.3, 127.4 of the Constitution in the wording proposed by the draft law) and supplement of the Constitution by Article 1301, which provides for the protection of professional interests of judges. According to the Constitutional Court, the proposed wording of Article 127 of the Constitution does not provide for the abolition or restriction of human and citizen’s rights and freedoms.
According to Article 85.1.27 of the Constitution, the competence of the Verkhovna Rada of Ukraine shall include the election of judges for unlimited term. The proposed wording provides that the subject authorised to appoint judges is the President who may realise his powers exclusively upon the submission of the High Council of Justice and in the manner prescribed by law. The Venice Commission also mentioned the necessity to exclude the Verkhovna Rada from the process of election of judges and the admissibility of participation of the Head of State in this process.

The proposed wording of Article 128 of the Fundamental Law contains provisions on establishing a competitive selection process that precedes the appointment of judges. The Constitutional Court assumes that the proposed wording of Article 128 of the Constitution does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

According to Article 129.1 of the Constitution, judges shall be independent and are subject only to the law while administering justice. The proposed amendments consolidate the principle according to which, while administering justice, a judge shall be independent and governed by the rule of law. The Constitutional Court assumes that these amendments correspond to Article 8.1 of the Fundamental Law, according to which in Ukraine the principle of the rule of law is recognised and effective, and promote strengthening Ukraine as a legal state in which the judiciary should be implemented on the basis of justice and real protection of human rights and freedoms.

The proposed amendments to Article 129 of the Constitution do not provide the legality in the list of basic principles of justice defined in Article 129.3 of the Constitution that conforms to the amendments to Article 129.1. Supplement of this list with the principle “reasonable terms for examination of the case by the court” is aimed at ensuring the guarantee of the protection by the court of the violated rights of the individual in the optimal terms and corresponds to the requirements of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

The proposed wording of Article 129.2.8 of the Constitution enshrines the guarantees of the right to appeal examination of a case and provides that cases of challenge in cassation of court decisions are prescribed by law. The Constitutional Court proceeds from the fact that a person must be guaranteed the right for review of a case by a court of appeal. After the appeal hearing of the case the parties thereto may be granted a right to appeal against court decisions of the first and appellate instances to the court of cassation instance in cases determined by law that will facilitate the implementation of the principle of the rule of law.

The Draft law also provides for the introduction of other, mostly editorial amendments to Article 129 of the Constitution that do not affect the content and scope of human and citizen’s rights and freedoms. Thus, the Constitutional Court assumes that the proposed wording of Article 129 of the Constitution does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

The amendments proposed by the Draft law to Article 130.1 of the Constitution provide that, while determining the State budget expenditures for the maintenance of courts, the proposals of the High Council of Justice shall be taken into account. The proposed wording of Article 130 of the Fundamental Law also contains a provision by which the remuneration of judges shall be defined by the law on judiciary. In addition, the proposed amendments to Article 130 of the Constitution do not provide for Article 130.2 of the Constitution, according to which judicial self-government shall operate to regulate internal organisational activity of courts; however, this is stipulated by the supplement of the Constitution with Article 1301, which covers by its content Article 130.2. In this view, the proposed wording of Article 130 of the Fundamental Law does not provide for the abolition or restriction of human and citizen’s rights and freedoms.
The wording of Article 131 of the Constitution proposes introducing the functioning of the High Council of Justice, determines its powers, composition, entities authorised to elect (appoint) members of the High Council of Justice, the term of office of the elected (appointed) members of the High Council of Justice, the conditions of competence of this body and fundamental requirements for the members of the High Council of Justice, it also provides the establishment in the system of justice of the bodies and institutions the activities of which should be aimed at the implementation by the High Council of Justice of its constitutional authorities and ensuring proper functioning of courts. The Constitutional Court assumes that the proposed wording of Article 131 of the Constitution does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

Article 147 of the Fundamental Law in the wording proposed by the draft law defines the main powers of the Constitutional Court and the principles on which its activity is based. The Constitutional Court assumes that the proposed wording of Article 147 of the Constitution does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

The proposed wording of Article 148 of the Constitution provides for the introduction of selection of candidates for the office of judge of the Constitutional Court on a competitive basis under the procedure prescribed by the law, change of the qualification requirements in terms of experience, and supplements a list of requirements for the candidate for the office of judge of the Constitutional Court with a requirement of high moral qualities and a status of a lawyer with the recognised level of competence. The proposed wording of Article 148 of the Constitution of Ukraine defines that a judge of the Constitutional Court of Ukraine shall step in his or her office as of the date of taking the oath at the special plenary sitting of the Court. The Constitutional Court assumes that the proposed wording of Article 148 of the Constitution does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

The proposed wording of Article 149 of the Constitution specified guarantees of inviolability and independence of judges of the Constitutional Court. The provisions related to dismissal from office/termination of powers of judges of the Constitutional Court and the requirements of incompatibility are set out in Article 148.5 of the Fundamental Law in the proposed wording, and in Article 149¹, which is proposed to add to the Constitution. In addition, the draft law proposes consolidating in the Constitution the provision, according to which a judge of the Constitutional Court of Ukraine shall not be legally liable for voting on decisions or opinions of the Constitutional Court, except for the cases of committing a crime or a disciplinary offence. Consequently, there is no evidence that the proposed wording of Article 149 of the Constitution provides for the abolition or restriction of human and citizen’s rights and freedoms.

The amendments to Article 151.1 of the Fundamental Law of Ukraine proposed by the draft law provide that the Constitutional Court of Ukraine shall provide opinions on compliance with the Constitution of Ukraine of international treaties of Ukraine that are in effect, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature upon submission of not only the President of Ukraine or the Cabinet of Ministers of Ukraine but not less than forty-five People’s Deputies of Ukraine. Moreover, Article 151 of the Constitution in the proposed wording contains a new provision according to which the Constitutional Court of Ukraine on submission of the President of Ukraine or not less than forty-five People’s Deputies of Ukraine shall provide opinions on compliance with the Constitution of Ukraine (constitutionality) of questions that are proposed to be put for the all-Ukrainian referendum on people’s initiative.

The Constitutional Court assumes that the proposed wording of Article 151 of the Fundamental Law does not provide for the abolition or restriction of human and citizen’s rights and freedoms.
Unlike Article 153 of the Constitution, the proposed wording of this article provides that the organisation and operation of the Constitutional Court of Ukraine, status of judges of the Court, grounds to apply to the Court and application procedure, and the procedure of enforcement of decisions of the Court shall be defined by the Constitution of Ukraine and by law.

The Constitutional Court assumes that the proposed wording of Article 153 of the Constitution of Ukraine does not provide for the abolition or restriction of human and citizen’s rights and freedoms. The proposed provision provides for the establishment of common rules for the adoption, implementation and enforcement of the decision of the court.

The Constitutional Court notes that paragraph one of Article 129 1 reproduces the content of Article 124.5 of the Constitution, according to which decisions shall be rendered by courts in the name of Ukraine and shall be legally binding for enforcement within the entire territory of Ukraine. The Constitutional Court assumes that these amendments to the Constitution are aimed at achieving legal certainty in the issues of enforcement of the decision of the court, which is an inalienable element of the rule of law, and do not foresee the abolition or restriction of human and citizen’s rights and freedoms.

The proposed wording of Article 130 1 suggested supplementing the Constitution with two combined provisions governing the tasks of self-government of judges in the matters of the protection of the professional interests of judges (Article 127.6 of the Constitution) and managing issues of internal activity of courts (Article 130.2 of the Constitution), which are not contained in the wordings of Articles 127 and 130 of the Constitution proposed by the draft law. Thus, Article 1301, by which it is proposed to supplement the Constitution, does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

The Draft law proposes establishing an exhaustive list of powers of the prosecutor’s office, procedure of appointment of the Prosecutor General, his term of office and the procedure for his early dismissal. According to Article 123 of the Constitution of Ukraine, organisation and operation of the public prosecution bodies of Ukraine shall be defined by law. A similar provision is contained in Article 131 1, which is proposed to be supplemented to the Fundamental Law. The Constitutional Court assumes that Article 1311, proposed to be supplemented to the Constitution, does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

Article 1312, proposed to be supplemented to the Constitution, defines that, in Ukraine, the Bar is functioning to provide professional legal assistance, and paragraph two of Article 1312 provides for the guarantee of independence of the Bar. Paragraph four of this Article indicates that only an advocate shall represent a person before the court, and defend a person against prosecution, which is consistent with the proposed amendment to Article 59.1 of the Fundamental Law concerning the right of everybody to professional legal assistance. The Constitutional Court assumes that the lawyer has the necessary professional skills and the ability to ensure the realisation of the right to protection from criminal prosecution and the representation of his interests in court. At the same time, each person is free to choose the defender of his rights among advocates.

According to paragraph five of Article 1312 proposed to be supplemented to the Constitution, exceptions to representation in court in labour disputes, disputes on the protection of social rights, elections and referendums, in insignificant disputes, and also representation in the court of minors, adolescents, legally incapable or partially legally incapable shall be defined by the law. The Constitutional Court assumes that the establishment on the legislative level of exceptions concerning the representation in a court by persons other than a lawyer may be conditioned by the peculiarities of certain category of cases, legal relations or status of a person, rights, freedoms or interests that are to be protected. The relevant regulation on representation in the court of such a person should contribute to the effective protection of the rights, freedoms and interests of
individuals and legal entities. In this regard, the Constitutional Court considers that the proposed amendments to Article 1312 of the Constitution does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

The proposed provision by its content is similar to Article 130.1 of the Constitution in the wording proposed by the draft law, which regulates the financial support of the courts that belong to the judicial system of Ukraine and sets the remuneration of a judge, and does not foresee the abolition or restriction of human and citizen’s rights and freedoms.

The proposed grounds for dismissal of a judge of the Constitutional Court from the office and grounds for termination of his powers are consistent with the grounds for dismissal and the reasons for termination of powers of judges of a court which belong to the judicial system of Ukraine (Article 126 of the Constitution in the proposed wording). Features of constitutional regulation in the part of termination of powers of a judge of the Constitutional Court consist in maintaining such a ground for termination of his powers as the termination of the term of office of a judge of the Constitutional Court (as this term is limited to nine years) and an increase in the age limit for the office of judge of the Constitutional Court to 70 years. The draft law also provides for the right of the Constitutional Court to decide independently on dismissal of a judge of the Constitutional Court from the office in the manner prescribed by law. The proposed provision is aimed at strengthening the guarantees of the independence of judges of the Constitutional Court from the entities authorised to appoint them to the office. The Constitutional Court assumes that these amendments do not foresee the abolition or restriction of human and citizen’s rights and freedoms.

Article 1511, proposed to be supplemented to the Constitution, provides that the individual has right to appeal to the Constitutional Court with the constitutional complaint after exhaustion of the domestic remedies. The introduction of the institute of the constitutional complaint is the improvement of the mechanism of individual access of a person to constitutional justice. Considering the above, the Constitutional Court assumes that supplementing the Constitution with the proposed wording of Article 1511 does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

Article 1512, proposed by the Draft law, equally envisages that decisions and opinions of the Constitutional Court are mandatory, final and are not subject to appeal, which is consistent with the principle of binding nature of decisions and opinions adopted by the Constitutional Court, as defined in Article 147 of the Fundamental Law in the wording proposed by the Draft law. In the light of the above, the Constitutional Court assumes that Article 1512, proposed to be supplemented to the Constitution, does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

The draft law proposes replacing the word “legal” to “jurisprudential” in Article 29.4 of the Constitution. According to the Constitutional Court, such an amendment does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

The Draft law proposes the following amendments to Article 55 of the Constitution:

(a) to supplement by a new paragraph after paragraph three as follows:
“Everyone has the right to appeal with the constitutional complaint to the Constitutional Court on the grounds established by this Constitution and in the manner prescribed by law.”

With regard to this, paragraphs four and five shall be considered as paragraphs five and six respectively;

(b) to replace the word “legal” by the word “juridical” in paragraph five.

These amendments are consistent with the proposed supplement of the Constitution by Article 1511, which provides for vesting the Constitutional Court with the power to decide on compliance with the Constitution of Ukraine (constitutionality) of a law on Ukraine upon constitutional complaint of a person alleging that the law of Ukraine applied in a final court
decision in his or her case contravene the Constitution of Ukraine, and outlining Article 153 of the Fundamental Law in the wording according to which the grounds and procedure for appeal to the Constitutional Court shall be defined by the Constitution and by law. Thus, the proposed amendments to Article 55 of the Constitution do not foresee the abolition or restriction of human and citizen’s rights and freedoms.

Article 59.2 of the Constitution provides that, to ensure the right to defence against prosecution and to provide for legal assistance in deciding cases in courts and other state bodies in Ukraine, there shall operate the Bar. The Constitutional Court notes that the Draft law provides to supplement the Fundamental Law by Article 1312, which regulates the lawyer’s representation of a person in the court. Thus, the proposed amendments to Article 59 of the Constitution does not foresee the abolition or restriction of human and citizen’s rights and freedoms.

According to Article 85.1.25 of the Constitution, the competence of the Verkhovna Rada of Ukraine shall include: granting consent for appointment and dismissal by the President of Ukraine of the Prosecutor General of Ukraine; declaring non-confidence to the Prosecutor General of Ukraine leading to his or her resignation from the office. The Draft law proposes excluding from the list of powers of the Verkhovna Rada the power to express non-confidence in the Prosecutor General, which results in his or her resignation. This conforms with the content of paragraph five of Article 1311, which is proposed to be supplemented to the Constitution and under which the Prosecutor General shall be early dismissed from his or her office exclusively in cases and on grounds prescribed by law.

According to Article 85.1.26 of the Fundamental Law, the competence of the Verkhovna Rada of Ukraine shall include: appointment and dismissal of one-third of the composition of the Constitutional Court of Ukraine. The draft law proposes excluding from the list of powers of the Verkhovna Rada to dismiss one-third of the composition of the Constitutional Court of Ukraine, which is consistent with the proposed Article 1491, which grants the Constitutional Court the authority to dismiss judges of the Constitutional Court.

According to Article 85.1.27 of the Constitution, the competence of the Verkhovna Rada of Ukraine shall include: election of judges for unlimited term. The proposed wording of Article 85.4 of the Constitution does not provide the participation of Parliament in the procedure of appointment of judges of the courts, which form a part of the judicial system. The Constitutional Court assumes that these amendments do not foresee the abolition or restriction of human and citizen’s rights and freedoms.

The Draft law proposes stipulating, in particular, that the order of enforcement of decisions of the court shall be determined by laws of Ukraine exclusively. This is conditioned by other constitutional amendments such as the supplement of the Fundamental Law of Ukraine with Article 1291, the second paragraph of which specifies that the State ensures enforcement of the decision of the court in the manner established by law.

The proposed wording of Article 92.1.14 of the Constitution provides for the replacement of the phrase “the bodies of inquiry and investigation” by “bodies of pretrial investigation” and replacement of the word “fundamentals” by the word “principles” concerning the organisation and activity of the Bar, which is consistent with Article 1312 proposed to be supplemented to the Constitution. The Constitutional Court assumes that the proposed wording of Article 92.1.14 of the Constitution does not provide for the abolition or restriction of human and citizen’s rights and freedoms.

According to Article 106.1 of the Fundamental Law, the President of Ukraine appoints and dismisses the Prosecutor General of Ukraine with the consent of the Verkhovna Rada of Ukraine (Article 106.1.11), appoints and dismisses one-third of the composition to the Constitutional Court of Ukraine (Article 106.1.22). The comparative analysis of Article 106.1.11
of the Constitution and the wording proposed by the Draft law regarding the appointment and dismissals of the Prosecutor General indicates that the amendments to this item correspond to the amendments that are proposed to be introduced to Article 85.1.25 of the Constitution. The proposed amendments to Article 106.1.22 of the Fundamental Law regarding the exclusion of the power of the President to dismiss one-third of the composition to the Constitutional Court of Ukraine conform to the proposed Article 1491, which grant the Constitutional Court the authority to dismiss judges of the Constitutional Court.

According to Article 106.1.23 of the Constitution, the President of Ukraine establishes courts by the procedure determined by law. The proposed exclusion of this provision is conditioned by the new wording of Article 125 of the Constitution, by which the court shall be established and dissolved by law, the draft of which shall be introduced to the Verkhovna Rada of Ukraine by the President of Ukraine after consultation with the High Council of Justice.

According to Article 106.4 of the Constitution, acts of the President of Ukraine issued under his or her authority as envisaged in Subparagraphs 5, 18, 21, 23 of this Article, shall be countersigned by the Prime Minister of Ukraine and the minister responsible for the act and its execution. According to Article 106.1.23 of the Constitution, the President of Ukraine establishes courts by the procedure determined by law. The Draft law does not provide for such presidential powers, thus eliminating the need for the countersigning of the acts of the Head of the State by the signatures of Prime Minister and the minister responsible for the act and its execution. The proposed amendments to Article 106 of the Constitution do not foresee the abolition or restriction of human and citizen’s rights and freedoms.

The proposed amendments to Article 110 of the Constitution are similar to those made to Article 108.2.2 (as regards the word “inability”) and those related to change of the title of the Supreme Court of Ukraine (in particular, in the new wording of Article 125 of the Constitution regarding the exclusion of the word “Ukraine” from the title). The proposed amendments to Article 110 of the Fundamental Law do not foresee the abolition or restriction of human and citizens’ rights and freedoms.

The proposed amendment provides for the exclusion of the word “Ukraine” from the title of the highest court in the judicial system of Ukraine – the Supreme Court of Ukraine, which is consistent with Article 125.3 of the Constitution in the wording proposed by the Draft law. This amendment does not foresee the abolition or restriction of human and citizens’ rights and freedoms.

The draft law proposes excluding Chapter VII “Prosecution Office” of the Constitution. The Constitutional Court of Ukraine proceeds from the fact that the provisions of Chapter VII “Prosecution Office” of the Constitution are covered by the content of Article 1311, by which the draft law proposes supplementing Chapter VIII “Justice” of the Constitution.

According to Article 136.6 of the Fundamental Law, justice in the Autonomous Republic of Crimea is administered by the courts that belong to the single system of courts of Ukraine. The proposed wording of Article 136.6 of the Constitution is consistent with Articles 124 and 125 of the Constitution in the proposed wording. In view of the above, the proposed amendments to Article 136 of the Constitution do not foresee the abolition or restriction of human and citizens’ rights and freedoms.

The proposed amendments to Article 150 of the Constitution, which defines the powers of the Constitutional Court of Ukraine provide for exclusion of the official interpretation of laws
of Ukraine from the powers of the Constitutional Court of Ukraine, which is consistent with the proposed amendments to Article 147.1 of the Constitution. The Draft law also proposes supplementing Article 150.1 of the Fundamental Law with Item 3 on the implementation by the Constitutional Court of Ukraine of other powers provided for by the Constitution. Such powers of the Constitutional Court of Ukraine are enshrined in Articles 151 and 159 of the Constitution.

The proposed wording of the provisions of Article 150.2 of the Constitution reproduce the list of subjects of the right to constitutional petitions on constitutionality of acts specified in Article 150.1.1, contained in Article 150.1.1.6 of the Constitution, and the official interpretation of the Constitution. The proposed amendments to Article 150 of the Fundamental Law do not foresee the abolition or restriction of human and citizens’ rights and freedoms.

According to Article 152 of the Constitution, laws and other legal acts, by the decision of the Constitutional Court of Ukraine, are deemed to be unconstitutional, in whole or in part, in the event that they do not conform to the Constitution of Ukraine, or if there was a violation of the procedure established by the Constitution of Ukraine for their review, adoption or their entry into force (Article 152.1); laws and other legal acts, or their separate provisions, declared unconstitutional, lose legal force from the day the Constitutional Court of Ukraine adopts the decision on their unconstitutionality (Article 152.2). The Draft law proposes granting the Constitutional Court of Ukraine the right in its decision to set the peculiarities of losing the legal effect by the laws, other legal acts, or their particular provisions. In addition, the proposed wording of Articles 152.1, 152.2 of the Constitution suggests to apply the notion “acts” instead of the term “legal acts” contained in Articles 152.1, 152.2. Thus, the proposed amendments to Article 152 of the Constitution do not foresee the abolition or restriction of human and citizens’ rights and freedoms.

The Draft law proposes the amendments to Chapter XV “Transitional Provisions” of the Constitution, which is its integral part and is primarily intended to ensure succession in the organisation and functioning of state institutions. The provisions of this chapter suggest defining, in particular, the terms of the exercise of authority by officials, elected or appointed prior to the day of entry into force of the Law “On Amendments to the Constitution (on justice)”, the terms of forming state bodies and features of election or appointment of officials, and envisaging the implementation by relevant officials or public authorities of these or other actions that are necessary for the transition of the state to a new constitutional regulation. The Constitutional Court of Ukraine assumes that the proposed amendments to Chapter XV “Transitional Provisions” of the Constitution do not foresee the abolition or restriction of human and citizens’ rights and freedoms.

The provisions of Items 1–4 of Chapter II “Final and Transitional Provisions” of the Draft law are an integral part of the draft law since they provide for the establishment of the procedure of taking effect by the Law “On Amendments to the Constitution and (on justice)” and the determination of measures aimed at implementation of the amendments to the Constitution. The Constitutional Court of Ukraine assumes that the provisions of Chapter II “Final and Transitional Provisions” of the Draft law do not foresee the abolition or restriction of human and citizens’ rights and freedoms, therefore, do not contradict the requirements of Article 157 of the Constitution.

According to Article 157.1 of the Fundamental Law, the Constitution of Ukraine shall not be amended if the amendments are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. The Constitutional Court of Ukraine assumes that the amendments proposed in the Draft law are not aimed at liquidation of the independence or violation of the territorial indivisibility of Ukraine.

Thus, the Constitutional Court of Ukraine held to recognise as conforming to the requirements of Articles 157 and 158 of the Constitution the draft law on introducing amendments to the Constitution (on justice) (registration No 3524).
References:

Convention for the Protection of Human Rights and Fundamental Freedoms of 1950;

Opinion of the Constitutional Court of Ukraine No 3-v/2001, dated 11 July 2001, in the case upon the constitutional appeal of the President of Ukraine for providing an opinion on conformity of the Constitution of Ukraine to the Rome Statute of the International Criminal Court (the Rome Statute case);

Joint expert opinion “On the law on the judicial system and the status of judges of Ukraine”, prepared by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe Adopted by the Venice Commission at its 82th Plenary Session (Venice, 12–13 March 2010);

Joint opinion “On the law on the judicial system and the status of judges of Ukraine”, prepared by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15–16 October 2010);


Appendix to the Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, dated 17 November 2010, No (2010)12;

Opinion of the Constitutional Court of Ukraine No 2-v/2013, dated 19 September 2013, in the case upon the appeal of the Verkhovna Rada of Ukraine on providing an opinion regarding conformity of the draft law on introducing amendments to the Constitution of Ukraine on strengthening guarantees of independence of judges to Articles 157 and 158 of the Constitution of Ukraine;

Opinion of the Constitutional Court of Ukraine No 1-v/2015, dated 16 June 2015, in the case upon the appeal of the Verkhovna Rada of Ukraine for providing opinion on compliance of the draft law on introducing amendments to the Constitution of Ukraine concerning the immunity of People’s Deputies of Ukraine and judges with the provisions of Articles 157 and 158 of the Constitution.

Summary to the Decision of the Constitutional Court of Ukraine No 4-rp/2016, dated 8 June 2016, in the case upon the constitutional petition of the Supreme Court of Ukraine concerning conformity of the provisions of Articles 141.3, 141.5.1, 141.5.2, 141.5.4, 141.6 of the Law of Ukraine “On the Judicial System and Status of Judges” and provisions of Item 5 of Chapter III “Final provisions” of the Law of Ukraine “On Introducing Amendments to Certain Legislative Acts of Ukraine on Pensions” to the Constitution of Ukraine (constitutionality) (the case of lifelong monthly monetary allowance of retired judges)

According to the Constitution, state power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power; bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine (Articles 6, 19.2). According to the Constitution, human and citizens’ rights and freedoms are protected by the court; justice is administered by professional judges and, in cases determined by law, people’s assessors and jurors; status of judges is determined exclusively by the laws of Ukraine (Articles 55.1, 92.1.14, 127.1).

According to Article 126.1 of the Fundamental Law, the independence and immunity of judges are guaranteed by the Constitution and the laws of Ukraine. Independence as part of the constitutional status of judges is guaranteed by the Constitution and ensured, particularly, by
special procedure for their election or appointment to the office and dismissal from the office, prohibition on influencing them in any manner, protection of the professional interests of judges, subjugation of judges only to the law in administering justice, ensuring by the state the funding and proper conditions for the operation of courts and the activity of judges by determining the expenditures for the maintenance of courts separately in the State Budget of Ukraine, bringing the perpetrators to legal liability for contempt to the court and judges, implementation of judges’ self-government (Articles 85.1.27, 126.2, 126.4, 126.5, 127.3, 127.4, 127.6, 128, 129.1, 129.5, 130, 131.1.1 of the Fundamental Law). Professional judges shall not belong to political parties and trade unions, take part in any political activity, hold a representative mandate, occupy any other paid positions, perform other remunerated work except scholarly, teaching and creative activity (Article 127.2 of the Constitution).

The Constitutional Court has repeatedly stated that the constitutional principle of judicial independence ensures the important role of the judiciary in the mechanism of the protection of human and citizens’ rights and freedoms and is a guarantee of realisation of the right to judicial protection under Article 55.1 of the Fundamental Law; the constitutional provisions on the independence of judges, which is an integral part of the status of judges and their professional activity related to the principle of the separation of state power and caused by the need to ensure the constitutional order and human rights, to guarantee the autonomy and independence of the judiciary; the guarantees of judicial independence, as a necessary condition of administration of justice by unbiased, impartial and fair court, established in the fundamental laws on the judicature, judiciary, the status of judges have the constitutional meaning and together with the Fundamental Law form the unified system of guarantees of the independence of judges and must be really provided; the constitutional status of a judge gives reasons to put forward high standards for a judge and keep confidence in his competence and impartiality, it provides for granting him or her the status of former judge in the future, which is also a guarantee of the proper administration of justice.

Since the declaration of independence, the right to a fair trial in Ukraine has been provided by way of development of the principle of independence of judges in the laws “On the Status of Judges” No 2862-XII, dated 15 December 1992, “On the Judicial System of Ukraine” No 3018-III, dated 7 February 2002, and “On the Judicial System and Status of Judges” No 2453-VI, dated 7 July 2010 (hereinafter referred to as “the Law No 2453”), in the wording of the Law “On Ensuring the Right to a Fair Trial” No 192-VIII, dated 12 February 2015 (hereinafter referred to as “the Law No 192”), with amendments introduced by the Law “On Amendments to Certain Legislative Acts of Ukraine on Retirement” No 213-VIII, dated 2 March 2015 (hereinafter referred to as “the Law No 213”), which consistently affirmed the independence of judges, freedom of impartial resolution of cases under the domestic beliefs of judges and their proper financial support. Guarantees of independence of judges set out in Articles 48, 52 of Chapter III, Article 117 of Chapter VII, Chapters IX and X of the Law No 2453 in the wording of the Law No 192, from the content of which it appears that one of the guarantees of the independence of judges is their proper material and social security, in particular providing remuneration to judges at the expense of the state and to former judges – a lifelong monthly monetary allowance or pension at their choice. The content and the scope of guarantees of the independence of judges defined by the Constitution shall not be diminished when adopting new laws or amending existing laws.

The Constitutional Court of Ukraine finds that the provisions of the Law No 2453 on the proper material and social security of judges should reflect the provisions of the Constitution and international acts concerning the independence of judges, aimed at ensuring the implementation of fair justice and stability of the achieved level of guarantees of the independence of judges.
Financial support for judges after retirement as a part of their legal status is not a personal privilege, but a means of the constitutional ensuring of the independence of judges who administer justice, and is provided to guarantee the rule of law and in the interests of people who come to court for a fair, impartial and independent justice.

The Constitutional Court of Ukraine emphasises that the constitutional status of judges who administer justice and former judges involves their proper financial support, which should guarantee the implementation of a fair, independent and impartial justice.

The Constitutional Court of Ukraine assumes that a lifelong monthly monetary allowance is a special form of material support of a judge and is a guaranteed monthly monetary payment guaranteed by the state that ensure proper material maintenance of a judge after his dismissal from office (resignation) and the standard of living worthy of his/her status. According to Article 141.1 of the Law No 2453, a judge who retired shall receive a pension or lifelong monthly monetary allowance at his choice. Article 141 of the Law No 2453, before amendments by the Law No 213, i.e. in the wording of the Law No 192, enshrined that “lifelong monthly monetary allowance shall be paid to the judge in the amount of 80 percent of the remuneration of judges holding the respective position. For each full year of service as a judge over 20 years, the amount of lifelong monthly monetary allowance shall be increased by two percent of the salary, but cannot exceed 90 percent of the salary of a judge, without limitation of the maximum amount of lifelong monthly monetary allowance” (first paragraph of Article 141.3), and established that “In case of change of remuneration of judges holding the respective position, the amount of the previously designated lifelong monthly monetary allowance shall be recalculated” (second paragraph of Article 141.3). It appears from the above that the Law No 2453 changed the specified order of calculation of the lifelong monthly monetary allowance, which reduced lifelong monthly monetary allowance of judges and excluded the provision for the possibility of its recalculation. The Constitutional Court concluded that at decrease in the size of the lifelong monthly monetary allowance of judges from 80 to 60 percent of the allowance of a judge holding the appropriate position, and at the exclusion of the provision whereby for each full year of service as a judge for over 20 years, the amount of the lifelong monthly monetary allowance shall be increased by two percent of the salary, but cannot exceed 90 percent of the salary of a judge, without limitation of the maximum amount of lifelong monthly monetary allowance, there was a decline of level of financial support of retired judges and, as a result, a decline of the guarantee of independence of a judge that may affect realisation of fair justice and implementation of the right to protection by the court. The exclusion of the provision on the possibility of recalculation of the lifelong monthly monetary allowance for retired judges due to the increase of monetary allowance of a judge who works at the respective position also reduces the guarantee of the independence of judges.

Thus, the provisions of Article 141.3 of the Law No 2453 in the wording of the Law No 213 narrows the content and the scope of the guarantees of the independence of judges, and, therefore, runs contrary to Articles 55.1, 126.1 of the Constitution.

Thus, according to the first and second sentences of the sixth paragraph of Article 141.5 of the Law No 2453 in the wording of the Law No 213, the Law “On Introducing Amendments to Certain Legislative Acts of Ukraine” No 911-VIII, dated 24 December 2015 (hereinafter referred to as “the Law No 911”), the maximum amount of the lifelong monthly monetary allowance of a retired judge (including bonuses, promotions, additional pension, the target monetary benefits, pensions for special merits before Ukraine, indexation and other additional payments to pensions established by law, except for additions to allowances to certain categories of persons having special merits to the country) cannot exceed ten living wages established for disabled persons; temporarily, for the period from 1 January 2016 to 31 December 2016, the maximum amount
of lifelong monthly monetary allowance for retired judges (including bonuses, promotions, additional pension, the target monetary benefits, pensions for special merits before Ukraine, indexation and other supplements to pensions established by law, except for additions to allowances to certain categories of persons having special merits to the country) cannot exceed 10,740 hryvnias.

In analysing these provisions as to their compliance with the Fundamental Law, the Constitutional Court of Ukraine comes from the fact that it has already examined inadmissibility of definition in the law of the maximum amount of the lifelong monthly monetary allowance of judges.

The Constitutional Court of Ukraine finds that the provisions of the first and second sentences of the sixth paragraph of Article 141.5 of the Law No 2453 in the wording of the Law No 213, the Law No 911 concerning the maximum amount of the lifelong monthly monetary allowance of a retired judge are inconsistent with Article 126.1 of the Constitution.

Article 141.5 of the Law No 2453 in the wordings of the Law No 213, the Law No 911 establish the following: temporarily, for the period from 1 January 2016 till 31 December 2016, persons (except invalids of the I and II groups, disabled veterans of the III group and participants of combat actions, persons covered by Article 10.1 of the Law “On Status of War Veterans, Guarantees of Their Social Protection”) who work in the positions and under conditions stipulated by the Law No 2453, the Law “On the Prosecutor’s Office”, shall not be paid the assigned pensions/lifelong monthly monetary allowances (first and second paragraphs); from 1 January 2017, payment of the lifelong monthly monetary allowance assigned according to this Article, for the period of work in the positions that give the right to its assignment or the right to pensions in the manner and under conditions stipulated by the laws “On the Prosecutor’s Office” and “On Scientific and Scientific-Technical Activity”, “On Status of People’s Deputy of Ukraine” shall be terminated; during this period, the pension is granted and paid in accordance with the Law of Ukraine “On Mandatory State Pension Insurance” (paragraph four). The mentioned provisions determine the categories of posts, holding which deprives former judges of the right to simultaneously obtain remuneration and a lifelong monthly monetary allowance.

Such ensuring of judges depends on the conditions related to the status of a judge and his professional activity in the administration of justice, and cannot depend on other conditions, including social security, which is granted and paid on the general principles and provided for by other laws except the Law No 2453. Obtaining by the former judge of the lifelong monthly monetary allowance may not depend on the performance by him of another work, in particular paid one. The legislator may foresee cases of termination of assignment and payment (or partial payment) of the lifelong monthly monetary allowance of judges, but only on the grounds that directly affect the status of judges (entry into legal force of a guilty verdict against a judge or termination of resignation in connection with the re-election of judges etc.). Therefore, a judge who is using the constitutional right to work after retirement, established by Article 43 of the Fundamental Law, cannot be deprived of the guarantees of the independence of judges, in particular adequate financial security of former judges (lifelong monthly monetary allowance). By amending Article 141.5 of Law No 2453 on cessation of payment of the lifelong monthly monetary allowance of the former judges that work at certain positions, the Verkhovna Rada of Ukraine violated the constitutional guarantee of judicial independence, since these legislative changes are contrary to the purpose of the establishment of constitutional guarantees for the material security of judges as an element of their independence, and do not meet the principle of a single status for all judges, as they impose the difference between those former judges that work and those that do not work.
In considering the case, the Constitutional Court found the same indications of non-conformity to the Constitution of the provisions of the third paragraph of Article 141.5 of the Law No 2453 in the wording of the Law No 213, namely: “in the period of work of the person (except disabled people of I and II groups, invalids of war of the III group and participants of combat actions, persons referred to in Article 10.1 of the Law of Ukraine ‘On Status of War Veterans, Guarantees of Their Social Protection’) in other positions/jobs, the lifelong monthly monetary allowance, the amount of which exceeds 150 percent of the cost of minimum living standard, established for persons that lost ability to work, is paid in the amount of 85 percent of the assigned size, but not less than 150 percent of the minimum living standard established for persons who lost their ability to work”, which is the basis for declaring them unconstitutional. Thus, the provisions of the first, second, third, fourth paragraphs of Article 141.5 of the Law No 2453 concerning the reduction of the size/termination of payment to former judges of lifelong monthly monetary allowance for the period of their work at certain positions, execution of other work are not consistent with the constitutional guarantees of independence of judges, and therefore run contrary to Article 126.1 of the Fundamental Law.

The Supreme Court of Ukraine also raises the issue before the Constitutional Court of Ukraine on the conformity to the Constitution (constitutionality) of the provisions of Item 5 of Chapter III “Final Provisions” of the Law No 213, according to which in case of failure to adopt until 1 June 2015 the law on the assignment of all pensions, including special ones, on the general basis, the rules regarding the assignment of a lifelong monthly monetary allowance shall be abolished from 1 June 2015 in accordance with the Law No 2453. The Supreme Court of Ukraine considers that these provisions “virtually eliminated the constitutional institute of the resignation of a judge that serves to guarantee the independence of acting judges and is an integral part of his legal status as an acting judge”. Considering this issue, the Constitutional Court takes into account Chapter IX “Support of Judges”, Chapter X “Status of Judges” of the Law No 2453, which identified that the status of judges provides for the granting to him in the future of the status of judges and guarantees material and social security, including the payment of lifelong monthly monetary allowance. The result of the judge’s retirement is the termination of his powers with preserving the title of a judge and guarantees of independence and immunity, including receiving the lifelong monthly monetary allowance of a judge. The abolition of the lifelong monthly monetary allowance provided for in Item 5 of Chapter III “Final Provisions” of the Law No 213 negates the essential content of the right of judges to resign and is contrary to Article 126.5.9 of the Constitution.

The Verkhovna Rada of Ukraine adopted the Law No 213, the Law No 911, separate provisions of which narrowed the scope of guarantees of judicial independence. The Constitutional Court notes that laws, other legal acts or their separate provisions declared unconstitutional cannot be adopted in the same wording since decisions of the Constitutional Court “are mandatory for execution throughout the territory of Ukraine, final and shall not be appealed” (Article 150.2 of the Constitution). Re-introduction of legal regulation that the Constitutional Court declared unconstitutional gives grounds to assert about the violation of constitutional regulations according to which laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it (Article 8.2 of the Fundamental Law). Thus, the Verkhovna Rada of Ukraine, by adopting the Law No 213, the Law No 911 and introducing amendments by them to the Law No 2453, violated Articles 8.2, 150.2 of the Constitution.

Having analysed the constitutional petition of the Supreme Court of Ukraine, dated 22 January 2016, the Constitutional Court of Ukraine concluded that it lacks legal substantiation of the unconstitutionality of the third sentence of the indicated paragraph, namely: “Lifelong
monetary allowance of judges is paid by the Pension Fund of Ukraine at the expense of the State budget of Ukraine”. This is the ground for termination of constitutional proceedings in this part pursuant to Article 45.2 of the Law of Ukraine “On the Constitutional Court of Ukraine”, i.e. the constitutional petition or constitutional appeal does not meet the requirements envisaged by the Constitution of Ukraine and this Law.

Laws and other legal acts or their separate provisions that are declared unconstitutional lose their legal force from the day the Constitutional Court of Ukraine adopts the decision on their unconstitutionality (Article 152.2 of the Constitution). According to the Constitutional Court of Ukraine, declaring as such that do not correspond to the Constitution (are unconstitutional) of the provisions of paragraphs three, the first, second, third, fourth paragraphs and the first, second sentences of the sixth paragraph of Article 141.5 of the Law No 2453 in the wordings of the Law No 213, the Law No 911 can lead to a gap in the field of legislative regulation of lifelong monthly monetary allowances of judges. The Constitutional Court of Ukraine considers it necessary to specify that the provisions of Articles 141.3, 141.5 of the Law No 2453 as amended by the Law No 192 are subject to application, i.e. the provisions of the Law No 2453 before its amendment by the Law No 213, Law No 911.

Thus, the Constitutional Court of Ukraine held to recognise as non-conforming to the Constitution of Ukraine (unconstitutional) the provisions of:


The constitutional proceedings in the case upon the constitutional petition of the Supreme Court of Ukraine, dated 22 January 2016, concerning conformity to the Constitution of Ukraine of the provisions of Article 141.5.6.3 of the Law of Ukraine “On the Judicial System and Status of Judges” No 2453-VI, dated 7 July 2010, with subsequent amendments under Article 45.2 of the Law of Ukraine “On the Constitutional Court of Ukraine” shall be terminated on the ground of inconsistency of the constitutional petition with the requirements envisaged by this Law.

Guided by Article 70.2 of the Law of Ukraine “On the Constitutional Court of Ukraine”, the Constitutional Court Ukraine considers it necessary to specify the procedure for the implementation of this decision:
– Article 141.3 of the Law “On the Judicial System and Status of Judges” No 2453-VI, dated 7 July 2010 in the wording of the Law “On Introducing Amendments to Certain Legislative Acts of Ukraine on Pensions” No 213-VIII, dated 2 March 2015, which is contrary to the Constitution is not subject to application as such that lost its effect from the day of the adoption of this decision by the Constitutional Court. Instead, subject to the application is Article 141.3 of the Law “On the Judicial System and Status of Judges” No 2453-VI, dated 7 July 2010 before amendments by the Law “On Amendments to Certain Legislative Acts of Ukraine on Pensions” No 213-VIII, dated 2 March 2015, i.e. in the wording of the Law “On ensuring the right to a fair trial” No 192-VIII, dated 12 February 2015, namely: “Lifelong monthly monetary allowance shall be paid to the judge in the amount of 80 percent of the remuneration of judges holding the respective position. For each full year of service as a judge after 20 years, the amount of the lifelong monthly monetary allowance shall be increased by two percent of the salary, but cannot exceed 90 percent of the salary of a judge, without limitation of the maximum amount of the lifelong monthly monetary allowance. In case of change of remuneration of judges holding the respective position, the amount of the previously designated monthly permanent allowance shall be recalculated”;

– the first, second, third, fourth and first paragraphs, the second sentence of the sixth paragraph of Article 141.5 of the Law “On the Judicial System and Status of Judges” No 2453-VI, dated 7 July 2010 in the wording of the Law “On Introducing Amendments to Certain Legislative Acts of Ukraine on Pensions” No 213-VIII, dated 2 March 2015, the Law “On Introducing Amendments to Certain Legislative Acts of Ukraine” No 911-VIII, dated 24 December 2015, which are inconsistent with the Constitution, shall not be subject to application as such that lost their effect from the day of the adoption of this decision by the Constitutional Court. Subject to the application shall be the first sentence of Article 141.5 of the Law “On the Judicial System and Status of Judges” No 2453-VI, dated 7 July 2010, in the wording of the Law “On Ensuring the Right to a Fair Trial” No 192-VIII, dated 12 February 2015, namely: “The pension or lifelong monthly monetary allowance of the judge shall be paid regardless of the income (profit) received by the judge after the resignation”;


The Decision of the Constitutional Court of Ukraine shall have a prejudicial meaning when considering claims by the courts of general jurisdiction in connection with legal relations arising from the provisions of the laws declared unconstitutional.

References:
Decision of the Constitutional Court of Ukraine No 5-rp/2002, dated 20 March 2002, in the case upon the constitutional petition of 55 People’s Deputies of Ukraine regarding the conformity of the provisions contained in Articles 58, 60 of the Law of Ukraine “On the state budget of Ukraine for 2001” the Supreme Court of Ukraine on conformity to the Constitution of Ukraine (constitutionality) of Items 2, 3, 4, 5, 8, 9 of Article 58.1 of the Law of Ukraine “On some measures for the budget funds saving” to the Constitution of Ukraine (case on benefits, compensation and guarantees);

Decision of the Constitutional Court of Ukraine No 19-rp/2004, dated 1 December 2004, in the case upon the petition of the Supreme Court of Ukraine regarding the official interpretation of the provisions of Article 126.1, 126.2 of the Constitution of Ukraine and Article 13.2 of the
Law of Ukraine “On the status of judges” (the case on the independence of judges as part of their status);

Decision of the Constitutional Court of Ukraine No 8-rp/2005, dated 11 October 2005, in the case upon constitutional petition of the Supreme Court of Ukraine and 50 People’s Deputies of Ukraine on conformity to the Constitution (constitutionality) of paragraphs three and four of Item 13 of Section XV “Final Provisions” of the Law of Ukraine “On General Mandatory State Pension Insurance” and the official interpretation of the provisions of Article 11.3 of the Law of Ukraine “On Status of Judges” (case on the pension level and lifelong monthly monetary allowance);

Decision of the Constitutional Court of Ukraine No 4-rp/2007, dated 18 June 2007, in the case upon the conformity with the Constitution of Ukraine (constitutionality) of separate provisions of Article 36, Items 20, 33, 49, 50 Article 71, Articles 97, 98, 104, 105 of the Law of Ukraine “On the 2007 State Budget of Ukraine” (case on guarantees of the independence of judges);

Decision of the Constitutional Court of Ukraine No 10-rp/2008, dated 22 May 2008, in the case upon the constitutional petition of the Supreme Court of Ukraine concerning compliance with the Constitution (constitutionality) of individual provisions of Article 65 Section I, Subparagraphs 61, 62, 63 and 66 of Section II, Subparagraph 3 of Section III of the Law “On the State Budget of Ukraine for financial year 2008 and on Amending Some Legislative Acts of Ukraine” and of 101 People’s Deputies of Ukraine concerning compliance with the Constitution (constitutionality) of provisions of Article 67 of Section I, Subparagraphs 1–4, 6–22, 24–100 of Section II of the Law “On State Budget of Ukraine for financial year 2008 and on Amending Some Legislative Acts of Ukraine” (case on the subjects and contents of the law on the State Budget of Ukraine);

Decision of the Constitutional Court of Ukraine No 3-rp/2013, dated 3 June 2013, in the case upon the constitutional petition of the Supreme Court of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of separate provisions of Article 2, second paragraph of Item 2 of Chapter II “Final and Transitional Provisions” of the Law “On Measures Concerning Legislative Provision of the Reformation of the Pension System”, Article 138 of the Law “On the Judicial System and Status of Judges” (case on changing conditions of pension payment and lifelong monthly monetary allowance of retired judges);

Decision of the Constitutional Court of Ukraine No 3-rp/2013, dated 8 April 2015, in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the conformity to the Constitution of Ukraine (constitutionality) of the provisions of paragraph two of Article 171\(^2\) of the Code of Administrative Proceedings of Ukraine;

The European Charter on the Statute for Judges, dated 10 July 1998;

II. THE USE OF DEMOCRATIC STANDARDS AGAINST DEMOCRACY
THE CONSTITUTIONAL PRINCIPLE OF RESPECT FOR INTERNATIONAL LAW AS AN ELEMENT OF THE PRINCIPLE OF THE RULE OF LAW

Abstract

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The aspiration of the Lithuanian nation to live in a democratic and independent state is enshrined in Article 1 of the Constitution, adopted in a referendum by the overwhelming majority of citizens having the right to vote. Democracy is thus one of the fundamental constitutional values on which Lithuanian constitutional identity is based. Together with the recognition of the innate nature of human rights and independence of the state, it cannot be denied or revoked in any circumstances.1 The declarations of independence, the interwar constitutional heritage witness the creation of the independent democratic state as the Lithuanian historical and legal tradition. The essential elements of democracy are laid down in the Constitution and the constitutional jurisprudence, formulated by the Constitutional Court. Although the list of these elements provided in the constitutional doctrine is not exhaustive, however, when it comes to a democratic state functioning on democratic grounds, it is inevitable that we have to talk about the supremacy of the Constitution, the rule of law, the protection of human rights and freedoms, the principle of the separation of powers, free, equal, and democratic elections, the right to a fair trial, etc.2

Still, it should be noted that, in today’s multi-layered society, there are sufficient preconditions for situations where a democratic system faces various challenges, and democratic principles and standards are used against democracy itself. The growth of populism, new possibilities of communication unavoidably have some influence on democratic processes. When freedom dominates at the expense of responsibility, a threat to the fortress of democracy arises. Therefore, the role of the Constitutional Court, which is charged with guaranteeing the supremacy of the Constitution in the legal system, becomes of vital importance in the protection of the constitutional democratic system.

Democracy and a democratic form of government are inseparable from the pluralism of ideas and the possibilities of their expression, which are implemented through constitutional freedoms of information and self-expression. However, in Lithuania, like in the other Central and Eastern European countries, these freedoms create the preconditions for the emergence of the media, both traditional and social, that does not hide, but openly declares its views that are incompatible with the international standards of the protection of human rights and are contrary to one of the most important constitutional values – the geopolitical orientation chosen by

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1 The Constitutional Court’s decision of 19 December 2012, its ruling of 24 January 2014, etc.
2 The Constitutional Court’s ruling of 19 September 2002.
Lithuania. The restriction of such media and their content is opposed to the protection of freedom of speech, which is guaranteed by the Constitution. However, when such media or information made available by them deliberately distorts the reality, deforms public opinion, and poses a threat to the security and democracy of the state, the state has not only the right, but also the duty to counter such threats, as required by Paragraphs 3 and 4 of Article 25 of the Constitution.

Freedom of self-expression can also be used for another purpose, which is becoming a challenge to democracy: it allows unrestricted dissemination of various populist ideas, which usually become very vivid before elections. Thus, some of the essential institutes of direct democracy – referendums and elections – can also be used not only to consolidate democracy in the state, but also to undermine the foundations of democracy in the state when representatives of populist ideas or representatives of such political parties can be elected to representative state institutions, or when, under the guise of the expression of the will of the nation, attempts are made to legitimise decisions that do not comply with legal norms. Thus, it is not surprising that, although at the beginning of its activities the Constitutional Court unambiguously defended the right of the Nation to resolve any state issues by referendum, later it saw the necessity for developing the constitutional doctrine of referendums by explaining that even some issues that are subject to a referendum can and must be subject to certain constitutionally valid restrictions. In its jurisprudence, the Constitutional Court also formulated the doctrine of amendments to the Constitution, which creates the preconditions for ensuring that even a referendum could not make such amendments to the Constitution that would deny the very essence of the Constitution. Such a position of the Constitutional Court should not be seen as an attempt to curb the sovereignty of the Nation, but as the striving for protecting the undeniable, “eternal” values enshrined in the Constitution, including democracy.
THE USE OF DEMOCRATIC STANDARDS AGAINST DEMOCRACY

Mihai POALELUNGI
President of the Constitutional Court of the Republic of Moldova

The issue of using democratic standards against democracy presumes there is a paradox. It should be said, among others, that paradoxes in themselves do represent common situations in constitutional law. On the one hand, it is a shared aspiration of the states represented by the Constitutional Courts attending this Forum to live in democratic societies, as assumed by international treaties and as proclaimed by the preambles of our constitutions. Let us not forget that the judges of the Strasbourg Court have constantly pointed out that democracy represents a fundamental feature of European public order. On the other hand, aiming at safeguarding democracy, one shall bear in mind the need for the limitation of certain individual interests that use as a smoke screen democracy itself.

When the rights of a person or group are limited in order to safeguard democracy, we are witnessing a phenomenon called “militant democracy.” The issue is even more complicated when a small number of judges, usually constitutional judges, who are being accused of a lack of legitimacy, because the people have not elected them and because they cannot be held accountable to anyone, decide as to what a democratic society means or what supposes the “militant democracy”. It is the so-called theory of the “Government of judges”.

The Constitutional Court of Moldova exercises its jurisdiction in a small state with not a long democratic tradition. The 27 years that have passed since we left the Soviet prison represent a blink of an eye for the history. However, we have been and we are still facing interesting cases of invoking democratic standards against democracy.

For the purposes of this report, I will briefly go through some of the most important cases of this kind.

I would like to commence with a recent decision (No 16 of 4 June 2018), delivered by the Moldovan Constitutional Court in times when Europe is discussing the danger of manipulation by the mass media.

The Parliament of Moldova has recently amended the Audio-visual Code, banning broadcasters and distributors of mass information services from transmitting informational, analytical, military and political content programmes produced in other countries than those of the European Union, United States of America, Canada and states that ratified the European Convention on Transfrontier Television. This ban is also applied in some states bordering the Eastern part of the Republic of Moldova, states that have not ratified the European Convention on Transfrontier Television. The application was lodged by the President of Moldova claiming that the newly adopted law violated the free access of citizens to information. As you know, the free access of citizens to information is an important aspect of the freedom of expression, and
freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Although the Court observed that the Code’s formulation was rather a rigid one, it gave weight to the parliamentary debates on the date the amendments were passed. Also, the Court deemed it important to convey the message that the ban was limited to transmitting television and radio programmes with informational, analytical, military and political content produced in other countries than those of the European Union, United States of America, Canada and states that have ratified the European Convention on Transfrontier Television. This ban does not apply to other sources of information than those of television and radio.

Further, the Court noted that the disputed provisions might have contributed to counter-operations against the proliferation of information hostile to the society of the Republic of Moldova, as well as to ensuring that its citizens benefit from accurate information. The Court observed that these particular purposes might be subsumed at least into the following general legitimate aims established by Article 54(2) of the Constitution: ensuring national security and protecting the rights of others. Thus, the Court had no reason to believe that the impact of such a ban in that case would have amounted to a disproportionate interference with the freedom of expression or the right to access such information.

This is a pure example of making recourse to democratic standards against democracy, as the Court observed.

Another recent case examined by the Constitutional Court of the Republic of Moldova (No 17 of 6 June 2018) was widely discussed not only nationally, but also in the media of other former Soviet states, as it tackled, among others, an issue related to Russian speaking minorities from our country: the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic.

Given the title itself of the Law, the doubts involved by its wording, as well as practical considerations, the Court had to refine its practice on the admissibility of applications. The Court noted that the name itself contained by the law was obsolete: “Moldovan Soviet Socialist Republic” ceased to exist on 23 May 1991, when the country’s name changed to the “Republic of Moldova.”

Moreover, in spite of the fact that the Union of Soviet Socialist Republics collapsed on 26 December 1991, the challenged law in question provided for the obligation of the cohabiting ethnicities to communicate in the Russian language. Therefore, should there be accepted that this law is in force, such an obligation would amount to imposing a conception of a paternalistic nature, atypical for the contemporary period. On the contrary, the nations of the successor states of the Union of Soviet Socialist Republics may use any language of communication they wish, as it is the act of understanding that is important.

The Court, therefore, rejected this part of the application, holding that the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic had fallen into desuetude, as the community of the Republic of Moldova lives in another state, a new, democratic, independent state, based on the rule of law, where the then momentary raison d’être of the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic makes no sense anymore.

But the applicants, who were MPs, also asked the Court to declare unconstitutional other laws relating to minimal linguistic guarantees for the ethnic minorities from Moldova. Considering the binding international treaties providing for minimum standards for minority linguistic rights, the Court emphasised the importance of bringing this issue before Parliament. The Court mentioned that it cannot allow for the constitutional mechanism of fundamental rights protection to ensure the MPs in opposition disappointed by a state policy a victory before the
Constitutional Court, a victory they could not secure in the law-making and democratic fora, where international conventions provide that the issue of national minorities shall be debated. This case is an example of an attempt to reduce the rights of the minorities through constitutional review. If we accept that the protection of minorities’ rights is an indispensable part of democracy, then diminishing these rights would compromise this value.

Earlier, in 2015, the Constitutional Court of the Republic of Moldova struck down a provision prohibiting the use of Nazi-like symbols due to the law’s failure to meet the clarity requirements (case No 28 of 23 November 2015). The challenged provision was part of the Law on fighting extremist activity. It defined the notion and forms of extremist activities, one of which is public propagation and demonstration of Nazi attributes or symbols similar to Nazi ones that could amount to confusion. The application lodged with the Court also described cases where a number of NGOs were denied registration by authorities on grounds of their use of Falun logo, which is somehow similar to the Nazi swastika.

The Court noted a lack of a precise indication of the notion of Nazi attributes and symbols. This, accordingly, could not allow citizens to understand which symbols are forbidden and which are similar to the Nazi ones. At the same time, this fact granted to the courts of law an extremely broad discretion when applying the challenged provision. Certainly, this led to court judgments with diametrically opposed interpretations. The issue favoured a discretionary power for the decision-makers. Hence, this law did not pass the test of foreseeability. The same applied for unlimited discretion of the courts of law.

The demands of pluralism, of tolerance and of broadmindedness without which there is no democratic society requested a careful assessment of the circumstances of the case. It was a case in which the aim of the protection of the public order and, thus, of the democracy, was invoked against the right of association, which is essential to the proper functioning of democracy.

And here is the last case that brings me to the end of my presentation: the case on party membership ban on the President of the Republic of Moldova (case No 35 of 12 December 2017). The applicant was an MP in the same party the current Head of State was leading prior to being sworn in office. He challenged the provision of the Election Code on the incompatibility of the Presidential office with the capacity of member of a political party.

The Court held that the provision aims to prevent the President from promoting political interests of a party. Within the constitutional architecture, the President is a neutral arbiter between state powers, society and political parties. As such, the President is obliged to act in the interests of society as a whole and not for the benefit of only a part of it.

Therefore, the Court did not accept the argument of the applicant that the President of the country should be allowed to hold the membership of a party, similarly to members of Parliament and Government. In this regard, the Court noted that they are in different legal situations, and the criterion of “political neutrality” cannot be applied to the members of Parliament and Government in the same manner as it is applied to the President of the country, given the fact that the members of Parliament and the members of the Government by definition cannot be politically neutral.

One of the reasons of this application was the legitimacy of the President, because he is voted by the people and not by the Parliament, as previously. Again, an example of invoking an element of democracy against democracy.

All cases I referred to were summarised and they will be published in the volume of this meeting.

As a constitutional judge, I have the duty to take into account the fact that democracy is based on the rule of law. The rule of law is in the hands of the judges. The courts are the ultimate authority ensuring the protection of the minorities’ rights, avoiding the abuses of dominant position, and preserving the whole democratic system. This is another aspect of the paradox of democracy.
I. THE PROTECTION OF THE FREEDOM TO EXPRESS CONVICTIONS AND FREEDOM OF INFORMATION

The right to have convictions and to freely express them

*The Constitutional Court’s ruling of 13 June 2000*

Democratic states under the rule of law consider that, as regards its content, freedom of thought, conscience, and religion is a more particular expression of the broader human freedom to have convictions and freely express them. “Convictions” is a broad and diverse constitutional notion, including political, economic convictions, religious feelings, cultural disposition, ethical and aesthetical views, etc.

The freedom to have convictions means that an individual is free to form his/her own convictions and to choose world-view values, that he/she is protected from any coercion, and that it is not permitted to exert control over his/her convictions. The duty of state institutions is to ensure and protect this freedom of individuals. The content of convictions is the private matter of an individual.

The right of the free expression of convictions is inseparable from the freedom to have them. The freedom of the expression of convictions is the opportunity to express one’s thoughts, views, and convictions orally, in writing, in symbols, or in other ways and by other means of the dissemination of information in an unhampered manner. At the same time, the freedom of the expression of convictions includes the freedom not to disclose one’s convictions and not be subjected to disclose them by force.

The freedom of convictions and their expression establishes ideological, cultural, and political pluralism. No views or ideology may be declared mandatory and thrust on an individual, i.e. a person who freely forms and expresses his/her own views and who is a member of an open, democratic, and civil society. This is an innate human freedom. The state must be neutral in matters of convictions; it does not have any right to establish a mandatory system of views.

The freedom to have convictions may not be limited in any way, and the freedom to express convictions may be limited under the procedure provided for by law and only in cases where this is necessary to protect the values pointed out in Paragraph 3 of Article 25 of the Constitution, i.e. human health, honour or dignity, private life, or morals, or to defend the constitutional order. The freedom of the expression of convictions may also be temporarily limited upon the imposition of martial law or the declaration of a state of emergency (Article 145 of the Constitution).

The validity of limitations on a right or freedom of a person in democratic society should be assessed on the basis of the criteria of common sense and those of evident necessity, it must

* The relevant instances of the official constitutional doctrine related to the aspects of freedom of expression – freedom to express convictions and freedom of information – are presented here.
be in compliance with the concept and requirements of justice, as well as the possibilities and conditions of its restriction that are established in the Constitution (the Constitutional Court’s ruling of 13 February 1997). Any limitation on fundamental rights and freedoms should be connected with the rational relation between competing values where such a relation guarantees that the essence of a particular human right would not be violated by means of limitations.

The freedom to seek, receive, or impart information (Article 25 of the Constitution)

Article 25 of the Constitution prescribes:

“Everyone shall have the right to have his own convictions and freely express them. No one must be hindered from seeking, receiving, or imparting information and ideas.

The freedom to express convictions, as well as to receive and impart information, may not be limited otherwise than by law when this is necessary to protect human health, honour or dignity, private life, or morals, or to defend the constitutional order.

The freedom to express convictions and to impart information shall be incompatible with criminal actions – incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation.

Citizens shall have the right to receive, according to the procedure established by law, any information held about them by state institutions.”

The constitutional freedom to seek, receive, or impart information and ideas unhindered is one of the fundamentals of an open, just, and harmonious civil society and a state under the rule of law. This freedom is an important precondition for implementing various rights and freedoms of a person, which are entrenched in the Constitution, since a person can implement most of his/her constitutional rights and freedoms in a fully fledged manner only if he/she has the right to seek, receive, or impart information unhindered. The Constitution guarantees and protects the interest of the public to be informed.

The provisions of Article 25 of the Constitution are inseparable from other provisions of the Constitution that consolidate the guarantees of the freedom of a person to seek, receive, or impart information unhindered: the provision of Paragraph 1 of Article 44, whereby censorship of mass information is prohibited, the provision of Paragraph 2 of the same article, under which the state, political parties, political or public organisations, or other institutions or persons may not monopolise the mass media, the provisions of Paragraph 2 of Article 33, which state that citizens are guaranteed the right to criticise the work of state institutions or their officials and to appeal against their decisions, and that persecution for criticism is prohibited, etc.

The freedom to seek, receive, or impart information is not an absolute one. The Constitution not only consolidates the freedom of an individual to seek, receive, or impart information, but also defines the limits of this freedom. For instance, under Paragraph 4 of Article 25 of the Constitution, the freedom to express convictions and to impart information is incompatible with criminal actions – incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation, and, under Paragraph 3 of the same article, the freedom to express convictions, as well as to receive and impart information, may not be limited otherwise than by law when this is necessary to protect human health, honour or dignity, private life, or morals, or to defend the constitutional order; Article 28 of the Constitution provides that, while implementing his/her rights and exercising his/her freedoms, everyone must observe the Constitution and laws of the Republic of Lithuania and must not restrict the rights and freedoms of other people.

The values consolidated in the Constitution constitute a harmonious system, there is a balance among them. Under the Constitution, it is not permitted to establish any such legal
regulation that, when consolidating the guarantees of implementing freedom of information, would create conditions for violating other constitutional values and the balance among constitutional values. […]

The freedom to express convictions, freedom of information, and conditions for limiting them (Article 25 of the Constitution)

The Constitutional Court's ruling of 19 September 2005

The provisions of Article 25 of the Constitution constitute the constitutional basis for freedom of information. They are interrelated and supplement each other. Constitutional freedom of information is inseparable from constitutional freedom of convictions and their expression and is a condition of the latter.

When interpreting the content of freedom of information, which is entrenched in the Constitution, as innate freedom of an individual, the Constitutional Court has held that this freedom is an important precondition for implementing various rights and freedoms of a person, which are consolidated in the Constitution, since a person can implement most of his/her constitutional rights and freedoms in a fully fledged manner only if he/she has the right to seek, receive, or impart information unhindered. The Constitution guarantees and protects the interest of the public to be informed (the Constitutional Court’s rulings of 23 October 2002, 26 January 2004, and 8 July 2005).

Under the Constitution, it is not permitted to establish any such legal regulation that, when consolidating the guarantees of implementing freedom of information, would create the preconditions for violating other constitutional values and their balance. The freedom to seek, receive, or impart information is not an absolute one (the Constitutional Court’s rulings of 20 April 1995, 19 December 1996, 23 October 2002, and 26 January 2004).

The provision of Paragraph 4 of Article 25 of the Constitution, whereby the freedom to express convictions and to impart information is incompatible with criminal actions – incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation, means that the prohibition on imparting information of the said content is absolute. Thus, the constitutional concept of freedom of information does not encompass the alleged freedom (which denies the constitutional values in substance) to perpetrate the criminal actions specified in Paragraph 4 of Article 25 of the Constitution, i.e. to impart such thoughts, views, etc. by which national, racial, religious, or social hatred, as well as violence or discrimination, is incited, persons are defamed, or society and its individual members are disinfomed otherwise (the Constitutional Court’s ruling of 8 July 2005). The concept of constitutional freedom of information does not encompass war propaganda, either, which is prohibited by Paragraph 2 of Article 135 of the Constitution.

The provision of Paragraph 4 of Article 25 of the Constitution, according to which the freedom to express convictions and to impart information is incompatible with criminal actions – incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation, also means that the legislature must establish by law such a legal regulation whereby incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation, if such incitement, defamation, or disinformation attempt to deny relevant constitutional values, would be prosecuted as criminal actions and legal liability would be established for them as criminal actions.

At the same time, it needs to be noted that the said provisions of Paragraph 4 of Article 25 of the Constitution, inter alia, the expression “criminal actions”, may not be interpreted only linguistically, i.e. as meaning that the constitutional freedom to express convictions and impart
information is incompatible with only such actions for which laws provide criminal liability. The said constitutional freedom is also incompatible with imparting such thoughts, views, etc. that incite national, racial, religious, or social hatred, violence or discrimination, or by which persons are defamed and society or its individual members are disinform otherwise for which laws provide not only criminal, but also other liability. Thus, under the Constitution, the constitutional freedom to express convictions and impart information is incompatible with any actions that are contrary to law, by which national, racial, religious, or social hatred, as well as violence or discrimination, are incited and by which persons are defamed and society or its individual members are disinform otherwise. If the said provision of Paragraph 4 of Article 25 of the Constitution, _inter alia_, its expression “criminal actions”, were interpreted differently (i.e. in a narrowing manner), the constitutional imperative of an open, just, harmonious civil society, the constitutional principle of a state under the rule of law, and other provisions of the Constitution would be disregarded.

Under Paragraph 3 of Article 25 of the Constitution, the freedom to express convictions, as well as to receive and impart information, may not be limited otherwise than by law when this is necessary to protect the constitutional values specified in this paragraph – human health, honour or dignity, private life, morals, or the constitutional order. It should be emphasised that the list of the constitutional values enumerated in Paragraph 3 of Article 25 of the Constitution may not be interpreted as a thorough and final one, i.e. as giving no permission to limit the freedom to receive and impart information when this is necessary to protect other constitutional values, which are not mentioned _expressis verbis_ in Paragraph 3 of Article 25 of the Constitution.

It also needs to be noted that freedom of information, which is entrenched in Article 25 of the Constitution, may be temporarily limited after martial law is imposed or a state of emergency is declared (Article 145 of the Constitution).

[... ] under the Constitution, it is permitted to limit human rights and freedoms, including the right to express convictions, and to receive and impart information and ideas if the following conditions are complied with: the limitations are established by means of a law; the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons and the values consolidated in the Constitution, as well as constitutionally important objectives; the limitations do not deny the nature or essence of the rights or freedoms; and the constitutional principle of proportionality is observed.

[... ] under the Constitution, the legislature, has the duty to establish such a legal regulation that would ensure that public power (its institutions, officials) will be able to promptly take the measures preventing such acts by which, under the cover of freedom of information, the values entrenched in and protected and defended by the Constitution are encroached upon.

The provisions of Paragraphs 3 and 4 of Article 25 of the Constitution must also be interpreted in the context of the provision of 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. The right of a person to apply to a court due to a fact that, in his/her opinion, his/her freedom of information is limited, means that a person has the right to challenge any decision of public power (its institution or official) in a court when, in his/her opinion, the said decision limits his/her right to seek, receive, or impart information. Under the Constitution, the legislature has the duty to establish by law a legal regulation that would ensure the effective judicial protection of this right.

It also needs to be noted that the constitutional right of a person to apply to a court due to the fact that, in his/her opinion, his/her freedom of information is limited also implies his/her right to raise the issue of the constitutionality of limitations and/or prohibitions on freedom of information established in legal acts applicable in a relevant case.
As mentioned before, constitutional freedom of information is an innate freedom of an individual. In its rulings, the Constitutional Court has held on more than one occasion that everything that is linked with human rights and freedoms must be regulated by means of laws; such laws must be in compliance with the Constitution. Therefore, the legal regulation defining the limits on the implementation of freedom of information must be established by means of a law.

Under Paragraph 3 of Article 25 of the Constitution, the legislature must define by law the content of information the imparting of which is prohibited or limited, the manner by means of which the imparting of certain information is prohibited, as well as other conditions of imparting particular information if this in any manner limits freedom of information. The legislature also must, by means of a law, establish: liability for disregard for the said prohibitions and limitations, including that for imparting such information the imparting of which is prohibited; subjects that have the powers to supervise the observance of the prohibitions and/or limitations, established by law, to impart certain information; subjects that apply liability for disregard of the prohibitions and/or limitations, established by law, on imparting certain information; effective measures for the judicial protection of freedom of information.

It is worth noting that the Constitution also does not preclude the regulation of certain relations by means of substatutory legal acts, inter alia, government resolutions, where such relations are linked with receiving and imparting information, including the relations linked with the supervision of and control over the observance of prohibitions, established by means of laws, on imparting information and/or the observance of limitations on imparting information. […] the Government, while regulating the aforesaid relations by means of its resolutions, may not establish any such legal regulation that would not be based on the Constitution and laws, or any such legal regulation that would compete with a legal regulation established by law.

[…] under the Constitution, all persons have the duty not to impart any such information the imparting of which is prohibited by law, as well as the duty not to violate the procedure for imparting restricted information. Persons who become aware of the fact that they in any manner participate in imparting information the imparting of which is prohibited by law or that they contribute to imparting such information otherwise, or that they in any manner violate the procedure for imparting information the imparting of which is limited by law must immediately discontinue such activity.

[…] Thus, the imparting of information not to be disclosed to the public and a violation of the procedure for imparting restricted information are violations of law not tolerated by the Constitution.

[…] Under the Constitution, the legislature has the duty to regulate by law the relations linked with seeking, receiving, and imparting information in order to ensure one of innate human rights, freedom of information (implying, inter alia, freedom of the electronic media) on the one hand, and, on the other hand, in order not to violate, but to protect and defend constitutional values in the course of implementing freedom of information.

Electronic communications and telecommunications are undergoing fast development. The opportunities to seek, receive, and impart information by making use of electronic information technologies, inter alia, the internet, are constantly expanding. It needs to be noted that, at the same time, the social relations linked with imparting information on the internet are becoming more complex. Therefore, it is necessary that legislation not get behind with the progress of information technologies and with changes in particular social relations, which are determined
by such progress, *inter alia*, that legislation reflect the particularities of the subjects of the said relations where the said particularities would objectively determine the necessity to differentiate the legal status of the said subjects.

**Limiting freedom of information (inter alia, advertising) in order to protect human health (Paragraph 3 of Article 25 of the Constitution)**

*The Constitutional Court’s ruling of 29 September 2005*

[...]* under Paragraph 3 of Article 25 of the Constitution, freedom of information may be limited by law if this is necessary to protect human health. Thus, freedom of advertising may be limited on the said grounds as well.*

[...]

When seeking to protect human health – a constitutional value, freedom of information (which [...], *inter alia*, encompasses freedom of advertising) may also be limited to a certain extent by means of a law. However, such a limitation on this constitutional freedom must be necessary in a democratic society, while the chosen measures must be proportionate to the objective sought.

It needs to be emphasised that the legislature, when limiting, by means of a law, freedom of advertising (at the same time, that of information) in order to protect human health, must establish such a legal regulation that would maintain a reasonable balance between the obligation to the state, established in the Constitution, to take care of human health and the constitutional right of an individual to seek, receive, and impart information. Information, also that of advertising content, may not be limited only due to the fact that, in the opinion of the legislature, it is not useful to the people, although it is not harmful to them. It should also be noted that selective limitations on advertising, i.e. limitations on imparting and/or receiving advertising by means of certain sources and the non-limitation of imparting and/or receiving advertising by means of other sources is allowed only when such differentiation is objectively justified. It should especially be noted that limitations on freedom of advertising established by law may not, under the Constitution, be greater than it is necessary, *inter alia*, to protect human health.

**The interest of the public to be informed**

*The Constitutional Court’s ruling of 21 December 2006*

The interest of the public to be informed, which is guaranteed and protected by the Constitution, implies relevant constitutional obligations for the state. On the one hand, the state (its institutions and officials) has not only the duty of negative content not to hinder the free flow of information and ideas, but also the duty of positive content to take all necessary measures so that other persons would not hinder the said flow. In this context, it should be emphasised that Article 44 of the Constitution provides that censorship of mass information is prohibited (Paragraph 1) and that the state, political parties, political or public organisations, or other institutions or persons may not monopolise the mass media (Paragraph 2).

The mission of the state as a political organisation of all society is to ensure human rights and freedoms and to guarantee the public interest (the Constitutional Court’s rulings of 30 December 2003, 13 December 2004, 29 December 2004, 16 January 2006, and 21 September 2006). The implementation of the public interest, as an interest of society, which is recognised by the state and is protected by law, is one of the most important conditions of the existence and evolution of society itself (the Constitutional Court’s rulings of 6 May 1997, 13 May 2005, and 21 September 2006). The same can be said about the interest of the public to be informed. Free and universal exchange of information and imparting it in an unrestricted manner are a particularly important factor in democratic processes. This factor ensures not only the formation
of individual opinions and subjective convictions, but also that of group views, including political will, as well as the formation of the will of the whole Nation (the Constitutional Court’s ruling of 13 February 1997). It needs to be emphasised that the state, as the common good of all society (the Constitutional Court’s rulings of 25 May 2004, 19 August 2006, and 21 September 2006), is under the constitutional obligation not only not to hinder the free flow of information and ideas and to take all necessary measures so that other persons would not hinder the said flow, but also to take measures (positive activity) itself (through its institutions) in order to inform the public about the most important processes taking place in society and the state so that citizens (and other residents) would receive as accurate information as possible about the things that they should know, that citizens could participate in the adoption of decisions of state importance, that people could participate in the adoption of other decisions related to managing public affairs, as well as decisions related to the implementation of their rights and freedoms. Otherwise, the preconditions would be created not only for violating the rights of a person (including the right of citizens, consolidated in Paragraph 1 of Article 33 of the Constitution, to participate in the governance of their state both directly and through their democratically elected representatives and the right of citizens, consolidated in Paragraph 2 of the same article, to criticise the work of state institutions or their officials and to appeal against their decisions), but also for violating other values, which are entrenched in and defended and protected by the Constitution.

The interest of the public to be informed, which is guaranteed and protected by the Constitution, as well as constitutional freedom of information, can be ensured only when various types of the mass media function freely (this does not mean that there are no restrictions) in the state. A mature and developed system of the mass media is a necessary condition for ensuring the public interest, i.e. the interest of the public, to be informed. The Constitution gives rise to freedom of the mass media and to the fact that the legislature has the duty to establish by law the guarantees of freedom of the mass media (the Constitutional Court’s rulings of 23 October 2002, 4 March 2003, and 8 July 2005).

**Limiting freedom of information**

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

In its acts, the Constitutional Court has held more than once that freedom of information is not absolute and that the Constitution does not permit the establishment of any such legal regulation that, by entrenching the guarantees of implementing freedom of information, would create the preconditions for violating other constitutional values and their balance. It needs to be noted that, under the Constitution, the state has the duty not only to guarantee the secrecy of information that constitutes a state secret, but also the protection of certain other information, i.e. in order that there would not be any arbitrary attempts to find out or impart information the disclosure of which could inflict damage on the rights, freedoms, and legitimate interests of a person, as well as on other values entrenched in and defended and protected by the Constitution; for instance, in addition to a “state secret”, Paragraph 1 of Article 117 of the Constitution indicates a “professional secret”, a “commercial secret”, as well as “the secrecy of private or family life”; Article 22 of the Constitution consolidates, *inter alia*, the inviolability of personal correspondence, telephone conversations, telegraph messages, and other communications, as well as the prohibition on collecting information concerning the private life of a person otherwise than on a justified court decision and only according to the law; various articles (parts thereof) of the Constitution consolidate the principle of the secrecy of voting during elections; it needs to be noted that not all information that must be protected in such a manner is explicitly mentioned in the text of the Constitution. The Constitutional Court has held that the legislature must define by law the content of information the imparting of which is prohibited or limited,
the manner by means of which the imparting of certain information is prohibited, as well as other conditions of imparting particular information if this in any manner limits freedom of information; the legislature also must, by means of a law, establish: liability for disregard for the said prohibitions and limitations, including that for imparting such information the imparting of which is prohibited; subjects that have the powers to supervise the observance of the prohibitions and/or limitations, established by law, to impart certain information; subjects that apply liability for disregard of the prohibitions and/or limitations, established by law, on imparting certain information; effective measures for the judicial protection of freedom of information […] (the Constitutional Court’s ruling of 19 September 2005).

The protection of state secrets (other classified information)

The Constitutional Court’s ruling of 15 May 2007

The state secret is a constitutional institute. The notion “state secret” is employed expressis verbis in the Constitution (Paragraph 1 of Article 117). The state secret is such information not subject to publishing or imparting where the disclosure of which could inflict damage on the state as the common good of all society, on the political organisation of all society whose purpose is ensuring human rights and freedoms and guaranteeing the public interest.

[…]

Certain requirements are established for persons who are granted the right to familiarise themselves with information that constitutes a state secret; such requirements are related to the reliability and loyalty of such persons to the State of Lithuania; the said requirements should be linked to the trust of the state in that person; the distrust of the state in a certain person can be determined by the activity of that person, inter alia, by committed violations of law, as well as the personal qualities of that person, his/her personal contacts, as well as other important circumstances; the permission to become familiar with state secrets may be granted only to such persons whose activity, personal qualities, connections, etc. cannot give rise to the apprehension that, if they learn a state secret, a threat will be posed to, all the more that damage will be inflicted on the sovereignty of the state, its territorial integrity, constitutional order and defence power, other especially important state interests and the bases of the life of society and the state, and that there will be violations of the most important relations regulated, defended, and protected by the Constitution, which need to be protected and defended specifically because of the fact that certain information, according to laws, is classified; persons who have lost the trust of the state in them must be deprived of the right to familiarise themselves with or handle information that constitutes a state secret.

The disclosure of a state secret may pose a threat to or even inflict damage on the sovereignty of the state, its territorial integrity, constitutional order and defence power, other especially important state interests and the bases of the life of society and the state; if the disclosure (finding out, imparting) of information that constitutes a state secret were not prevented, if such disclosure were not legally prosecuted, the preconditions for violating even the most important relations regulated, defended, and protected by the Constitution would be created; thus, the preconditions for giving priority to the interest of a certain person or persons to know and impart certain information at the expense of the public interest would be created.

[…]

When laws regulate the relations linked with state secrets (or other classified information) and their protection, it is necessary to establish not only what information is regarded as a state secret (or what information constitutes classified information) and liability for its revelation, but also what persons and under what procedure and conditions can dispose of (or can be deprived of the right to dispose of) state secrets (or other classified information), as well as in what cases
and under what procedure and conditions information that constitutes a state secret (or other classified information) may be declassified and who is empowered to do so. Such persons, procedure, and conditions may be differentiated, *inter alia*, according to the kinds (categories) of state secrets (or other classified information), which are established by the legislature.

When disclosing the content of the constitutional institute of the state secret, it should also be noted that the constitutional obligation to protect state secrets (or other classified information) also arises from the international treaties that are ratified by the Seimas […]. 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.

[…]

[[…]] when state institutions decide whether a person has the right to work or familiarise himself/herself with information that constitutes a state secret (or other classified information), it is necessary to pay regard to the imperative that, in order that a person would have such a right, the state must have unconditional confidence in him/her, and that a person who lost the trust of the state in him/her, must be deprived of the said right.

[[…]]

When choosing an institutional mechanism of ensuring the protection of state secrets (or the protection of other classified information), the legislature has broad discretion. For instance, it is allowed to establish in the system of state security an institution that will have the powers to control how state secrets (or other classified information) are protected and to adopt relevant decisions binding on subjects of secrets.

**The publication of legal acts that contain information constituting a state secret or other classified information**

*The Constitutional Court’s ruling of 27 June 2007*

It is also possible to adopt such legal acts that contain information constituting a state secret or other classified information. The Constitutional Court has held that, under the Constitution, the state has the duty to guarantee the secrecy of information that constitutes a state secret; the disclosure of a state secret may pose a threat to or even inflict damage on the sovereignty of the state, its territorial integrity, or on other especially important state interests or the foundations of the life of society and the state; when the relations linked with state secrets (or other classified information) and their protection are regulated by means of laws, it must be established what persons, under what procedure and conditions, can dispose of state secrets (or other classified information) (the Constitutional Court’s ruling of 15 May 2007). The legislature has the duty to establish such ways and procedure of the official publication of the legal acts that contain information constituting a state secret or other classified information where the said ways and procedure would guarantee the protection of the secrecy of such information, without denying at the same time the imperatives of the publication of legal acts, which arise from the Constitution,
inter alia, by ensuring the accessibility of legal acts to legal subjects whose rights and duties are enshrined in those legal acts. On the other hand, the Constitutional Court has held that the legal normative acts regulating the relations linked with the constitutional human rights and freedoms and with their implementation may not bear any classification markings at all (the Constitutional Court’s ruling of 5 April 2000).

The interest of the public to be informed (Article 25 of the Constitution)
The Constitutional Court’s ruling of 17 November 2011

[...] one of the foundations of an open, just and harmonious civil society and a state under the rule of law is the constitutional right to receive information, which is entrenched in Article 25 of the Constitution.

The Constitution guarantees and protects the interest of the public to be informed (inter alia, the Constitutional Court’s rulings of 8 July 2005, 19 September 2005, 29 September 2005, and 21 December 2006). The constitutional right to receive information is an important precondition for implementing various rights and freedoms of a person, which are entrenched in the Constitution (the Constitutional Court’s ruling of 21 December 2006).

[...] the interest of the public to be informed assumes especial importance in the process of elections to political representative institutions, inter alia, elections to municipal councils. During the electoral process, real possibilities must be created for persons implementing the active electoral right, who decide on the eligibility of a candidate to be a member of the municipal council, to receive information about the major facts of such person’s life, which may be of significance when representing the interests of voters and handling public affairs.

II. FREEDOM OF THE MEDIA

Freedom of the media (Article 25 of the Constitution)
The Constitutional Court’s ruling of 23 October 2002

Article 25 of the Constitution and other provisions of the Constitution consolidating and guaranteeing the freedom of an individual to seek, receive and, impart information give rise to freedom of the media. Under the Constitution, the legislature has the duty to establish the guarantees of freedom of the media by law.

The right of a journalist to preserve the secret of the source of information
The Constitutional Court’s ruling of 23 October 2002

[...] by consolidating the right of a journalist to preserve the secret of the source of information and not to disclose the source of information as one of the guarantees of freedom of the media, the legislature must pay regard to the imperative of an open, just, and harmonious civil society and the constitutional principle of a state under the rule of law, which are entrenched in the Constitution, and must not violate the rights and freedoms of a person. It is not permitted to establish by law any such legal regulation whereby, while consolidating the right of a journalist to preserve the secret of the source of information and not to disclose the source of information, the preconditions for violating the values entrenched in the Constitution would be created.

Thus, by establishing, [by the law], the right of a journalist to preserve the secret of the source of information and not to disclose the source of information, the legislature may not establish such a legal regulation that would create the preconditions for not disclosing the source of information even when this is necessary in a democratic state to disclose the source of information due to vitally important or other especially significant interests of society, or in
cases where this is necessary in order to ensure that the constitutional rights and freedoms of a person are protected and that justice is administered, since the non-disclosure of the source of information might cause much graver effects than its disclosure. If the aforementioned legal regulation were established, the balance among the values protected by the Constitution, the constitutional imperative of an open and harmonious civil society, as well as the constitutional principle of a state under the rule of law, would be violated.

It needs to be noted that, after the right of a journalist to preserve the secret of the source of information and not to disclose the source of information is consolidated, in cases where the question arises whether the source of information should be disclosed, it must be assessed in every particular case whether the non-disclosure of the source of information would violate the values protected under the Constitution. In a democratic state under the rule of law, the decision of such questions is within the competence of courts. The constitutional principle of judicial defence is a universal one (the Constitutional Court’s ruling of 2 July 2002).

Thus, the legislature, when establishing by law the right of a journalist to preserve the secret of the source of information and not to disclose the source of information, also has the duty to stipulate, in a law, that in every case it is only a court that can decide whether a journalist must disclose the source of information. When establishing such powers of a court, the legislature is bound by the concept of freedom of the media, under which it is permitted to demand that the source of information be disclosed only when this is necessary in order to ensure vitally important or other especially significant interests of society and in order to ensure that the constitutional rights and freedoms of persons are protected, that justice is administered, i.e. only when this is necessary to disclose the source of information due to a more important interest protected under the Constitution. Thus, it is not necessary to disclose the source of information if a court decides that the interest to disclose the source of information is not more important than the interest not to disclose the source of information. In cases where the source of information is disclosed, a court, while taking account of the circumstances of a case, may adopt a decision on limiting disclosed information that may be made known to the public. Thus, by establishing the powers of a court to decide whether or not the source of information should be disclosed, the legislature may not deny the duty of a court, which follows from the Constitution, in the course of deciding the issue of the disclosure of the source of information, to assess, in every particular case, whether it is required to disclose the source of information namely due to the fact so as to ensure vitally important or other especially significant interests of society and in order to ensure that the constitutional rights and freedoms of a person are protected and that justice is administered.

It also needs to be noted that the legislature, when establishing by law the powers of a court to decide the issue of the disclosure of the source of information, has the duty to establish such a legal regulation whereby a court may decide whether a journalist must disclose the source of information only in cases where all other means of the disclosure of the source of information have been used.

The public radio and television broadcaster (its constitutional mission and functions, as well as constitutional requirements for the activity of a public broadcaster)

*The Constitutional Court’s ruling of 21 December 2006*

Experience in other states shows that, as a rule, states need to have at least one public radio and television broadcaster (which is, as a rule, founded by the state itself); a special subject – a public broadcaster that is established and operates on the grounds other than private (commercial) broadcasters – is entrusted *volens nolens* with broadcasting […] socially and constitutionally important information to the public.
The fact that the Constitution does not employ the notion “public broadcaster” does not mean that no requirements arise for a public broadcaster from the Constitution, which are determined by the particularities of a public broadcaster in comparison with other – private (commercial) – broadcasters. Quite to the contrary, the duty of the state (its institutions) to impart to the public through the mass media (inter alia, through radio and television) information that is related to fostering various values entrenched in and protected and defended by the Constitution and to implementing various principles of the Constitution, as well as the fact that the state opportunities to entrust private broadcasters with imparting such information and rendering particular public services to society are limited ones, implies the constitutional necessity to found a public radio and television broadcaster and to regulate the relations related to its activity in order that the said duty of the state would be properly executed.

[...] the raison d’être of a public broadcaster is to ensure the public interest – the interest of the public to be informed, which is entrenched in and protected and defended by the Constitution. This implies a special mission of a public broadcaster.

The mission and functions of a public broadcaster stem from various norms and principles of the Constitution, as well as from the values entrenched in the Constitution. This implies that a national public broadcaster must be established and that it must provide particular public services in order that these services would cover all society and help ensure national interests, that such services would be designated for the education of civil society and the fostering of culture. On the other hand, this does not deny the fact that, along with the national public broadcaster, there could be other public broadcasters that operate not at state level (but, for example, at regional level) the mission of which may have certain particularities determined by the specificity of the audience of their listeners and/or viewers.

It needs to be specially emphasised that important functions fall on a public broadcaster, which carries out its constitutional mission in contributing to the implementation of the sovereignty of the Nation and the principles of democracy, as well as in ensuring the security of society and the state, public order, the welfare of citizens and their rights and freedoms. In addition, an important role falls on a public broadcaster when the state fulfils its constitutional obligation to support culture and science, to take care of the protection of Lithuanian historical, artistic, and cultural monuments, as well as other culturally valuable objects.

The activity of a public broadcaster must be organised in such a way that state institutions could have a real opportunity to impart certain information through that public broadcaster. For instance, a law must consolidate the duty of a public broadcaster to promptly announce official reports about emergency situations (natural or other disasters, etc.), as well as information about other important events in this country and those from abroad, inter alia, events that could (either directly or indirectly) cause negative effects to Lithuanian society and/or the state itself. A public broadcaster must also give air-time for urgent messages in other special cases, inter alia, when high state officials and the heads of institutions so request. The principle of democracy entrenched in the Constitution implies, inter alia, that a law must establish such a legal regulation where, at the time of election campaigns, a public broadcaster gives air-time to political parties and political organisations, candidates for the Seimas, for the European Parliament, for the post of the President of the Republic and for municipal councils that participate in the respective election; the constitutional principles of justice and the equality of the rights of persons imply that the persons of the same categories should be given equal air-time, unless such allocation of the same air-time and the observance of the criterion of arithmetical proportionality would hinder the implementation of certain socially and constitutionally important objectives.

Besides, the constitutional freedom of associations and the constitutional provisions that the state recognises the churches and religious organisations that are traditional in Lithuania and
that churches and religious organisations are free to proclaim their teaching imply that a law
may (and, under certain circumstances, must), without violating the constitutional secularism
and world-view neutrality of the State of Lithuania, as well as the separation of state and church,
establish the duty for a public broadcaster to give some air-time to public organisations and the
churches recognised by the state, thus ensuring the self-expression opportunities of the members
of these organisations and communities and diminishing the threat that they would not be heard
at all. At the same time, it needs to be noted that it is not permitted to abuse political, religious,
or other expression by any persons in programmes and broadcasts of a public broadcaster, it is
not permitted that such expression violates the constitutional right of other people to have their
own convictions and freely express them, since, under the Constitution, “no views or ideology
may be declared mandatory and thrust on an individual, i.e. a person who freely forms and
expresses his/her own views and who is a member of an open, democratic, and civil society” (the
Constitutional Court’s ruling of 13 June 2000).

In its ruling of 20 April 1995, the Constitutional Court held that “the publisher is responsible
for imparted information; therefore, the demands or directions of the publisher or the editor
concerning the content of information, as well as decisions in regard with the possibility of
its imparting, etc., are not considered to be censorship”. This official constitutional doctrinal
 provision is applicable to all radio and television broadcasts, including those made by a public
broadcaster. In addition, the official constitutional doctrinal provision that state institutions and
officials have the duty to respect human dignity as a special value (the Constitutional Court’s
ruling of 29 December 2004) and the constitutional imperatives regarding the inviolability of
the right to private life and the protection of private life are applicable to a public broadcaster,
too. Therefore, a public broadcaster must refuse to broadcast programmes or broadcasts in
which opponents or other persons are insulted or otherwise humiliated, in which any people
are discriminated on the basis of their sex, race, nationality, language, origin, social status,
belief, convictions, or views, in which human dignity is otherwise violated, or the said public
broadcaster must not permit that persons who do so participate in its programmes or broadcasts.
The legislature has the duty to consolidate the right to react, which could be used effectively by
the individuals about whom disinformation was imparted (which could violate their dignity as
well) in the programmes or broadcasts of a public broadcaster (or other broadcasters) by denying
untrue information (facts).

It has been mentioned that an important role falls on a public broadcaster when the state
fulfils its constitutional obligation to support culture and science, to take care of the protection
of Lithuanian historical, artistic, and cultural monuments, as well as other culturally valuable
objects. This implies that a public broadcaster must assign proper air-time to the programmes
and broadcasts designated for culture, inter alia, science, art, other areas of spiritual life and
creation, to the material and spiritual heritage of society, as well as to the programmes and
broadcasts promoting Lithuanian culture beyond the boundaries of Lithuania. The programmes
and broadcasts of a public broadcaster must reflect the variety of Lithuanian culture, without
excluding the cultural life and cultural heritage of Lithuanians who reside abroad. In this context,
it should be mentioned that, as it was held by the Constitutional Court, “the state support and
development of culture as a constitutionally protected and defended value would be impossible
if culture were not developed in regions, separate parts of the territory of the state, separate
self-governing territorial communities, which form part of the whole national community – the
civil Nation” (the Constitutional Court’s ruling of 8 July 2005).

It should also be emphasised that the especially important role of a public broadcaster when
the use of the language is fostered in public life, when respect for the Lithuanian language – a
constitutional value – is consolidated by ensuring its survival, spread, and consistent development.
A public broadcaster may foster culture by choosing various genres of broadcasts: information, education, entertainment, including light entertainment. In this context, it needs to be noted that the Constitution also gives rise to no prohibition whatsoever precluding a public broadcaster from broadcasting entertainment broadcasts if they have cognitive, educational, or other cultural value, especially if such broadcasts can connect different social groups from the cultural standpoint. It is important that the broadcasts of a public broadcaster meant for culture, no matter to what genre they belong or to what audience they are meant, must always be quality broadcasts. No consumerist interest of any social group, *inter alia*, that denying the cultural identity of Lithuania, may have any impact on the broadcasts of a public broadcaster.

Summing up, it needs to be held that it is the very nature and mission of a public broadcaster that makes it different from private (commercial) radio and television broadcasters – the broadcasting of programmes and broadcasts by a public broadcaster must be the rendering of public services, i.e. the rendering of services to the public, since public services must satisfy the public interest; thus, such public services must be of a public character. In this respect, a public broadcaster expresses the public interest. Consequently, a public broadcaster must always remain independent of any particular – private or group – interests (political, economic, or other interests).

In a pluralistic democracy (Lithuania, under the Constitution, is a pluralistic democracy), the activity of a public broadcaster must be based on objectiveness, impartiality, and justice, and it may not depend on any party or other political preferences. The activity of a public broadcaster must rally society, but not shatter it. In the programmes broadcast by this broadcaster, various views must be represented, universal, human values verified by the civilisation and time must be propagated, the entire variety of life of society and the state, as well as the variety of cultures, must be reflected, various topics and issues, *inter alia*, such that are designated to people with special needs, whose socialisation and integration into society are more difficult than that of other people (for example, people with disabilities), must be discussed. An important part of the mission of a public broadcaster, which arises from the Constitution, is to ensure that the imparting of the information broadcast by it would help to increase social capital, to decrease social exclusion and to increase social solidarity, to strengthen constitutionally valuable social ties, civic consciousness, and an open, just, and harmonious civil society, to help society to perceive itself as the national community – the civil Nation, to increase the creative potential of society, to promote civilisation, ecological awareness, to foster the culture of society, the cultural affinity and cultural continuity of the Nation, as well as human self-expression, and to promote the rational resolution of social and state issues.

It is due to this that a public broadcaster may and, in view of the fact that the state opportunities to entrust private broadcasters with rendering public broadcasting services are limited ones, even must be commissioned to render public radio and television services or most of them.

**The independence of a public broadcaster**

_The Constitutional Court’s ruling of 21 December 2006_ 

The constitutional mission of a public broadcaster also implies the fact that material, organisational, and financial conditions must be created in order that such a public broadcaster would successfully accomplish its mission, that a legal regulation established by law would guarantee the independence of the public broadcaster from interference of state institutions, officials, and other persons with the activity of the said broadcaster. In order that a public broadcaster could carry out its mission, this is a _conditio sine qua non_.

In this context, it needs to be noted that, in itself, the fact that the state is the founder of a public broadcaster does not mean that the imperative of the independence of a public broadcaster is deviated from.
It needs to be emphasised that a law must establish such a model of government of a public broadcaster that would ensure that the constitutional mission of the said broadcaster will not be deviated from and that the independence of the said broadcaster will not be denied.

In itself, it is impossible to regard as a deviation from the said independence imperative the fact that certain state institutions, which are provided for in a law, may participate in the formation of the highest institution of a public broadcaster, where the said highest institution has the powers to decide the most important issues of the activity of the public broadcaster, as, for example, to plan the strategy of the activity of the public broadcaster, to establish requirements for programmes and broadcasts, etc. (this highest institution may be named in a varied manner: a council, a board, etc.), as well as in the formation of the institutions supervising the activity of the public broadcaster. In itself, such participation of the state institutions that are provided for in a law in the formation of the said institutions of the national public broadcaster does not mean that the state interferes with the activity of the national public broadcaster.

However, it needs to be emphasised that a public broadcaster founded by the state may reasonably be regarded as a public broadcaster only when the institution that has the powers to decide the most important issues of the activity of the public broadcaster is composed not of state officials or state servants, but of persons who could reasonably be called representatives of all society, but not of some interest groups (also professional and institutionalised groups, *inter alia*, those linked with the mass media, with radio and television in particular, as well as groups uniting persons whose creative work or production could be promoted by the public broadcaster). They must express namely the interests of all society. These persons must represent the widest possible social spectrum. The procedure for the election or appointment of the highest institution that has the powers to decide the most important issues of the activity of the public broadcaster must be public and transparent.

**Control over the activity of a public broadcaster**

*The Constitutional Court's ruling of 21 December 2006*

[...] a law must establish not only such a model of government of the national public broadcaster that would ensure that the constitutional mission of this broadcaster will not be deviated from and that the independence of the national public broadcaster will not be negated, but also a particular model of control over this broadcaster.

Such control over the activity of the national public broadcaster must be comprehensive, it may not be just formal. Such control may not be exercised by such persons who themselves are related to the national public broadcaster by official, property, or financial links or are dependent on it in one way or another, or who themselves have interests related to the activity of the national public broadcaster, or who belong to the interest groups (also institutionalised ones) that have precisely such interests.

The aforementioned control over the national public broadcaster includes, among other things, a financial and property audit, which is a very important part of this control. *Inter alia*, control must be exercised over whether the national public broadcaster abuses its special legal status and the opportunities granted by this status (also those that are granted in the radio and television services market), whether, in its activity, the constitutional imperatives of fair competition are deviated from, and whether the funds that are allocated (not exclusively from the state budget) to the national public broadcaster so that it could carry out its special constitutional mission are used precisely for this purpose.

However, control over the activity of the national public broadcaster may not be understood as a mere financial or property audit. Such control must also include control (both *a priori* (preliminary) and *a posteriori* (successive)) over the trend in the content and structure of the
programmes and broadcasts of the national public broadcaster, i.e. such its monitoring and checking where the programmes and broadcasts of the national public broadcaster are also assessed from the aspect of the mission of this broadcaster, which arises from the Constitution and is defined in laws.

It needs to be emphasised that such control may not become the censorship of the programmes and broadcasts of the national public broadcaster, which, as censorship of any other mass media, is prohibited expressis verbis by the Constitution.
Main findings

The Constitutional Court of the Republic of Moldova (hereinafter – “the Court”) recognised as constitutional amendments brought to the Audiovisual Code concerning state informational security. It held that banning broadcasters from transmitting informational, analytical, military and political content programmes produced in other countries than those of the European Union, United States of America, Canada and states that ratified the European Convention on Transfrontier Television does not amount to a disproportionate interference with the freedom of speech.

Facts

The application underlying this case was filed by the President of the Republic of Moldova, thus challenging the Law No 257 of 22 December 2017 amending the Audiovisual Code. The applicant alleged a breach of the Constitution by the contested law in that it imposed a ban on broadcasters and media service distributors from transmitting informational, analytical, military and political content programmes produced in other countries than those of the European Union, United States of America, Canada and states that ratified the European Convention on Transfrontier Television. He relied, inter alia, on the following constitutional provisions: freedom of speech and access to information. On the other hand, the statement of reasons of the law reads that it aims at ensuring informational security of the State and at fighting foreign propaganda, as these provisions would only allow for media content complying with international democratic standards to be broadcast in Moldova.

Reasoning

Whether the disputed measure was “prescribed by law”

The Court noted that in such a sensitive field as the audiovisual mass media, along with the negative obligation not to interfere, the State is also under the positive obligation to implement a proper legislative and administrative framework aiming at ensuring an effective pluralism. At the same time, it noted that the audiovisual communication principles of the Audiovisual Code are only applicable to broadcasters and media service distributors under Moldovan jurisdiction, as they produce no effects for those under the jurisdiction of other states. It also observed that the constitutional provisions relied on by the applicant are reflected in Article 10 of the European Convention on Human Rights. Therefore, the application was examined based on democratic standards set out by the European Court of Human Rights in this field.

Given that the European Convention on Human Rights does not only require for the interference to be “prescribed by law” in the second paragraph of Article 10, but it also provides...
for the quality of the law in question, so that it would be accessible to the person concerned and foreseeable as to its effects. From a general perspective, following an initial analysis of the contested law, the Court acknowledged that it complies with the standards of the quality of law, as it meets the clear, precise and predictable criteria. It did so examining the law under the right of the broadcasters and media service distributors to transmit informational, analytical, military and political content programmes produced in other countries than those of the European Union, United States of America, Canada and states that ratified the European Convention on Transfrontier Television.

Nevertheless, with regard to its character, the Court observed that it is a rigid law, as it establishes a blanket ban preventing broadcasters and service distributors from transmitting informational, analytical, military and political content programmes produced in other states than the mentioned ones. Here, the Court underscored that legal systems are the product of a compromise between the need for certain rules and the need to leave, for the future, the possibility of providing a solution for a social problem. The Court undertook to determine whether the way chosen by the legislator in respect of the law challenged in the present case complies with the fundamental values provided for by the Constitution.

The pursued legitimate aims
The Court noted that the disputed provisions may actively contribute to operations in order to countervail the proliferation of information hostile to the Moldovan society, as well as to ensure that its citizens benefit from accurate information. First of all, this positive obligation of the state mitigates the chances of a possible undue influence of the result of democratic processes in Moldova by powerful groups from abroad. Secondly, this countervails a possible undue influence of public opinion on controversial issues, by hybrid technics, which, however, are banned by the standards imposed by the European Convention on Transfrontier Television. The Court observed that these particular purposes may be subsumed, at least, to the following general legitimate aims established by Article 54(2) of the Constitution: ensuring national security and protecting the rights of others.

The rational connection between the disputed provisions and the legitimate aims
As a mere finding on the legitimate nature of the goals pursued would not suffice, the Court proceeded to examine whether there could be established a rational connection between the imposed ban and the above-mentioned legitimate aims. The Court noted that Article 7 of the European Convention on Transfrontier Television, which the challenged law is making reference to, regulates the responsibilities of the broadcasters, including the condition for the news to fairly present facts and events and encourage the free formation of opinions. Under Paragraph 1 of Article 5 of this Convention, each Member State of the Convention shall ensure that all programme services transmitted by broadcasters within its jurisdiction comply with the terms of this Convention. Accordingly, the Court observed that the challenged law operates with the presumption that broadcasters from states that are not a party to this Convention could fail to comply. The law bans the transmission of TV and radio programmes with informative, analytic, military and political content of broadcasters from non-party states. Unlike these states, there is no such a risk in Member States of the European Union, United States of America and Canada, where democratic standards are high. Therefore, the disputed legislative measure has a direct connection with the legitimate aims pursued.
The availability of less intrusive means

Further, the Court noted that there are available alternative means to access such programmes. It thus found that, since the Parliament refers to the issue of countering foreign propaganda, there may emerge the question of the effectiveness of these restrictions provided for by the challenged law, as long as there remains a free Internet access to programmes broadcast from the states in question. On the other hand, the Court held that it is not unreasonable to apply the ban only to radio and television programmes, as such programmes remain the most influential means to communicate ideas in the Republic of Moldova, in 2018. Moreover, despite a significant development in recent years, there is no evidence that the news spreading via the Internet became more influential than radio and television programmes.

With regard to the existence of less intrusive means, the Court held that a case-by-case supervision of every television and radio programme broadcasting informational, analytical, military and political content that is not produced in the states listed in the challenged law could lead to uncertainties, to numerous litigations, costs and delays, which may give rise to arbitrariness. A contextual scheme would create an excessive burden for the State, whose authorities should monitor the programmes of all broadcasters that do not fall under the European Convention on Transfrontier Television. On the other hand, this scheme would give excessive discretion to the authorities in charge of surveilling the content of these programmes.

The fair balance criteria

The Court therefore examined whether there was struck a fair balance between the contested blanket ban and the legitimate aims pursued. The Court observed, on the one hand, that there appears to be a consensus among European states on the obligation to allow broadcasting of radio and television programmes from the states that have ratified the European Convention on Transfrontier Television and, on the other hand, it noted that there is no European consensus among Council of Europe member states on how to regulate the broadcasting of radio or television programmes produced abroad, that could jeopardise national security. The Court gave weight to parliamentary debates on the need for such a blanket ban.

Freedom of thought and expression constitute an essential exigency of an intellectually healthy society (see mutatis mutandis the opinion of Lord Bingham from Judgment R (On The Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport (Respondent), UKHL 15, 12 March 2008, para. 27). The free communication of information, opinions and argument is an essential condition of truly democratic government. The fundamental rationale of a democratic process is that competing political stands and opinions shall be made possible to be debated and exposed to public scrutiny, so that the good solutions would prevail over the bad ones. There shall be assumed that, at a given moment, the public will make a sound choice. Nonetheless, there is little probability for the playing field of the debate to be so far as practicable level. Therefore, it is the task of the broadcasters to ensure this goal in an impartial way, via balanced programmes in which all lawful views may be ventilated.

However, the attainment of this goal might be undermined by undue influences of foreign governments, attempting to impose their policies in states as Moldova. There is a likelihood that the goals of such governments aim to be accepted by the audience from Moldova, when constantly repeated, even if they are erroneous. Some foreign governments allocate massive funds to radio and TV programmes broadcast abroad, aiming at influencing the outcome of certain democratic processes from other states.

Therefore, the Court mentioned that the European democratic tradition is opposing to the idea of decisions on governmental policies to be taken by highest spenders (see mutatis mutandis the
opinion of Lady Hale from Judgment *R (On The Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport (Respondent)*, UKHL 15, 12 March 2008, para. 48). The goal of genuinely democratic societies should be their citizens to be able to make up their own minds on the important issues of the day. Nevertheless, broadcasting of TV or radio programmes with informational, analytical, military and political content, produced in other countries than those of the European Union, United States of America, Canada or states that ratified the European Convention on Transfrontier Television may bring major distortions to the free exchange of information and ideas. Therefore, one can hardly speak of a balance in the market of ideas in Moldova, given that TV and radio programmes from states in question are much more than national ones. Even TV programmes of Member States of the European Union, United States of America, Canada or states parties to the European Convention on Transfrontier Television cannot balance the situation, as the majority of the population of Moldova does not know the language of these states. Accordingly, in *Centro Europa 7 S.r.l. and Di Stefano v Italy*, 7 June 2012, § 133, the European Court of Human Rights held that a situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society, as enshrined in Article 10 of the European Convention on Human Rights.

The Court also noted that the issue before it by this application was subject to extensive debate under the law-making authority. In June 2016, the Parliament of Moldova hosted an international conference on counterbalancing foreign propaganda aiming at ensuring state security. In December 2017, the draft law challenged by this application was launched for debates. The stenograph of the conference includes also the opinion stating that there had been a manipulation on the informational market of Moldova for 20 years, which is caused by the lack of measures on combating propaganda. The Court also noted that the authors of the draft made use of specialised research showing that media is a basic tool used in waging informational aggression. In this sense, using media outlets, a deformed image of the internal affairs of the targeted state could be created and fuelled from abroad.

The Court also considered of importance the fact that the ban is limited to the broadcasting of informational, analytical, military and political radio and television programmes that are not produced in the states listed in the challenged law. It does not cover other types of programmes. Moreover, the Court found that the ban does not cover other information sources than television or radio stations. The limits of a restriction are important factors in the analysis of its proportionality.

Consequently, persons allegedly affected by the limitation of access to informational, analytical, military and political radio and television programmes that are not produced in states provided for by the challenged law do have other sources of information available. The Court had no reason to believe that the impact of the ban in question in the present case amounts to a disproportionate interference with the freedom of expression or the right of access to such information.

In view of the above, the Court rejected the application of the President of the Republic of Moldova, Mr Igor Dodon. The Court declared constitutional the Law No 257 of 22 December 2017 amending the Audiovisual Code.
JUDGMENT OF 4 JUNE 2018
Use of the Russian language and inapplicability of constitutional review of laws passed prior to the entrance into force of the Constitution

Main findings
A constitutional review may be applied also to laws passed prior to the entrance into force of the Constitution. The Constitutional Court of the Republic of Moldova (hereinafter – “the Court”) has also the power to decide whether the laws are fallen into desuetude. Accordingly, the Court declared unconstitutional certain provisions of the Code of Constitutional Jurisdiction and of the Law on the Constitutional Court. It found as fallen into desuetude the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic.

Facts
The Constitutional Court of the Republic of Moldova was asked by a group of MPs to examine the constitutionality of certain provisions of the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic, the Law on publishing and enactment of official acts, the Law on the rights of individuals belonging to national minorities and legal status of their organisations, the Parliament’s Rules of Procedure, the Code of Constitutional Jurisdiction and the Law on the Constitutional Court.

According to Article 13 of the Constitution, the official language of the Republic of Moldova is Romanian. Hence, the Russian language enjoys a special status.

Given the title itself of the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic, the doubts involved by its wording, as well as practical considerations, the Court had to refine its practice on the admissibility of applications. It had to firstly review whether this law was in force, in general, and subsequently to find whether there was a need to deliver on its compliance with the Constitution, if necessary. The Court noted that the name itself contained by the law was obsolete: “Moldovan Soviet Socialist Republic” ceased to exist on 23 May 1991, when the country’s name changed to the “Republic of Moldova.”

Moreover, in spite of the fact that the Union of Soviet Socialist Republics collapsed on 26 December 1991, the challenged law in question provided for the obligation of the cohabiting ethnicities to communicate in the Russian language. Therefore, should there be accepted that this law is in force, such an obligation would amount to imposing a conception of a paternalistic nature, atypical for the contemporary period. On the contrary, the nations of the successor states of the Union of Soviet Socialist Republics may use any language of communication they wish, as it is the act of understanding that is important.

According to the Court, the transitory nature of this law, valid solely for the times it was passed, was proven also by numerous subsequent laws taking over provisions thereof. On the other hand, the civil and criminal procedural laws come out with a different approach from that of the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic, i.e. the requests are submitted in Romanian and the language that the judicial procedures take place in the Republic of Moldova is Romanian, too.

All these considerations made the Court to determine the obsolete and useless nature of the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic. On the one hand, it is not its provisions that produce effects, but the provisions of subsequent special laws. On the other hand, the community of the Republic of Moldova lives in another state, a new, democratic, independent state, based on the rule of law, where the then momentary raison d’être of the Law on the use of languages spoken on the territory of the Moldovan Soviet Socialist Republic makes no sense anymore.
The Court emphasised that the effect of declaring a law obsolete amounts to its repeal. Accordingly, it declared as inadmissible this part of the application.

Next, the Court had to examine the applicability of Article 13 of the Constitution on state language and the use of other languages and Article 16 of the Constitution on equality. The Court mentioned that, should it accept this critique of the applicants that the official character of Romanian language would be affected, this would amount to a formal fallacy. Accordingly, the Court noted that, as long as there is a number one priority to publish normative acts, carry out teaching or display the names of institutions in the Romanian language, Article 13 of the Constitution is not affected.

As regards the applicability of Article 16 of the Constitution, which provides for the equality of the citizens before the law and public authorities, the Court noted that the European Charter for Regional or Minority Languages does not guarantee a blanket right for the speakers of regional or minority languages to communicate with authorities in their languages. It, however, requires the states, in Article 10, to take a positive stand on the use of a regional or minority language in people’s contacts with administration and public services, when possible, with no excessive constraints from public authorities.

The Court emphasised that the Declaration of Independence of the Republic of Moldova opened the way for the country to join the Charter of Paris for a New Europe. As a result, safeguarding linguistic rights of national minorities of the Republic of Moldova is part of its constitutional identity, a conclusion deriving from the Judgment of the Constitutional Court of Moldova No 36 of 5 December 2013, Paragraph 86.

Considering the binding international treaties providing for minimum standards for minority linguistic rights, the Court emphasised the importance of bringing this issue before Parliament. The Court mentioned that it cannot allow for the constitutional mechanism of fundamental rights protection to ensure the MPs in opposition disappointed by a state policy – which is in line with international standards in the field – a victory before the Constitutional Court, a victory they could not secure in the law-making and democratic fora, where international conventions provide that the issue of national minorities shall be debated.

It further examined the legal provisions precluding from constitutional review normative acts adopted prior to the entrance into force of the Constitution. Irrespective of the amendment or lack of amendment of the laws passed prior to the entrance into force of the Constitution, the competence of the Court covers all cases where the laws are in force. As long as a piece of legislation passed prior to the entrance into force of the Constitution is not repealed in line with Article II of final and transitory provisions of the Constitution, the Constitutional Court may apply a constitutional review thereof. It is motivated to proceed so based on the principle of effectiveness it shall grant to the fundamental rights and based on its statute as the guardian of the Constitution.

The Court thus found its jurisdiction covers all cases where the laws are in force, irrespective of whether they were adopted prior to the entrance into force of the Constitution.
Summary to the Decision of the Constitutional Court of Ukraine No 2-rp/2016, dated 1 June 2016, in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the conformity to the Constitution of Ukraine (constitutionality) of the provision of the third sentence of Article 13.1 of the Law “On Psychiatric Care” (case on judicial control over hospitalisation of disabled persons at 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 capable of perceiving and/or controlling 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 not be 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.

* This section provides summaries of the decisions and opinions of the Constitutional Court of Ukraine.
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 capable, at their own discretion, of implementing property and personal non-property rights, of performing duties and bearing 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.

Thus, the Constitutional Court of Ukraine held:

To declare the provisions of the third sentence of Article 13.1 of the Law “On Psychiatric Care” No 1489-III, dated 22 February 2000, with subsequent amendments in conjunction with the provisions of Article 13.2 concerning hospitalisation at a psychiatric institution at the request or with the consent of guardian upon the decision of psychiatrist without judicial control of a person declared to be legally incapable in the manner prescribed by law as such that do not conform to the Constitution (unconstitutional).
To recommend that the Verkhovna Rada of Ukraine immediately bring the provisions of the legislation in the field of psychiatric care in accordance with this decision.

References:
Judgment of the European Court of Human Rights, dated 24 October 1979, in the case of Winterwerp v the Netherlands;
Judgment of the European Court of Human Rights, dated 16 June 2005, in the case of Storck v Germany;
Judgment of the European Court of Human Rights, dated 8 November 2005, in case of Gorshkov v Ukraine;
Judgment of the European Court of Human Rights, dated 3 October 2006, in the case of McKay v the United Kingdom;
Judgment of the European Court of Human Rights, dated 17 January 2012, in the case of Stanev v Bulgaria;
Resolution of the General Assembly of the United Nation Organisation “Principles for the protection of person with mental illness and the improvement of mental health care” No 46/119, dated 18 February 1992;
Recommendation of the Parliamentary Assembly of the Council of Europe on psychiatry and human rights No 1235, dated 1 January 1994;
Convention on the Rights of Persons with Disabilities, dated 13 December 2006;
Recommendation of the Committee of Ministers concerning the Legal Protection of Persons Suffering from Mental Disorders Placed as Involuntary Patients No R(83)2, dated 22 February 1983;
Decision of the Constitutional Court of Ukraine No 3-rp/2003, dated 30 January 2003;

Decision of the Grand Chamber of the Constitutional Court of Ukraine No 1-r/2017, dated 23 November 2017, in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the compliance of the provisions of the third sentence of Article 315.3 of the Code of Criminal Procedure of Ukraine with the Constitution of Ukraine (constitutionality)

The Parliament Commissioner for Human Rights appealed to the Constitutional Court with a petition to review the compliance of the provisions of the third sentence of Article 315.3 of the Code of Criminal Procedure No 4651-VI, adopted by the Verkhovna Rada of Ukraine on 13 April 2012 (hereinafter referred to as “the Code”), with the Constitution (constitutionality). In accordance with this provision, application of measures to ensure criminal proceedings, selected at the stage of pretrial investigation, upon the unavailability of relevant petitions of the parties to the criminal proceedings is considered to be continued.

Restriction of the constitutional right to freedom and personal inviolability must be exercised in compliance with the constitutional guarantees of the protection of human and citizen’s rights and freedoms.

Restrictions related to the implementation of the constitutional rights and freedoms cannot be arbitrary and unfair, they must pursue a legitimate aim, be conditioned by the social necessity of achieving this aim, proportionate and substantiated; in the case the constitutional right or freedom is restricted, the legislator is obliged to introduce such legal regulation that will give the opportunity to achieve the legitimate aim with the minimum interference with the implementation of this right or freedom in the best way and not to violate the substantive content of such a right.
The Constitutional Court considers that the following mandatory requirements for lawful arrest or detention should be determined: firstly, arrest or detention should be carried out solely on the basis of a duly substantiated court decision; secondly, the grounds and procedure for the application of these preventive measures should be prescribed in the law and should be consistent with the constitutional guarantees of a fair trial and the principle of the rule of law.

The right to freedom and personal inviolability, like any other right, requires protection against arbitrary restrictions, which necessitates periodic judicial control over restrictions or deprivation of liberty and personal inviolability, which must be carried out at time intervals specified by law.

The grounds and procedure for the application of coercive measures that restrict the constitutional right to freedom and personal inviolability, in particular in criminal proceedings, are enshrined in the Code.

In order to achieve the objectives of criminal proceedings and for the proper administration of justice in cases of criminal offences, the Code provides for measures to ensure criminal proceedings, which include preventive measures, namely home arrest and detention (Articles 131, 176, 181, 183).

The measures for the enforcement of criminal proceedings in accordance with Article 131.2 of the Code include: call by an investigator, prosecutor, summoning and attachment; imposition of a fine; temporary restriction on the application of a specific right; removal from office; temporary suspension of a judge from administration of justice; temporary access to things and documents; temporary seizure of property; arrest of property; detention of a person; preventive measures. According to Article 176.1 of the Code, the types of preventive measures are personal obligation, personal guarantee, bail, home arrest, detention.

Among the above types of preventive measures, a special place is taken by home arrest and detention as they are related to restrictions on the constitutional right of a person to freedom and personal inviolability.

A preventive measure in the form of home arrest implies restriction of the freedom of movement of a suspect/accused by way of his/her isolation at home through the prohibition to leave it 24 hours a day or at a certain period of time; home arrest may be applied to a person who is suspected or accused of committing a crime, for the commitment of which the punishment is provided for by the law in the form of imprisonment; the period of detention of a person under home arrest may not exceed two months; in case of necessity, extension of this term is possible upon the request of the prosecutor within the term of pretrial investigation in the manner prescribed by Article 199 of the Code (Articles 181.1, 181.2, 181.6 of the Code).

Detention is the strictest preventive measure related to deprivation of liberty, which implies coercive isolation of a suspect/accused by placing him/her in a detention institution for a certain period, subject to the regime of that institution.

Article 183.1 of the Code states that detention is an exceptional preventive measure which is applied only if the prosecutor proves that none of the milder preventive measures can avoid the risks provided for in Article 177 of the Code. These risks include the following attempts by the suspect/accused: to hide from the bodies of pretrial investigation and/or court; to destroy, conceal or distort any of the things or documents that are essential for establishing the circumstances of the criminal offence; to illegally affect the victim, witness, other suspect, accused, expert, specialist in the same criminal proceedings; to impede criminal proceedings in another way; to commit another criminal offence or to extend the criminal offence in which the person is suspected or accused.

The investigating judge or the court is obliged to decide on a refusal to apply a preventive measure if during the consideration of the petition the prosecutor does not prove: existence of
a reasonable suspicion of committing a criminal offence by a suspect/accused; availability of sufficient grounds to believe that there is at least one of the risks stipulated by Article 177 of the Code, as indicated by the investigator, prosecutor; insufficiency of applying milder preventive measures to avoid a risk or risks mentioned in the petition (Articles 194.1, 194.2 of the Code).

Therefore, the substantiation for the application of preventive measures related to the restriction of the right to freedom and personal inviolability, in particular home arrest and detention, should be subject to judicial review at specific intervals, periodically, by an objective and impartial court for the purpose of examining whether there exist or not the risks that imply application of such preventive measures, including when pretrial investigation is over, when some risks may have already disappeared.

Pursuant to Article 315.2 of the Code, during the preparatory court hearing, upon the petition of the participants in court proceedings, the court has the right to select, change or cancel the measures for ensuring criminal proceedings, including the preventive measure chosen in respect of the accused (first sentence); when considering such petitions, the court complies with the rules provided for in Chapter II “Measures to ensure criminal proceedings” of the Code (second sentence); in the absence of the said petitions of the parties to the criminal proceedings, application of the measures for ensuring criminal proceedings selected during the pretrial investigation is considered to be extended (the third sentence).

The effect of the provision of the third sentence of Article 315.3 of the Code, as it is seen from its content, extends to all types of measures of ensuring criminal proceedings, selected in respect of a suspected person at the stage of pretrial investigation.

Thus, according to the above provision of the Code, during the court proceedings in the court of first instance, within the preparatory court hearing, the continuation of such preventive measures to ensure criminal proceedings, as preventive measures in the form of home arrest and detention, is permitted, without examination of the substantiation of the grounds for their application.

Yet, the continuation of measures to ensure criminal proceedings, namely preventive measures in the form of home arrest and detention, selected during a pretrial investigation, without a court examination of the substantiation of the grounds for their application, contradicts the requirements of compulsory periodic judicial review over the application of preventive measures, related to the restriction of the person’s right to freedom and personal inviolability, enshrined in Article 29.2 of the Constitution, according to which “No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law”.

The Constitutional Court considers that preventive measures (home arrest and detention) that restrict the right to freedom and personal inviolability guaranteed by Article 29.1 of the Constitution can be applied by the court at a new procedural stage – that of judicial proceedings, in particular during the preparatory court hearing, only pursuant to a substantiated decision of the court and only on the basis and in the manner prescribed by law.

The Constitutional Court notes that the conclusions of the investigating judge regarding any circumstances that concerned the nature of the suspicion, the charges, and were taken into account when substantiating the preventive measure chosen during the pretrial investigation, are not prejudicial for the court at the stage of judicial proceedings. During the preparatory proceedings, the court shall examine the substantiation for the application of a preventive measure against the accused related to the restriction of his/her right to freedom and personal inviolability and adopt a substantiated decision, regardless of the fact whether the term of validity of the ruling of the investigating judge, issued at the stage of the pretrial investigation on selection of such a preventive measure, has expired.
Yet, the content of the provision of the third sentence of Article 315.3 of the Code allows for the extension of the effect of a ruling of an investigating judge issued at the stage of pretrial investigation regarding the preventive measures taken in the form of home arrest and detention to the stage of judicial proceedings in the court of first instance in the case where the indictment is transferred to a court without the prosecutor’s request for the continuation of these preventive measures in view of the termination of the pretrial investigation, that is, termination of one stage of criminal proceedings and the commencement of another stage – the stage of the judicial proceedings.

In addition, the provisions of Articles 42.1 and 42.2 of the Code differentiate between the notion of “suspect”, “accused (defendant)” in criminal proceedings. At the same time, paragraph one of Article 177 of the Code provides for the possibility of applying preventive measures to both the suspect and the accused, while paragraph two of this article defines the grounds for the application of such measures by the investigating judge or the court. The consequences of transferring the indictment in the manner provided for in Article 291 of the Code and the receipt of the indictment by a court are the acquisition by a person against whom such a charge was made, of a new procedural status – the accused (defendant), as well as the beginning of the new procedural stage of the criminal proceedings – that of judicial proceedings in a court of the first instance.

Thus, the change in the procedural status of a person from a suspect to an accused (defendant) and the beginning of a stage of the judicial proceedings at a court of first instance precludes the automatic continuation of the application of preventive measures chosen by the investigating judge to such a person at the stage of pretrial investigation as a suspect. Consequently, in the absence of a substantiated decision of the court, which permits the deprivation of freedom for a period determined by this court decision, such a person should be immediately released.

During the judicial proceedings in the court of first instance (preparatory court hearing and trial), the prosecutor as a party to the charge has the duty to support public prosecution in court, to prove the guilt of the person and the need to extend the preventive measure by filing relevant petitions regarding such extension.

The Constitutional Court proceeds from the fact that preventive measures (home arrest and detention) that restrict the right to freedom and personal inviolability guaranteed by Article 29.1 of the Constitution can be applied by the court at a new procedural stage – the stage of judicial proceedings in the court of first instance, in particular during the preparatory court hearing, upon the availability of the prosecutor’s petition (Article 176.4 of the Code).

Pursuant to the constitutional principles of equality and competition, other participants in criminal proceedings, together with the prosecutor, are empowered to file a petition, in particular, regarding the application of other, including milder, preventive measures, their modification or cancellation.

The provisions of the third sentence of Article 315.3 of the Code allow the court, in the course of a preparatory court hearing, to extend the validity of the preventive measure (home arrest and detention) in the absence of petitions of the parties.

The Constitutional Court considers that any provisions of the Code should be applied by bodies of state power and their officials, with account of the constitutional norms, principles and values.

According to Article 55.1 of the Constitution, the rights and freedoms of a person and a citizen shall be protected by a court. The most important feature of the court is its independence and impartiality, and one of the main principles of legal proceedings is the equality of all participants in the trial before the law and the court (Article 129.2.1 of the Constitution).
The Constitutional Court considers that the continuation by the court during the preparatory court hearing of the application of measures to ensure criminal proceedings for preventive measures in the form of home arrest and detention in the absence of the petitions submitted by the prosecutor violates the principle of equality of all participants in the trial, as well as the principle of the independence and impartiality of the court, as the court takes sides with the prosecution in determining the existence of risks under Article 177 of the Code, which affect the need to prolong home arrest or detention at the stage of the judicial proceedings at court of the first instance. When the judge, in the absence of the petitions of the parties (the prosecutor) initiates to continue detention of the accused in custody or home arrest, he/she goes beyond the judicial function and actually takes sides with the prosecution, which is a violation of the principles of independence and impartiality of the judiciary.

Thus, the Court held to recognise the provisions of the third sentence of Article 315.3 of the Code of Criminal Procedure of Ukraine as non-conforming to the Constitution of Ukraine (unconstitutional).

The provisions of the third sentence of Article 315.3 of the Code of Criminal Procedure of Ukraine, recognised unconstitutional, shall lose their effect on the day of the adoption of the decision by the Constitutional Court of Ukraine.

References:
Convention for the Protection of Human Rights and Fundamental Freedoms of 1950;
Universal Declaration of Human Rights of 1948;
International Covenant on Civil and Political Rights of 1966;
Decision of the Constitutional Court of Ukraine No 3-rp/2003, dated 30 January 2003, in the case upon the constitutional petition of the Supreme Court of Ukraine on the constitutionality of the provisions contained in Articles 120.3, 234.6, 236.3 of the Criminal Procedural Code of Ukraine (case on consideration by the court of individual resolutions of investigator and prosecutor);
Decision of the Constitutional Court of Ukraine No 15-rp/2004, dated 2 November 2004, in the case 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 punishment sentenced by court);
Decision of the Constitutional Court of Ukraine No 10-rp/2011, dated 11 October 2011, in the case upon the constitutional petition of 50 People’s Deputies of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of some provisions of Article 263 of the Code of Administrative Offences and Article 11.1.5 of the Law of Ukraine “On Militia” (case on terms of the administrative arrest);
Decision of the Constitutional Court of Ukraine No 2-rp/2016, dated 1 June 2016, in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the conformity to the Constitution of Ukraine (constitutionality) of the provision of the third sentence of Article 13.1 of the Law “On Psychiatric Care” (case on judicial control over hospitalisation of disabled persons at a psychiatric institution);
Judgment of the European Court of Human Rights, dated 9 January 2003, in the case of Shishkov v Bulgaria;
Judgment of the European Court of Human Rights, dated 3 October 2006, in the case of McKay v the United Kingdom;
Judgment of the European Court of Human Rights, dated 10 June 2008, in the case of Tase v Romania;
Judgment of the European Court of Human Rights, dated 6 November 2008, in the case of *Yeloyev v Ukraine*;
Judgment of the European Court of Human Rights, dated 10 February 2011, in the case of *Kharchenko v Ukraine*;
Judgment of the European Court of Human Rights, dated 6 October 2011, in the case of *Agrokompleks v Ukraine*;

**Decision of the Grand Chamber of the Constitutional Court of Ukraine No 3-r/2018, dated 24 April 2018, in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance of the provisions of Article 216.6 of the Criminal Procedure Code of Ukraine with the Constitution of Ukraine**

The Ukrainian Parliament Commissioner for Human Rights appealed to the Constitutional Court with a petition to declare Article 216.6 of the Criminal Procedure Code (hereinafter referred to as “the Code”) as such that does not comply with Articles 3.1, 8.1, 27.1, 27.2, 28.2 of the Constitution (unconstitutional). According to Article 216.6 of the Code, investigating authorities of the State criminal-executive service (hereinafter – the Service) shall conduct pretrial investigation of crimes committed on the territory or on the premises of the Service.

An analysis of Articles 27, 28 of the Basic Law in the systemic connection with its Article 3 and the legal positions of the Constitutional Court give grounds to assert that Articles 27, 28 of the Constitution institutionalise not only the negative obligation of the state to refrain from acts that would infringe upon the right of a person to life and respect for his or her dignity, but also the positive obligation of the state, which is, in particular, to ensure the proper system of national protection of the constitutional human rights by developing appropriate legal regulation; introduction of an effective system of protection of life, health and human dignity; creation of conditions for realisation of a person’s fundamental rights; guaranteeing the order of compensation for damage caused as a result of violations of the constitutional human rights; ensuring the inevitability of liability for violation of the constitutional human rights.

The Constitutional Court of Ukraine considers that the positive duty of the state regarding the introduction of an adequate system of protection of life, health and dignity of a person envisages ensuring an effective investigation of the facts of deprivation of life and ill-treatment, including those persons who are in custody under full state control. The effectiveness of such an investigation is measured by its completeness, comprehensiveness, efficiency, independence, etc. Independence of the investigation of violations of human rights to life and respect for their dignity in places of deprivation of liberty means, in particular, that from the point of view of the impartial observer there should be no doubt about the institutional (hierarchical) independence of a public authority (its officials) authorised to conduct an official investigation of such violations. In this aspect, the independence of the investigation cannot be achieved if the competent public authority (its officials) is (are) institutionally dependent on the authority (its officials) to whom the system of places of detention is subordinated and who is (are) responsible for its functioning.

Thus, based on Articles 27.1, 27.2, 28.1, 28.2 of the Constitution of Ukraine, in a systemic connection with its Article 3, the state must implement legislation that would ensure the effective investigation upon claims and allegations on violations of the constitutional human rights to life and respect for their dignity in the places of deprivation of liberty by a competent public authority (its officials) that is not in the institutional or hierarchical dependence on the state authority (its officials) to whom the system of places of detention is subordinated and who is (are) responsible for its operation.
The Constitutional Court emphasises that the legislator’s powers regarding the regulation of issues related to the organisation and activities of the pretrial investigation bodies are limited by the requirement that they should observe the provisions of the Constitution in the course of law-making activity.

By ratifying the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), Ukraine undertook the obligation to guarantee to everyone the rights and freedoms provided for in the Convention (Article 1) under its jurisdiction. The rights and freedoms guaranteed by the Convention are minimal for a democratic state that ratified it.

Since Article 27 of the Constitution corresponds to Article 2 of the Convention (“The Right to Life”), and Article 28.2 of the Basic Law corresponds to Article 3 of the Convention (“Prohibition of Torture”), the Constitutional Court, in considering this case, takes into account the practice of interpretation and application of the mentioned articles of the Convention by the European Court of Human Rights.

The Code stipulates that the investigator is, in particular, an officer of the Service, authorised within the limits of the competence provided for in the Code to conduct a pretrial investigation of criminal offences (Article 3.1.17); investigating subdivisions of the Service are assigned to the bodies of pretrial investigation (Subparagraph “ґ” of Article 38.1.1).

Pursuant to Article 216.6 of the Code, which is the subject of examination as to compliance with the Constitution (constitutionality), the investigating authorities of the Service conduct a pretrial investigation of crimes committed on the territory or on the premises of the Service.

The Law “On the State Penal-Executive Service” (hereinafter – the Law No 2713) states that the Service is tasked with the implementation of the state policy in the field of execution of criminal penalties (Article 1); one of the main principles of the Service is the unity of command (Article 2.5).

According to Article 6.1 of Law No 2713, the Service consists of the central executive authority, which implements state policy in the field of execution of criminal penalties, its territorial authorities, the criminal-executive inspection, penal institutions, investigative isolation units, paramilitary units, educational institutions, security institutions health enterprises, penal enterprises, other enterprises, institutions and organisations created in order to fulfil the tasks of the Service.

By the Resolution of the Cabinet of Ministers “On Some Issues of Optimisation of the Activities of the Central Executive Bodies of the Justice System” No 343, dated 18 May 2016, the State Penitentiary Service was liquidated, and the tasks and functions related to the implementation of state policy in the area of execution of criminal penalties and probation (Paragraph 1) were entrusted to the Ministry of Justice (hereinafter – the Ministry); it was also established that it is the successor of the liquidated state penitentiary service in the implementation of the state policy in the field of execution of criminal penalties and probation (Paragraph 2).

From the analysis of instruments (the Regulation No 228 on the Ministry, approved by the Cabinet of Ministers of Ukraine on 2 July 2014, as amended, the Regulation No 2166/5 on the bodies of the pretrial investigation of the Service, approved by the Order of the Ministry on 4 July 2017), it appears that the bodies of pretrial investigations of the Service function as a part of the Ministry, therefore, investigators of these bodies, despite the existence of procedural guarantees of their independence in accordance with the Code, are hierarchically subordinated to senior officials of the Ministry.

According to Article 216.6 of the Code, investigation of crimes committed on the territory or on the premises of the Service shall be investigated by the bodies of the Ministry, which
is responsible for the proper functioning of the penal system and shall ensure the pretrial investigation of such crimes. Consequently, pretrial investigation bodies institutionally belong to the penitentiary system.

The Constitutional Court emphasises that the state’s positive obligation to establish an effective system of protection of life, health and dignity of a person envisages ensuring an effective investigation into the facts of deprivation of life and ill-treatment, including those who are staying, in particular, in penal institutions, and investigative detention centres under the full control of the state. Such an investigation should be independent, that is, from the point of view of the impartial observer, there should be no doubt as to the institutional or hierarchical independence of the state body (its officials) authorised to carry out official investigations into violations of human rights guaranteed by Articles 27, 28 of the Constitution. Independence of investigation of violations of the constitutional human rights to life and respect for its dignity cannot be achieved if the competent state body belongs to the penitentiary system, and its officials are hierarchically dependent on senior officials of this system.

The Constitutional Court holds that that the hierarchical subordination of the investigative bodies of the Service to the highest officials of the Ministry of Justice cannot ensure compliance with the constitutional requirements regarding the independence of the official investigation of crimes committed against persons being in penitentiary institutions and investigative detention centres. Such hierarchical dependence levels out the procedural guarantees of the independence of the investigator, that is, he will be to some extent biased while conducting pretrial investigation of crimes committed against persons being in penitentiary institutions or investigative detention centres.

Thus, empowering investigators of the Ministry of pretrial investigation of crimes committed on the territory or on the premises of the Service enables abuse by employees of penal institutions, improper treatment of persons who are in prisons or detention centres, and concealment of abuse and other unlawful acts of the relevant official (officials) of the Ministry, including upon reports, statements and complaints of affected people. That is, attribution to the competence of the Ministry of the pretrial investigation, whose investigators are empowered to investigate any crimes committed on the territory or on the premises of the Service, contributes to creating conditions that would prevent bringing to criminal prosecution those Service officers who may be involved in crimes against life, health and dignity of persons in detention places.

The Constitutional Court notes that the investigation of crimes committed on the territory or on the premises of the Service, established by Article 216.6 of the Code, in interrelation with the relevant normative regulation on the operation of investigative bodies of the Service cannot ensure an effective investigation of violations of the constitutional human rights to life and respect to dignity, which makes it impossible for the state to fulfil its main constitutional duty, i.e. to assert and ensure human rights and freedoms.

Thus, the Constitutional Court of Ukraine held to recognise Article 216.6 of the Criminal Procedure Code of Ukraine, according to which “investigating bodies of the State Criminal Executive Service of Ukraine shall carry out pretrial investigation of crimes committed on the territory or on the premises of the State Criminal Executive Service of Ukraine”, as such that does not conform to the Constitution of Ukraine (unconstitutional).

Article 216.6 of the Criminal Procedure Code of Ukraine, declared unconstitutional, shall lose its effect three months after the date of the adoption of this Decision by the Constitutional Court of Ukraine.

The Court held to oblige the Verkhovna Rada of Ukraine to bring the normative regulation established by Article 216.6 of the Criminal Procedure Code of Ukraine, which was declared unconstitutional, in accordance with the Constitution of Ukraine and this Decision.
References:

Decision of the Constitutional Court of Ukraine No 11-rp/99, dated 29 December 1999, in the case upon the constitutional petition of 51 People’s Deputies on the compliance of the provisions of Articles 24, 58, 59, 60, 93, 190.1 of the Criminal Code of Ukraine with the Constitution of Ukraine (the case on death penalty);

Decision of the Constitutional Court of Ukraine No 2-rp/2016, dated 1 June 2016, in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the conformity to the Constitution of Ukraine (constitutionality) of the provision of the third sentence of Article 13.1 of the Law “On Psychiatric Care” (case on judicial control over hospitalisation of disabled persons at a psychiatric institution);

Judgments of the European Court of Human Rights:

Kats and Others v Ukraine, dated 18 December 2008;
Salakhov and Islyamova v Ukraine, dated 14 March 2013;
Mykhalkova v Ukraine, dated 13 January 2011;
Davydov and Others v Ukraine, dated 1 July 2010;
Kucheruk v Ukraine, dated 6 September 2007;
Yarmenko v Ukraine, dated 12 June 2008;
Lopatin and Medvedskii v Ukraine, dated 20 May 2010;
Teslenko v Ukraine, dated 20 December 2011;
Aleksakhyn v Ukraine, dated 19 July 2012;
Belousov v Ukraine, dated 7 November 2013;
Karabets and Others v Ukraine, dated 17 January 2013.
III. THE CONSTITUTIONAL STANDARDS OF RESPONSIBLE GOVERNANCE
The constitutional standards of responsible governance are revealed in the jurisprudence of the Constitutional Court: interpreting the legal provisions related in various aspects to the powers of state institutions and their implementation, the Constitutional Court gradually disclosed the constitutional principle of responsible governance.

Thus, the constitutional principle of responsible governance is not expressis verbis specified in the Constitution. The origins of this principle can be found in the Constitutional Court’s ruling of 11 May 1999, as well as its conclusion of 31 March 2004 and ruling of 25 May 2004. In these acts, revealing the concept of impeachment against a member of the Seimas or the President of the Republic and clarifying the requirements for a person to be eligible to stand for election as the President of the Republic, it was mentioned that the principles of a state under the rule of law are implemented, among other things, if confidence in state officials is combined with the public control of their activities and with their responsibility to society, including the possibility of their removal from office.

The ruling of 11 May 1999 states that, in a democratic state under the rule of law, officials and institutions, in the performance of their duties, must follow laws and the law. The ruling noted that 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. This was essentially repeated in the conclusion of 31 March 2004 and partly in the ruling of 25 May 2004.

Thus, the imperative of following laws and the law by state authorities and of their responsibility to society, which should be regarded as an element of the constitutional principle of responsible governance, can be derived from the constitutional principle of a state under the rule of law, as well as from the provisions of Paragraphs 2 and 3 of Article 5, Paragraph 1 of Article 30, and Article 33 of the Constitution.

The constitutional principle of responsible governance was named for the first time in the Constitutional Court’s ruling of 1 July 2004, which declared unconstitutional the provision of the Statute of the Seimas according to which remuneration of a member of the Seimas for educational work were considered payment for creative activities.
In this ruling, when revealing the constitutional principle of responsible governance, it was noted that the fact that the scope of power is limited by the Constitution, and that state institutions serve the people [i.e. the provisions of Paragraphs 2 and 3 of Article 5 of the Constitution], implies that state officials, who perform their functions when implementing state power, and all persons who make decisions important to society and the state must follow the Constitution and the law and must act in the interests of the Nation and the State of Lithuania.

In addition, this ruling formulated the corresponding duties for the legislature in order to consolidate the guarantees of the implementation of this principle, i.e. according to the Constitution, the legislature has the duty to establish by means of legal acts such a legal regulation that would ensure that state officials, who perform their functions in implementing state power, and all persons who make decisions important to society and the state are able to properly exercise their powers; would make it possible to avoid clashes between public and private interests; would create no legal preconditions for the aforementioned state officials or other persons for acting in the private interests or interests of a group instead of the interests of the Nation and the State of Lithuania and for using their status for the benefit of their own, their close relatives, or other persons; would make it possible to effectively control how the aforementioned state officials or other persons follow the said requirements; and would make it possible to hold liable under the Constitution and laws the aforementioned state officials or other persons if they do not follow these requirements.

In its ruling of 13 December 2004, when revealing various constitutional requirements for state service, the Constitutional Court noted that the constitutional principle of responsible governance is one of the many interconnected elements of the constitutional principle of a state under the rule of law.

It should be noted that the Constitutional Court has disclosed the very broad scope of the application of the constitutional principle of responsible governance, which is much wider than the scope of application of the principle of good administration in EU law (entrenched as the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union).

The Constitutional Court has indicated that all state officials and all state institutions, including the Seimas, the Government, the President of the Republic, in the performance of their duties (when fulfilling functions in the exercise of state power) and all persons who make decisions important to society and the state must follow the Constitution, laws, and the law and be responsible to society.

The rulings of the Constitutional Court of 24 September 2009, 1 July 2013, and 19 November 2015 formulated the provisions 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 principle of responsible governance.

The ruling of 4 April 2006 states that the constitutional principle of responsible governance must be followed by the Seimas when it uses its constitutional powers to set up provisional investigation commissions: it can form them “not in order to investigate any, but only special questions, i.e. those of state importance”; the powers of these commissions “should be related to the constitutional mission and functions of the Seimas”; the Seimas should not use such powers “to form provisional investigation commissions in such a way whereby the Seimas would itself collect all information necessary for legislation and performance of its other functions and whereby the formation of provisional investigation or similar commissions and investigation conducted by them would prevail in the activities of the Seimas”; otherwise, the preconditions might be created for hindering the Seimas in acting “rationally and effectively in the interests of the Nation and the State of Lithuania”.
In the rulings of 22 January 2008, 8 March 2018, and 12 April 2018 (in deciding the matter of competitions for the positions of state servants and the material liability of ministers, as well as of government resolutions that recognise economic projects as important for the state), it was stated that the constitutional principle of responsible governance gives rise – in addition to other constitutional imperatives – to the principle of transparency of state service (and, as stated later, to that of activities of public institutions and officials), which implies the publicity and openness of state service, as well as the validity, clarity, and reasoning of decisions made.

In the conclusions of 26 October 2012 and 10 November 2012 on violation of the Law on Elections to the Seimas, as well as in the ruling of 11 July 2014 on organising and calling referendums, it was held respectively that the principle of responsible governance, which is enshrined in the Constitution, implies, *inter alia*, that the Central Electoral Commission and territorial electoral institutions for organising elections (referendums), a citizens’ initiative group for a referendum, and other groups of citizens must exercise their functions in accordance with the Constitution and the law, by acting in the interests of the Nation and of the State of Lithuania, must properly implement the powers conferred upon them by the Constitution and laws in determining the results of elections, as well as in organising and calling referendums; the Central Electoral Commission must assess the specific circumstances of the election process that are significant to the election results.

In its conclusion of 10 November 2012, the Constitutional Court, in interpreting the requirements stemming from constitutional principles, including the principle of responsible governance, also emphasised that candidates whose election was sought by committing gross violations of the principles of democratic, free, and fair elections may not receive a mandate of a member of the Seimas; in every situation where final election results are established, the Central Electoral Commission has the duty to ascertain that there are no reasonable doubts that the genuine will of the voters when the votes were cast for one or another candidate could be distorted.

The ruling of 11 July 2014 states that, among other things, the constitutional principle of responsible governance gives rise to the powers of the institution organising referendums – the Central Electoral Commission – to ensure compliance with the Constitution and laws in organising a referendum, *inter alia*, the power not to register a citizens’ initiative group for a referendum where such a group fails to fulfil the duty to bring the decision proposed to be put to the referendum into line with the Constitution or proposes putting to the referendum an issue that is not in line with other requirements for its content and form; also, the Seimas has the duty not to call a referendum where a decision proposed to be put to the referendum does not comply with the requirements stemming from the Constitution.

It should be noted that the Constitutional Court found for the first time a violation of namely the constitutional principle of responsible governance (albeit together with the constitutional principle of a state under the rule of law) in its ruling of 27 May 2014, deciding the matter of an amendment to the final results of the election to the Seimas determined on the basis of the conclusion of the Constitutional Court where the said amendment was made later by means of a resolution of the Seimas. The Constitutional Court held that not only Paragraph 3 of Article 107 of the Constitution and the constitutional principle of a state under the rule of law, but also the constitutional principle of responsible governance gives rise to the requirements where the Seimas, in implementing its constitutional powers and when taking a final decision on the results of an election to the Seimas, is obliged to base its decision on the respective Constitutional Court’s conclusion, not to create any preconditions for awarding a mandate of a member of the Seimas to the candidates whose election was sought by committing the gross violations of the
principles of democratic, free, and fair elections, as well as not to alter the final results of the election to the Seimas without a constitutional ground and without another conclusion of the Constitutional Court.

Afterwards, a violation of the constitutional principle of responsible governance (by the way, always together with the constitutional principle of a state under the rule of law) has been found several times:

- the ruling of 11 June 2015 found that, among others, this principle was violated, *inter alia*, by the provision of the Law on the Methodology for Determining Municipal Budget Revenue, insofar as it provided that the share (in percentage terms) of the personal income tax specified for every municipality in the appendix to this law was to be transferred to the respective municipal budgets in the absence of any law-established criteria on the grounds of which such a share was to be calculated. This ruling stated that the legislature must also abide by the constitutional principle of responsible governance, by which the state institutions and officials must properly exercise the powers conferred on them according to the Constitution and laws, and it must establish a clear procedure for calculating the funds allocated to the municipalities, where such a procedure would ensure the funding required for a fully fledged functioning of self-government and for the fulfilment of municipal functions, and, alongside, would ensure the autonomy and freedom of activity of municipalities within their competence, as defined by the Constitution and laws;

- the ruling of 8 July 2016 found that, among others, this principle was violated by the provision of the Rules of Procedure of the Government, as approved by government resolution, according to which, in the absence of the constitutionally justified exceptional cases established in the Law on the Government, the agenda of a sitting of the Government could be supplemented with draft legal acts requested to be placed on the agenda of the sitting as additional issues proposed by ministers in cases where these draft legal acts had not been agreed beforehand and were related not only to the competence of the institutions that had prepared (submitted) the draft legal act, but also to the competence of other institutions;

- the ruling of 5 October 2016 found that, among others, this principle was violated by the provision of the Statute of the Seimas according to which remuneration for the given month could not be reduced by more than one third for a member of the Seimas who, during that month, continuously failed, without an important and justifiable reason, to attend the sittings of the Seimas, or the sittings of the committees or other structural units of the Seimas to which he/she is appointed according to the procedure prescribed in the Statute of the Seimas. It was noted in this ruling that, *inter alia*, the constitutional principle of responsible governance gives rise to the imperative to ensure, by means of a law, the reasonable use of the funds of the state budget allocated for the remuneration of the members of the Seimas;

- the ruling of 22 December 2016 found that, among others, this principle was violated by the provision of a resolution of the Seimas by which the Seimas had approved the conclusion of the Provisional (ad hoc) Investigation Commission of the Seimas for the restoration of the civil and political rights of the former President Rolandas Paksas. It was noted in this ruling that the constitutional principle of responsible governance implies the duty of the Seimas to properly implement the powers granted to it by the Constitution and laws, to implement its functions in observance of the Constitution and the law, and to act in the interests of the Nation and of the State of Lithuania; therefore, the Seimas may not approve a conclusion of any possible content made by an ad hoc investigation commission of the Seimas, *inter alia*, any such proposals formulated therein that would be incompatible with the Constitution; the duty stems for the Seimas from the Constitution, before it decides whether to approve or not to approve a conclusion of an ad hoc investigation commission, or whether to approve it in part (with reservations), to assess whether
the proposals formulated in the said conclusion (including those whereby certain legal acts are proposed to be adopted or not to be adopted) violate the requirements stemming, inter alia, from the constitutional principle of responsible governance;

– the ruling of 12 April 2018 found that, among others, this principle was violated by the government resolution on the recognition of an economic project as a project of state importance. It was noted in the ruling that the principle of the transparency of activities of public authorities and officials, which stems from the constitutional principle of responsible governance, implies the requirement for the Government, when recognising social, economic, cultural, or other projects to be of state importance, not only to express, in a government resolution, a formal decision to recognise a certain project to be of state importance, but also to establish the essential conditions for the implementation of the project important to the state, such as the aim, object, implementation deadlines, sources of funding, essential obligations of the developer (developers) of the project, etc.;

– the ruling of 19 June 2018 found that, among others, this principle was violated by the provisions of the Law on Science and Studies, adopted on 13 January 2018, that provided for the evaluation and provisional accreditation, to be completed by 1 March 2018, of study fields that were being carried out. It was noted in this ruling that the legislature must pay regard, inter alia, to requirements implied by the constitutional principle of responsible governance, including the requirement to provide for an appropriate vacatio legis – a reasonable period of time from the moment of the official publication of the law laying down new quality standards for higher education provided by institutions of science and studies and new measures making it possible to evaluate the quality of studies and of their implementation, as well as their conformity with the established standards, until its entry into force (date of its application), during which, inter alia, higher education schools would be able to prepare in an appropriate manner for the implementation of the changed requirements, resulting from the said law, for the quality of studies and of their implementation.

It should be observed that, unlike than in the above-mentioned ruling, the appropriateness of a vacatio legis was assessed in the Constitutional Court’s ruling of 15 February 2013. In this ruling, when deciding the constitutionality of the adoption of the 2009 state budget and related laws, it was noted that the constitutional principle of responsible governance gives rise to the requirements to begin the drafting of the state budget in advance, while amendments to laws affecting state revenue and expenditure should be adopted before the Seimas approves the state budget, where an appropriate vacatio legis should be provided for; however, these requirements could be deviated from in exceptional circumstances if justified by an overriding reason in the public interest – in order to guarantee the stability of public finances and to prevent excessive budget deficits in the state due to a particularly difficult economic and financial situation as a result of an economic crisis – which determines the need for urgent and effective solutions; the Seimas, which, according to the Constitution, approves the state budget by law, may not refrain from reacting to such a substantial change in the economic and financial condition of the state where, due to an economic crisis, a very difficult economic and financial situation occurs in the state.

The acts of the Constitutional Court on the constitutionality of legal acts adopted in the context of the difficult economic and financial situation should be mentioned in this regard. In the Constitutional Court’s decision of 16 April 2014, when interpreting the ruling of 1 July 2013, which declared unconstitutional the provisions of laws regarding the disproportionate reduction of the remuneration of state servants and judges upon the occurrence of a very difficult economic and financial situation in the state, it was held that the legislature, while following the constitutional principle of responsible governance, may postpone the establishment and/or implementation of the mechanism of compensation for the losses incurred due to the
disproportionate reduction of remuneration for a reasonable time that should be determined in view of an assessment of the existing economic and financial situation in the state and in the light of the consequences of an extreme situation and the capabilities of the state, including various obligations assumed by the state, which, *inter alia*, are related to financial discipline, thus, also to the imperative of balancing the revenue and expenditure of the state budget.

In the ruling of 19 November 2015, when deciding whether the postponement by law of the term for submitting a draft law regulating a mechanism for compensating for losses incurred as a result of disproportionately reduced work remuneration was justified, it was additionally noted that, among others, the constitutional principle of responsible governance means that the state budget must be realistic and that the revenue and expenditure provided for therein must be grounded upon an assessment of the needs and possibilities of society and the state. It was also held in this ruling that the proposed implementation of the compensation mechanism must be reasonably justified by the actual capabilities of the state; therefore, the circumstances related to the existing economic, financial, and geopolitical situation and to the imperative to implement the obligations assumed under laws were to be regarded as very significant and indicating that the Government had had limited possibilities for the actual and responsible assessment of the capabilities of the state to fulfil the obligation to compensate fairly (from the point of view of the time limits and amounts of the payment of compensation) and within a reasonable time for the losses incurred as a result of the disproportionate reduction of remuneration.

As regards the development of the concept of the constitutional principle of responsible governance, mention should also be made of the ruling of 29 June 2018. In this ruling, in deciding on the constitutionality of the provisions of the Law on Science and Studies, as well as the constitutionality of the Seimas resolution by which the Seimas had approved the reorganisation of Lithuanian Sports University by way of incorporating it into the Lithuanian University of Health Sciences, the Constitutional Court emphasised that, when the state decides to carry out a reform of the system of state schools of higher education, *inter alia*, to reorganise or liquidate state schools of higher education, it is necessary in the course of implementing these decisions to observe the requirements arising, *inter alia*, from the constitutional principle of responsible governance, as well as to respect, among other things, the legitimate interests and legitimate expectations of the members of the community of a given state school of higher education, *inter alia*, those of the persons working and studying at the higher education school in question; the Seimas and the Government must respect the constitutional principle of responsible governance, which implies the duty to evaluate and weigh in a responsible manner the interests and capabilities of both society and the respective communities of state schools of higher education so that the long-term effectiveness of the system of higher education would be ensured; when adopting these decisions, account should also be taken, *inter alia*, of the historical traditions of a specific high school and the need to maintain their continuity.

It could be concluded that, according to the jurisprudence of the Constitutional Court, responsible governance is understood, first of all, as a general imperative for all related subjects who make decisions important to society and the state to follow the Constitution and the law, to act in the interests of the Nation and of the State of Lithuania. It is also understood as proper exercise of powers conferred by the Constitution and laws, the validity, clarity, and reasoning of decisions, as well as proper control and liability. It also could be understood, more specifically, as the duty to responsibly evaluate and balance the relevant interests and opportunities, the clarity and transparency of the procedures, the duty to react to a substantial change in the economic and financial condition of the state, the requirement to establish an appropriate *vacatio legis*, i.e. a time period from the official publication of the law until the beginning of its application, etc.
Thus, the constitutional principle of responsible governance, which is closely linked to Article 5 of the Constitution and the constitutional principle of a state under the rule of law, has an important independent meaning in the jurisprudence of the Constitutional Court: when assessing whether a particular legal regulation is in conflict with the said principle, the Constitutional Court formulates standards that must be followed by all state institutions and officials in exercising responsibly the powers conferred upon them by the Constitution and laws.
Ukraine and Lithuania have established a pro-European vector of development with the recognition of themselves as democratic rule-of-law states, where everyone is guaranteed the appropriate protection of rights and freedoms. The realisation of this goal is a very complicated process, which must be carried out in different directions. The construction of an optimal model of public administration, in particular, institutional support, in which the bodies of state power and bodies of local self-government will effectively perform their activities in compliance with the constitutional framework, is extremely important for the effective realisation of the established course.

The underlying concepts and principles, functions and powers, the basis of the organisation are unconditionally enshrined in the Constitution, which is the quintessence of all state-legal processes. The Constitution establishes the limits and nature of state regulation in all spheres of social development, as well as relations between the state on the one hand and a person and a citizen on the other. However, it should be noted that having a good Constitution is not enough: it is necessary to create the appropriate conditions for its implementation.

The Constitution of Ukraine established that bodies of state power and bodies of local self-government, as well as their officials, are obliged to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine, and also everyone is obliged to strictly adhere to the Constitution. That is, it is the Constitution and laws that determine the basis for the proper functioning of state authorities and local self-government bodies.

Exercising their powers, the bodies of state power and bodies of local self-government, first of all, must respect the Constitution, i.e. they must be able to limit their own intentions and interests, sacrificing them for the sake of public good. The Constitution is the basis of the legitimacy of public authority, which in turn means that compliance with the Constitution by the state authorities and local self-government bodies is a guarantee of the recognition of such power by law and justice. The observance of the Constitution by state authorities and local self-government bodies is an important factor in the development of a democratic rule-of-law state and, in modern conditions, has a number of problems.

First, it is well known that the Constitution establishes the fundamental concept of social relations, which must exist in our state, its provisions are the basic categories for the society, the state, as well as a person and a citizen. However, it is worth noting that, if, at the stage of drafting the Constitution or its initial formation, the requirements of the already existing relations were applied to it, then public relations built in the future would require their own compliance with the Constitution. Therefore, as long as the valid Constitution is in force, there will always be the
problem of the compliance of the modern public relations with the Constitution and of the manner they are legally regulated by the bodies of state power and bodies of local self-government in accordance with constitutional prescriptions. No matter how perfect the Constitution is, the rapid development of mankind will always produce new questions, new challenges for it.

Second, the Constitution is not just a text, but also values and spirit. Since the spirit of the Constitution is either embodied in its own ideas or derived from these ideas through their interpretation by state authorities or local self-government bodies, this category is somewhat vulnerable and gives a start to an alternative implementation of the Constitution or an incorrect interpretation of these norms in other acts. It often occurs that a democratic way of the rules of conduct, as laid down in the Constitution, does not find its reflection in life, namely in the adoption of relevant laws, which should continue the mentioned constitutional provisions. Despite the fact that the provisions of the Constitution are directly applicable norms, the absence of laws that develop the specified provisions of the Constitution can become the basis for the misuse of their application and, accordingly, for non-observance of constitutional prescriptions. There are plenty of such examples, but this does not contradict the axiom that the values and ideas of the Constitution cannot be freely interpreted by the state authorities and local self-government bodies, because this raises the problem that these institutions can afford to apply them in a way that they consider to be more convenient.

Third, an important aspect in preventing non-compliance with constitutional requirements by state authorities and local self-government bodies is to create a balanced system of checks and balances, which provides a basis for clearly delimiting powers between the highest authorities and preventing dissonance in the exercise of authority by a competent entity.

Fourth, it should be noted that the observance of constitutional requirements by state authorities and local self-government bodies is possible only with the consolidated participation of both state institutions in the exercise of their powers and the society itself in their perception and compliance with the requirements imposed by the state. Therefore, it should be noted that to build a model of the proper exercise of the powers of state authorities and bodies of local self-government in accordance with the constitutional framework requires self-control on the part of the state apparatus and proper supervision by the civil society to effectively serve the interests and guarantee the security of the citizens.

Fifth, a significant role in this regard is played by the history of mentality formation of the Ukrainian people and the evolution of the apparatus of state administration, which for a long time used to be under the influence of, and whose development on democratic principles was hindered by, the imperial institutions. Therefore, in the formula “state apparatus – a person and a citizen” dominated, and even the ruling position was occupied by, state bodies in whose activities all-permissiveness was inherent. Under such circumstances, the negative consequences of the actions of state authorities, which led to non-compliance with the norms of the Constitution, were indulged by the civil society. In the western constitutional tradition, which Ukraine has chosen as a model for itself, the main object is a person, and the implementation of the provisions of the constitution by the state apparatus is one of the methods of protecting his or her rights. Today, Ukraine pulls away from anti-democratic principles of building a public administration and forms a model in which state bodies and local self-government bodies have no alternative in the performance of their duties but be guided only by the letter of the law.

At the same time, it is necessary to mention the role of the constitutional court as a guard of constitutional norms, as an organ that protects constitutional requirements against infringements from the state. The main function of the Constitutional Court of Ukraine is the legal protection of the Constitution of Ukraine expressed in the acts adopted by the constitutional control body. The acts of the Constitutional Court of Ukraine are the final result of the Court’s manifestation to
guarantee the rule of the Constitution of Ukraine and, with the introduction of the constitutional complaint institute, it is also a way of protecting the rights of individuals from abuses of the state.

Constitutional liberalism describes a form of government that supports the principles of classical liberalism and the rule of law. It differs from liberal democracy, because it is not a method of government choice. The famous journalist and scholar Fareed Zakaria explains that the constitutional liberalism “deals with the goals of the government”. This applies to the tradition deeply rooted in the history of Western democracies, which is aimed to protect the freedom and dignity of a person from state coercion.

Constitutionalism is an idea, associated with the political theories of John Locke and the founders of the American Republic, that the Government can and should be legally limited in its powers and that its authority or legitimacy depends on its adherence to these restrictions. Constitutionalism in this sense of the concept is an idea that the state can or should be limited by its powers and that its powers depend on the observance of these restrictions by the state.

Usually, defining the concept of constitutionalism, the main emphasis is placed on the role of the constitution as a limiter of state power. Among the variety of views on this phenomenon, scientists pay attention to the fact that constitutionalism is a set of such socio-economic, political, legal, cultural, historical and other conditions under which the Constitution functions as a quite effective legal limitation of state power, for which the constitution is primary. It precedes the formation and functioning of the derivative bodies of state power, and those in power are bound by its provisions.

I think that the basis of constitutionalism is:
- the principle of constitutional restriction of state power;
- the majority in parliament has to respect the freedom and the rights of a minority; it is necessary to anticipate the constitutional means to prevent centralisation and abuse of power; in this regard, the Constitution provides institutional guarantees (the separation of powers, the principle of constitutionally established competence, etc.);
- the Constitution shall have the highest legal force;
- the Constitutional Court must exercise judicial constitutional control over the legal and actual activities of the state and its bodies; it must protect constitutional human rights on the basis of the constitutional complaint institute.

Since the limited power is much stronger than unlimited, the restriction of state power in order to protect human rights and civil rights is the main purpose of the Constitution and the activities of the Constitutional Court.

I would like to remind you that the main purpose of the Constitution is the restriction of state power in order to guarantee freedom and the main precaution from its usurpation, while the most important purpose of the Constitutional Court is to protect a person from the arbitrariness of state power. Therefore, the lack of a strong and authoritative Constitutional Court in the country is a direct way to a gradual degradation of statehood and the loss of rights and freedoms. This is an opportunity for state bodies and political forces to slip out of constitutional control and to violate constitutional rights and freedoms.

The key task of the Constitutional Court of Ukraine is to ensure the rule of the Constitution of Ukraine, to decide on the compliance of the laws of Ukraine with the Constitution of Ukraine and in cases of other acts stipulated by the Constitution of Ukraine. The Fundamental Law of the state is the fundamental value of society and not a mechanism in the hands of the authorities.

The institute of the constitutional complaint was introduced in accordance with the changes to the Constitution of Ukraine. As a result, a person has got an opportunity to directly appeal to the Constitutional Court of Ukraine in order to protect their constitutional rights violated by law.
I believe that a constitutional complaint is not only one of the forms of recourse to the Constitutional Court of Ukraine in the form of a written petition for examination of the conformity with the Constitution (constitutionality) of the law of Ukraine or its individual provisions applied in a final court decision in the case of the subject of the right to constitutional complaint, but also a mechanism that will allow a person to obtain a moral and material compensation.

The constitutional complaint must, in particular, contain a substantiation of the allegations concerning the unconstitutionality of a specific law (its separate provisions), indicating which of the human rights guaranteed by the Constitution of Ukraine were violated as a result of the application of this law.

A constitutional complaint may be filed in the event that all other national remedies have been exhausted. An analogy of the constitutional complaint is the appeal to the European Court of Human Rights. The European Convention on Human Rights and the Constitution of Ukraine have a common legal nature, so the institute of the constitutional complaint is intended, to a certain extent, to transfer the resolving of the issues of restoration of violated human rights from the international to the national level. In addition, the established practice of the ECtHR is gradually becoming a source of the national constitutional law.

Since the establishment of the constitutional complaint institute (in November 2016), 926 constitutional complaints have been received by the Constitutional Court. 648 of them were returned to the subject of the right to a constitutional complaint. 269 constitutional complaints were distributed among judges-rapporteurs, out of which 190 rulings on refusals were held. 79 constitutional complaints are to be considered by the Constitutional Court.

In my opinion, the decisions in cases involving constitutional complaints will have overall positive effects, both for the protection of constitutional rights and freedoms and for the legitimacy of the functioning of the institutions of state power. For example, in the Decision on the judicial control of the hospitalisation of incapacitated persons to a psychiatric institution, the Constitutional Court of Ukraine has developed criteria for the admissibility of restrictions on constitutional rights and freedoms. In particular, restrictions on the exercise of constitutional rights and freedoms cannot be arbitrary and unfair, they must be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate aim, be conditioned by the social necessity of achieving this objective, be proportionate and reasonable; in the case of limiting a constitutional right or freedom, the legislator is obliged to introduce such a legal regulation that will enable to optimally achieve the legitimate aim with minimal interference with the exercise of this right or freedom and not to violate the essential content of such a right.

These criteria must necessarily be taken into account both by the parliament and other bodies of public authority both in the process of lawmaking and in the process of law enforcement.

Following the constitutional provision that the state power in Ukraine is exercised on the basis of its division into legislative, executive and judicial (part one of Article 6 of the Constitution of Ukraine), the Constitutional Court of Ukraine in its decisions has repeatedly provided its legal position and stressed that the separation of state power is a structural differentiation of the three main equal functions of the state: legislative, executive, and judicial. It reflects the functional definiteness of each state body, involves not only the differentiation of their authority, but also their interaction, the system of mutual checks and balances that are intended to ensure their cooperation as a unified state power. The principle of the division of state power has a sense only under the condition that all public authorities act within a single legal field. Strict observance of the Constitution and laws of Ukraine by the legislative, executive and judicial powers guarantees the implementation of the principle of the separation of powers and is the key to their unity, an important prerequisite of stability, ensuring public peace and harmony in the state.
At the beginning of this year, for the first time in the history of the Constitutional Court of Ukraine, the language law and the referendum law were declared unconstitutional. They were found to be unconstitutional in general because of a violation of the procedure for their consideration and approval. It is unacceptable in a legal state to outrage the constitutional procedure for the consideration and approval of laws.

Today, the issue of adopting a new constitution of Ukraine in a referendum is being discussed briskly in Ukraine. Yet, first, the referendum is a form of direct democracy, which is based on constitutional norms and principles, while the law adopted in 2012 threatened the use of this mechanism for manipulating and usurpation of power. Second, given the recognition by the Constitutional Court of Ukraine a referendum law as unconstitutional, a “gap” in this issue appeared in the country’s legislation; therefore, the legislator must adopt a new law as soon as possible.

However, regarding the idea to put the Constitution issue on a referendum, it should be noted that the Constitutional Court of Ukraine must defend the constitutional order of the state and the constitution.

In particular, by the decision of the Constitutional Court of Ukraine, dated 26 April 2018, the Law of Ukraine “On the All-Ukrainian Referendum”, which was approved by the parliament during the Yanukovych’s presidency, was declared unconstitutional. This decision particularly admitted that the content of the law did not correspond to the Constitution of Ukraine, because the Verkhovna Rada had regulated such relations in this law that could not be subject to its regulation. The Constitutional Court has determined in this Decision that the Constitution of Ukraine does not envisage making changes while bypassing the parliament. This decision is obligatory, it must be observed and enforced.

In accordance with the constitutional requirements, any change in the Constitution of Ukraine passes several legislative stages. The peculiarity of the adoption of amendments to Section I “General Principles”, Section III “Elections. Referendum” and Section XIII “Amendments to the Constitution of Ukraine” is the fact that higher requirements for this process are applied.

It should also be emphasised that the Constitutional Court formulated the constitutional principle in the decision on the referendum: “the people has a sovereign prerogative regarding the exercise of the constituent power”. Since the Constitution of the state is an act of the people, and not that of the state or of the legislator, the people expresses their will and exercises the constituent power. Constituare (lat.) means “constitute”. The formation of the state happens in the adoption of the constituent act in the form of a Constitution. That is why, although the people is the bearer of the constituent power, it still has the limits defined by the Constitution of Ukraine, with regard to the procedure for amending the Constitution of Ukraine.

Article 153 of the Constitution of Ukraine determines that the activity of the Constitutional Court of Ukraine, the procedure of consideration of the cases by it and its decisions are determined by the Constitution of Ukraine and the law. According to the prescriptions of the Law of Ukraine “On the Constitutional Court of Ukraine”, it is established that the Constitutional Court in the decision or in the opinion can set the procedure and terms of its implementation, as well as oblige the relevant government authorities to ensure control of the implementation of the decisions and compliance with the opinion. In addition, the Court may demand from the relevant authorities a written confirmation of the implementation of the decision or compliance with the opinion. Besides, the Parliament has established that non-compliance with the decisions and failure to comply with the Court’s opinion entail responsibility under the law (Article 98 of the Law).

An example of this may be the decision of the Constitutional Court of Ukraine in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on
the compliance of the provisions of Article 216 of the Criminal Procedure Code of Ukraine with the Constitution of Ukraine.

During the consideration of this case, the Constitutional Court of Ukraine noted that the established in paragraph six of Article 216 of the Code jurisdiction of crimes committed on the territory or in the offices of penal institutions in interrelation with the appropriate regulatory regulation on the operation of investigators of this service is not able to ensure the effective investigation of violations of constitutional human rights for life and respect for a person’s dignity, which makes impossible the execution by the state of its main constitutional duty, namely the establishment and guarantee of human rights and freedoms.

Therefore, it was held that paragraph six of Article 216 of the Criminal Procedure Code of Ukraine, according to which “the investigating authorities of the State Criminal Execution Service of Ukraine carry out pretrial investigation of crimes committed on the territory or in the offices of the State Criminal Execution Service of Ukraine” did not comply with the Constitution of Ukraine (was unconstitutional). In addition, it was determined that the said unconstitutional article would lose its force within three months after the adoption of the decisions by the Constitutional Court of Ukraine. At the same time, the Constitutional Court of Ukraine obliged the Parliament of Ukraine to bring the normative regulation in line with the Constitution of Ukraine and the said Decision.

Another example comes to mind: the Constitutional Court of Ukraine in its decision in the case of judicial control over admission of incapacitated persons to a psychiatric institution declared unconstitutional the provision of the Law of Ukraine “On Psychiatric Assistance” regarding the admission of a person recognised under the law as incapable to a psychiatric institution at the request or with the consent of their tutor by decision of a doctor-psychiatrist in the absence of legal control and recommended the Verkhovna Rada of Ukraine to immediately bring the provisions of the legislation of Ukraine in the field of the provision of psychiatric care in accordance with this decision. Unfortunately, the relevant normative regulation of these issues remains unregulated in a proper manner at the legislative level. The Constitutional Court of Ukraine has indicated that, before the adoption of the relevant amendments to the law, the judgment of the Court shall be used, according to which the hospitalisation of a person who is recognised as incapacitated in accordance with the law to a psychiatric institution is possible only on the basis of a court decision.

In conclusion, I would like to mention another example: when the Constitutional Court of Ukraine considered the case of social security of Chernobyl liquidators, it clearly established the order of execution of its Decision, indicating that the provisions of the Law that were declared unconstitutional had lost validity and were not subject to application from the date that the Constitutional Court of Ukraine adopted its Decision. However, in order to avoid legal uncertainty, the Constitutional Court in its decision on this case indicated that the rules of the original version of the Law are subject to application and set out the version that had to be applied.
The responsibility of state officials to society; the principle of responsible governance

The Constitutional Court's ruling of 1 July 2004

The Constitution is the supreme law, which imposes limitations on state power. The Constitution consolidates the principle of responsible governance.

The fact that, under the Constitution, the Nation executes its supreme sovereign power either directly or through its democratically elected representatives, that the scope of power is limited by the Constitution, and that state institutions serve the people, implies that state officials, who perform their functions when implementing state power, and all persons who make decisions important to society and the state, must follow the Constitution and law and must act in the interests of the Nation and the State of Lithuania. The civil Nation, which entrusts such persons with the management of general matters and with representation of the Nation and the state who make decisions important to society and the state by virtue of the office they hold or the mandate they have acquired, must be protected from the arbitrariness of state officials, from their actions based on their personal or group interests instead of the interests of the Nation and the State of Lithuania, from using their status for the benefit of their own, their close relatives, or other persons. In its ruling of 25 May 2004, the Constitutional Court held the following: “In order that the citizens – the national community – could reasonably trust state officials so that it would be possible to ascertain that all state institutions and all state officials follow the Constitution and law and obey them, and that those who do not obey the Constitution and law would not hold the office for which the confidence of the citizens – the national community – is needed, it is necessary to ensure a public democratic control over the activity of the state officials and their accountability to society comprising, inter alia, the possibility of removing from office those state officials who violate the Constitution and law, who bring their personal interests or the interests of a certain group above the public interests, or who bring discredit on state authority by their actions.”

According to the Constitution, the legislature has the duty to establish by means of legal acts such a legal regulation that would ensure that state officials, who perform their functions in implementing state power, and all persons who make decisions important to society and the state, are able to properly exercise their powers, that clashes between public and private interests are avoided, that no legal conditions are created for state officials, who perform their functions in implementing state power, and for all persons who make decisions important to society and the state, for acting in the private interests or interests of a certain group instead of the interests of the Nation and the State of Lithuania, and for using their status for the benefit of their own, their close relatives, or other persons in order to make it possible to effectively control how state officials, who perform their functions in implementing state power, and all persons who make
decisions important to society and the state follow the said requirements, and in order to hold liable under to the Constitution and law the aforementioned state officials or other persons if they do not follow these requirements.

**Democratic state governance; the responsibility of the authorities to society; the principle of responsible governance**

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

The constitutional requirement that the power of the State of Lithuania should be organised in a democratic way and that the democratic political regime must be in place in the country is inseparable from the provision of Paragraph 3 of Article 5 of the Constitution, whereby state institutions serve the people, as well as from the provision of Paragraph 2 of the same article, whereby the scope of power is limited by the Constitution. The nature of the democratic institutes of power is that all persons who implement the political will of the people are controlled in various forms so that this will would not be distorted (the Constitutional Court's decision of 29 May 1996). In its ruling of 1 July 2004 and conclusion of 5 November 2004, the Constitutional Court held that the Constitution consolidates the principle of responsible governance. The responsibility of the authorities to society is a principle found in a state under the rule of law, which is established in the Constitution, by providing that state institutions serve the people, that citizens have the right to govern the country either directly or through democratically elected representatives, to criticise the work of state institutions or that of their officials, and to lodge complaints against their decisions, also by guaranteeing citizens the possibility of defending their rights in a court and the right of petition, as well as by regulating the procedure for considering requests and complaints lodged by citizens, etc. (the Constitutional Court’s ruling of 11 May 1999 and its conclusion of 5 November 2004).

**The principle of responsible governance**

*The Constitutional Court’s conclusion of 10 November 2012*

The principle of responsible governance, as consolidated in the Constitution, implies that all state institutions and officials [...] are obliged to follow the Constitution and law while performing their functions and must properly implement the powers granted to them by the Constitution and laws by acting in the interests of the Nation and the State of Lithuania (the Constitutional Court’s conclusion of 26 October 2012).

**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 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 publicity and transparency requirements of law-making procedures**
*The Constitutional Court’s ruling of 8 July 2016*

[...] 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, implies the publicity and transparency requirements of law-making procedures; such requirements must be followed, inter alia, by institutions that exercise state power. Compliance with such requirements in the course of passing legal acts is an essential condition for public trust in the state and law, as well as for the responsibility of state authorities to the public; this compliance creates the preconditions for involving the public in the decision-making process related to public interests, inter alia, while providing the opportunity to become familiar with the drafted legislation and other relevant information and, thus, inter alia, to implement the rights, guaranteed to citizens under Article 33 of the Constitution, to participate in the governance of the state, to criticise the work of state institutions or their officials, and to appeal against their decisions.

[...] also such constitutionally grounded cases are possible where a law may also provide for a non-public process of passing legal acts where such legal acts are adopted by the Government, as, for instance, in order to protect information constituting a state secret, to avoid a threat to the constitutional order, defensive power, or other important interests.

**THE SPECIFIC REQUIREMENTS OF RESPONSIBLE GOVERNANCE**

**I. EXAMPLES OF THE SPECIFIC REQUIREMENTS FOR THE SEIMAS IN THE EXERCISE OF ITS POWERS**

The powers of the Seimas to adopt a final decision on the results of an election to the Seimas (Paragraph 3 of Article 107 of the Constitution)
*The Constitutional Court’s ruling of 27 May 2014*

When implementing its powers, established in Paragraph 3 of Article 107 of the Constitution, to take a final decision on the results of elections to the Seimas, the Seimas is obliged to pay regard to the constitutional principles of a state under the rule of law and responsible governance.

The Constitutional Court has held on more than one occasion that, in a constitutional democracy, representative political institutions may not be formed in such a way that would raise doubts as to their legitimacy and legality, inter alia, that would raise doubts as to whether the principles of a democratic state under the rule of law were not violated in the course of the election of persons to representative political institutions; democratic elections are an important form of citizens’ participation in the governance of the state, as well as a necessary element of the formation of state political representative institutions; elections may not be regarded as democratic or their results as legitimate and legal if elections are held by undermining the principles of democratic elections established in the Constitution and violating democratic electoral procedures (inter alia, the Constitutional Court’s conclusion of 5 November 2004, its ruling of 1 October 2008, and its conclusion of 10 November 2012).

The principle of responsible governance, which is consolidated in the Constitution, implies that all state institutions and officials are obliged to follow the Constitution and law
while performing their functions and to properly implement the powers granted to them by the Constitution and laws by acting in the interests of the Nation and the State of Lithuania (the Constitutional Court’s conclusions of 26 October 2012 and 10 November 2012).

When the Seimas is making a final decision on the final election results, an essential significance derives from the fact that certain gross violations of the principles of democratic, free, and fair elections were committed during the election, and that those violations might have distorted the genuine will of the voters. It should be noted that violations of the said electoral principles can be committed not necessarily by candidates for the members of the Seimas themselves – these violations can be committed also by other persons seeking the election of certain candidates to the Seimas.

In its conclusion of 10 November 2012, the Constitutional Court, in interpreting the requirements stemming from the constitutional principles of a state under the rule of law, responsible governance, and those of democratic, free, and fair elections to the Seimas, inter alia, emphasised that candidates whose election was sought by committing gross violations of the principles of democratic, free, and fair elections may not receive a mandate of a member of the Seimas; otherwise, the confidence of the Nation in its representation and the state itself would be undermined.

Thus, while implementing its powers, provided for in Paragraph 3 of Article 107 of the Constitution, to take a final decision on the results of elections to the Seimas and having regard to the constitutional principles of a state under the rule of law and responsible governance, the Seimas, inter alia, is not allowed to create any preconditions for awarding a mandate of a member of the Seimas for candidates whose election was sought by committing certain gross violations of the principles of democratic, free, and fair elections.

Under Paragraph 3 of Article 107 of the Constitution, on the basis of the Constitutional Court’s conclusion that the election law was violated during the election of the members of the Seimas, the Seimas takes a final decision on the results of the election to the Seimas. It should be noted that the Seimas has the powers to conclusively decide on the results of elections to the Seimas, insofar as these results are related to the violations of the election law established in the relevant conclusion of the Constitutional Court.

Requirements for a legal regulation governing the payment of remuneration for the work of a member of the Seimas (inter alia, in cases where a member of the Seimas fails to attend the sittings of both the Seimas and its structural subunits)

The Constitutional Court’s ruling (no KT26-N13/2016) of 5 October 2016

[...] under Paragraph 3 of Article 60 of the Constitution, the work of the members of the Seimas, as well as expenses relating to their parliamentary activities, is remunerated from the state budget. Thus, under Paragraph 4 of Article 60 of the Constitution, the Seimas, while regulating by law one of the guarantees of the parliamentary activity of a member of the Seimas – the payment of remuneration for the work of a member of the Seimas – must also pay regard to the imperatives, which arise from the Constitution, concerning the use of the funds of the state budget.

[...]

[...] the concept of the procedure for the proper possession, use, and disposal of state-owned property, inter alia, the funds of the state budget, which is implied by the Constitution, inter alia, by Paragraph 2 of Article 128 thereof, and the constitutional principle of responsible governance give rise to the imperative of ensuring, by means of a law, the reasonable use of the funds of the state budget allocated for the remuneration of the members of the Seimas.

Thus, the Constitution, inter alia, Paragraph 3 of Article 60 thereof, and the constitutional principle of responsible governance give rise to the duty of the legislature to comply with the
following requirements […] in the course of regulating the payment of remuneration for the work of the members of the Seimas:

– the work of the members of the Seimas, as provided for in Paragraph 3 of Article 60 of the Constitution, is remunerated from the state budget; the main form of this work is participation in the sittings of the Seimas, as well as the sittings of the committees or other structural subunits of the Seimas to which the members of the Seimas are appointed according to the procedure prescribed in the Statute of the Seimas;

– the episodic fulfilment of the constitutional powers (such as drafting laws and other legal acts of the Seimas, meeting with voters, or performing parliamentary activities in other ways) of a member of the Seimas (or continuous fulfilment of such powers only in part) where such a member of the Seimas, without an important and justifiable reason, denies the constitutional duty of a member of the Seimas to attend the sittings of the committees or other structural subunits of the Seimas to which he/she is appointed according to the procedure prescribed in the Statute of the Seimas, where such sittings, as mentioned before, is the main form of the work of a member of the Seimas, i.e. when such a member of the Seimas is regularly absent from such sittings without an important and justifiable reason, may not be regarded as proper implementation by the member of the Seimas of his/her constitutional duty to represent the Nation, i.e. the duty for the implementation of which the members of the Seimas are remunerated under Paragraph 3 of Article 60 of the Constitution.

In the context of the constitutional justice case at issue, it should also be noted that the legislature, when implementing the duty, which stems from the Constitution, inter alia, Paragraph 4 of Article 60 thereof, to regulate by law one of the guarantees of the parliamentary activity of a member of the Seimas – the payment of remuneration for the work of a member of the Seimas, inter alia, when establishing the amount of such remuneration and the procedure of the payment thereof, must take into consideration the aforementioned constitutional imperatives, which imply the constitutional duty of a member of the Seimas, inter alia, to attend the sittings of the Seimas, as well as the sittings of the committees or other structural subunits of the Seimas to which such a member of the Seimas is appointed according to the procedure prescribed in the Statute of the Seimas; the legislature must establish the financial consequences for continuous failure to carry out the said constitutional duty without an important and justifiable reason. The legislature has the discretion to establish various amounts of the reduction of the remuneration of a member of the Seimas (fixed amounts by which the remuneration of the members of the Seimas is reduced), the subject (all the Seimas or its structural subunit) that applies such amounts in accordance with a certain procedure in a specific situation, and various grounds for reducing the remuneration of a member of the Seimas, inter alia, in cases where a member of the Seimas without an important and justifiable reason continuously fails to attend the sittings of the Seimas, as well as the sittings of the committees or other structural subunits of the Seimas to which such a member of the Seimas is appointed according to the procedure prescribed in the Statute of the Seimas.

In this context, it should be noted that, when regulating the payment of remuneration for the work of a member of the Seimas in cases where such a member of the Seimas without an important and justifiable reason continuously fails to attend the sittings of the Seimas, as well as the sittings of the committees or other structural subunits of the Seimas to which he/she is appointed according to the procedure prescribed in the Statute of the Seimas, the legislature must also pay attention to the fact that, as it was held in the Constitutional Court’s ruling of 25 January 2001, the recognition of parliamentary opposition is a necessary element of pluralistic democracy; the parliament must take into account the principle of the minority’s protection (the Constitutional Court’s ruling of 26 November 1993 and 25 January 2001). Therefore, open non-attendance of the sittings of the Seimas by the members of the Seimas, as well as the
sittings of the committees or other structural subunits of the Seimas to which they are appointed according to the procedure prescribed in the Statute of the Seimas, where such non-attendance is based on views and political objectives of the parliamentary opposition, i.e. where such non-attendance is obstruction as a type of political protest and a method of parliamentary activity in an attempt to prevent the adoption of a decision that is not acceptable to the minority, under the Constitution, in certain situations, may be regarded as a rather important reason for not attending such sittings unless such non-attendance is regular.

It should also be noted that the payment of remuneration from the funds of the state budget to such a member of the Seimas who denies the constitutional duty of a member of the Seimas to attend the sittings of the Seimas, or the sittings of the committees or other structural subunits of the Seimas to which he/she is appointed according to the procedure prescribed in the Statute of the Seimas, where such sittings, as mentioned before, is the main form of the work of a member of the Seimas, i.e. when such a member of the Seimas is regularly absent from such sittings without an important and justifiable reason, should be considered a constitutionally unjustified privilege.

Provisional investigation commissions of the Seimas

The Constitutional Court’s ruling of 4 April 2006

[...]) in a democratic state under the rule of law, it is not allowed to deny the powers of the parliament – the representation of the Nation – to take measures, inter alia, to form the structural subunits of the parliament for this purpose, and to commission them to conduct necessary research in order to receive 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 arising problems; otherwise, the proper fulfilment of the functions of the parliament – the representation of the Nation – and the adoption of necessary decisions would not be ensured. The said powers arise from the very essence of parliamentary democracy and are one of the features of parliamentarism. In the practice of the parliaments of democratic states under the rule of law, the opportunity of parliaments to take measures in order to receive information about 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 arising problems is also implemented by means of such institutes as provisional commissions (which are commissioned to conduct certain research) formed by parliaments, parliamentary hearings and deliberations, etc.

The institute of provisional commissions formed by the Seimas, inter alia, provisional investigation commissions, is also characteristic of the parliamentarism tradition of the State of Lithuania.

Under the Constitution, it is not permitted to establish any exhaustive (final) list of questions for the investigation of which the Seimas may form provisional investigation commissions: since the Seimas, as the representation of the Nation and the institution of legislation (performing [...] not only the legislative but also various other functions), may pass laws and other legal acts regulating most varied social relations, it can virtually form provisional investigation commissions designated for an investigation into most varied processes that take place in the state and society.

The principle of responsible governance is consolidated in the Constitution (the Constitutional Court’s rulings of 1 July 2004, 13 December 2004, and 2 June 2005). The Constitution does not imply any such activities of the Seimas where the Seimas collects all information necessary for legislation and other functions of the Seimas by itself, by not relying on the information submitted to it by other state institutions, and where the formation of provisional or similar commissions and investigation performed by them prevail in the activities of the Seimas. Quite
to the contrary, the Constitution implies the institute of provisional investigation commissions of the Seimas and the legal regulation of the formation of such commissions and of their activities where the said provisional investigation commissions are formed not in order to investigate any, but only special questions, i.e. those of state importance. The powers of provisional investigation commissions of the Seimas should be related to the constitutional mission and functions of the Seimas.

The Constitution does not imply any possibility of forming any such provisional investigation commissions of the Seimas that would be commissioned with an investigation into such matters that institutions of public power, under the Constitution, may not investigate at all, as, for example, the circumstances of the private or family life of an individual if such an investigation unreasonably interferes with the private life of an individual, which is defended and protected under the Constitution, if the inviolability of private life is violated, etc.

The constitutional principle of the separation of powers and other provisions of the Constitution make it possible to draw the conclusion that the Seimas has no powers to form any such provisional investigation commissions that would be commissioned with an investigation into the matters in the course of the investigation of which the powers of other institutions that exercise public power, as well as the powers of other state and municipal institutions provided for in the Constitution and/or laws, would be interfered with. For example, a provisional investigation commission of the Seimas cannot take over the constitutional powers of courts or otherwise interfere with the implementation of the constitutional competence of courts, nor may it violate the independence of judges and courts in the administration of justice, let alone administer justice by itself; a provisional investigation commission of the Seimas may not take over the constitutional powers of prosecutors or otherwise interfere with the implementation of the constitutional competence of prosecutors, nor may it violate the independence of a prosecutor when he/she organises and directs pretrial investigation and upholds charges on behalf of the state in criminal cases (the Constitutional Court’s ruling of 13 May 2004).

However, the fact that provisional investigation commissions of the Seimas may not be commissioned with an investigation into the matters in the course of investigation of which the powers of other institutions that exercise public power, as well as the powers of other state and municipal institutions provided for in the Constitution and/or laws, would be interfered with does not mean that provisional investigation commissions of the Seimas cannot have any powers in regard of state or municipal institutions, their officials, and other persons at all. Such powers may be established by means of a law and by paying regard to the Constitution.

II. EXAMPLES OF THE SPECIFIC REQUIREMENTS FOR THE PRESIDENT OF THE REPUBLIC IN THE EXERCISE OF HIS/HER POWERS

The veto right of the President of the Republic (Paragraph 1 of Article 71 of the Constitution)

The Constitutional Court’s ruling of 22 February 2008

While interpreting the provision “Within ten days of receiving a law adopted by the Seimas, the President of the Republic […] shall, upon reasonable grounds, refer it back to the Seimas for reconsideration” of Paragraph 1 of Article 71 of the Constitution, it needs to be noted that the President of the Republic may, in a particular decree, specify various grounds – not only legal, but also economic, political, moral, and expediency grounds, also those that are related to the international obligations of the State of Lithuania, etc. […] these grounds do not necessarily have to be linked to the content of the relevant law, they may, in the opinion of the President of the Republic, be also linked with the committed infringements during the procedure of adopting
the said law, *inter alia*, with the fact that, while adopting that law, the Seimas did not follow the
stages of the legislation process or the rules of legislation that are enshrined in the Constitution
and/or the Statute of the Seimas. In such cases, the President of the Republic, while making use
of the right of delaying veto, which is granted to him/her by the Constitution, does not allow such
a law to take effect where, in his/her opinion, the said law may be in conflict with the procedure,
laid down in the Constitution, for adopting it.

It needs to be emphasised that the reasons of the President of the Republic, on the basis of
which a law adopted by the Seimas is referred back to it for reconsideration, must be rational,
clear and comprehensible. The President of the Republic, while referring, on reasonable grounds,
a law back to the Seimas for reconsideration, must follow the imperatives of the welfare of the
Nation, responsible governance, civic consciousness, social harmony, justice, the supremacy
of law, as well as other values, which are consolidated in and defended and protected by the
Constitution. However, the mere fact that the reasons of the President of the Republic, on the
basis of which a law adopted by the Seimas is referred back to it for reconsideration, could be
assessed by someone (*inter alia*, members of the Seimas) as unfair, may not be a pretext for
questioning the constitutionality of a relevant decree of the President of the Republic (as well as
for questioning such constitutionality by initiating a particular constitutional justice case at the
Constitutional Court).

### The powers of the President of the Republic to confer state awards (Item 22 of Article
84 of the Constitution)

*The Constitutional Court’s ruling of 7 September 2010*

The grounds of the constitutional institute of state awards are consolidated, *inter alia*, in
[...] Item 22 of Article 84 of the Constitution.

[...]

Item 22 of Article 84 of the Constitution provides that the President of the Republic confers
state awards.

While interpreting the power of President of the Republic to confer state awards, which is
consolidated in Item 22 of Article 84 of the Constitution, in conjunction with the provision “The
President of the Republic, implementing the powers vested in him, shall issue acts–decrees.
To be valid, the decrees issued by the President of the Republic for the purposes specified in
Items 3, 15, 17, and 21 of Article 84 of the Constitution must be signed by the Prime Minister
or an appropriate Minister” of Article 85 of the Constitution, it needs to be held that, under
the Constitution, the President of the Republic confers state awards (which are established by
means of a law passed by the Seimas) by issuing decrees whose power is not bound either by the
approval of the Prime Minister or an appropriate minister.

The content of the constitutional institute of state awards was disclosed to certain extent in
the Constitutional Court’s ruling of 12 May 2006. *Inter alia*, the following was held in the said
ruling of the Constitutional Court:

[...]

– conferring a certain state award is not the implementation of the right or a legitimate
expectation of a person, even if he/she is of undoubted merit to Lithuania, but rather such an
assessment of his/her merit where the said assessment is within the discretion of and depends on
the will of the President of the Republic;

– the President of the Republic has rather broad freedom of the discretion to decide whether
or not to award a proposed person. It should be stressed that the Constitution does not oblige
the President of the Republic to confer a certain state award on a certain person or persons (in
recognition of their certain merit); however, when conferring state awards, the President of the
Republic must pay regard, *inter alia*, to the requirements for fulfilling conscientiously the duties of his/her office, and for being equally just to all, as established in Article 82 of the Constitution.

[...] the constitutional institute of state awards is related to certain extent with the power of the President of the Republic, which is consolidated in Item 1 of Article 84 of the Constitution, to decide the basic issues of foreign policy.

As held in the Constitutional Court’s ruling of 12 May 2006, according to international customs, the diplomatic protocol, i.e. according to the established international practice, state awards can be conferred on citizens of foreign states (*inter alia*, on Heads of States and high-ranking officials) by paying a special tribute to their state and to them and by seeking to develop mutually beneficial relations between Lithuania and other states.

[...] the legislature, while establishing the procedure how proposals are made that persons be conferred state awards, cannot deny the power of the President of the Republic, which is consolidated in Item 22 of Article 84 of the Constitution, to confer state awards.

The legislature, in regulating the relations connected with the procedure for conferring state awards, *inter alia*, when consolidating the powers of particular subjects (*inter alia*, ministers) to propose (present) that certain persons be awarded state awards, or when establishing the procedure for the consideration of the issues of conferring state awards in some institutions, may not establish any such legal regulation that would deny the power of the President of the Republic, which stems from Item 22 of Article 84 of the Constitution, to confer state awards.

Any change of or any limitation on the powers of the President of the Republic in this sphere, as well as any establishment of such a procedure for the implementation of these powers, where the actions of the President of the Republic would be bound by decisions of the institutions or officials that are not provided for in the Constitution, would mean changing the constitutional competence of the President of the Republic.

[...] the President of the Republic, when he/she confers state awards, is also bound by the constitutional principle of responsible governance.

[...] the President of the Republic, when implementing the power to confer state awards, which is consolidated in Item 22 of Article 84 of the Constitution, and when, due to this, issuing a decree, is bound by the requirement arising from the constitutional principle of a state under the rule of law, according to which, *inter alia*, it is allowed to confer only such state awards that are established by law.

**III. EXAMPLES OF THE SPECIFIC REQUIREMENTS FOR THE GOVERNMENT IN THE EXERCISE OF ITS POWERS**

**The duty of the Government to observe laws that are in force (Item 2 of Article 94 of the Constitution)**

*The Constitutional Court’s ruling of 23 May 2007*

Under the Constitution, the Government, as an institution of executive power, has broad discretion to form and pursue the economic policy of the state and to regulate economic activity correspondingly. Under Paragraph 1 of Article 95 of the Constitution, the Government decides the affairs of state governance at its sittings by adopting resolutions by a majority vote of all the members of the Government; the Government is jointly and severally responsible to the Seimas for the general activities of the Government (Paragraph 1 of Article 96 of the Constitution). According to its competence defined in the Constitution and laws, in formulating and pursuing
the economic policy of the state and regulating economic activity in a respective manner, *inter alia*, by adopting resolutions, the Government must not act *ultra vires*; the Government must observe the Constitution and laws. Should the Government fail to observe laws, the constitutional principle of a state under the rule of law implying the hierarchy of legal acts, and Item 2 of Article 94 of the Constitution, under which the Government executes, *inter alia*, laws, would be negated.

[...] the Government [...] does not have the discretion to decide not to apply the provisions of a certain law regulating corresponding relations, unless the non-application of a certain provision of such a law is *expressis verbis* provided for in laws.

**The duty of the Government to comply with the publicity and transparency requirements of law-making procedures when adopting legal acts**

*The Constitutional Court’s ruling of 8 July 2016*

[...] 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, implies the publicity and transparency requirements of law-making procedures; such requirements must be followed, *inter alia*, by institutions that exercise state power. [...] also such constitutionally grounded cases are possible where a law may also provide for a non-public process of passing legal acts where such legal acts are adopted by the Government, as, for instance, in order to protect information constituting a state secret, to avoid a threat to the constitutional order, defensive power, or other important interests.

[...] in view of the constitutional status of the Government as an executive state institution, as well as of the fact that, under Article 95 of the Constitution, the Government decides the affairs of state governance at its sittings by adopting resolutions, only a law may provide for the constitutionally justified exceptional cases related to the adoption of government decisions, *inter alia*, during a state of emergency or martial law or in the event of a natural disaster, when the agenda of a sitting of the Government can be supplemented with new draft legal acts that have not been agreed, according to the ordinary procedure, with the ministries, as well as other government establishments and state institutions concerned, by specifying the relevant reasons. However, once such a procedure for the initiation of the legal acts (submission of draft legal acts) of the Government is established by means of a law, no preconditions should be created for the formation of such a practice of supplementing the agenda of a sitting of the Government with additional issues that, by way of derogation from the said constitutionally justified exceptions, would deny the constitutional requirements of publicity and transparency of law-making procedures.

**IV. OTHER EXAMPLES OF THE REQUIREMENTS OF RESPONSIBLE GOVERNANCE**

**The duty of the state institutions that form and execute state economic and financial policies to prepare for possible very difficult economic and financial situations**

*The Constitutional Court’s decision of 20 April 2010*

Under the Constitution, *inter alia*, under the constitutional principles of a state under the rule of law and responsible governance, the state institutions forming and pursuing state economic and financial policies must also assess the fact that, due to special circumstances (an economic crisis etc.), there may arise a very difficult economic and financial situation in the state. Therefore, the state institutions must take all possible measures in order to predict the
tendencies in the economic development of the state and to prepare for the possible occurrence of such very difficult economic and financial situations.

The concept of the state budget; the powers of the Seimas and the Government in the sphere of the state budget; requirements for the adoption and entry into force of laws affecting the revenue and expenditure of the state budget (inter alia, the requirement that amendments to laws affecting the revenue and expenditure of the state budget be adopted before the Seimas approves the state budget and the requirement that a sufficient vacatio legis be envisaged)

The Constitutional Court’s ruling of 15 February 2013

[...] the state budget is an important constitutional institute. The grounds for drafting and approving the state budget are consolidated in the Constitution, inter alia, in Item 14 of Article 67 and Articles 127, 129–132 thereof.

[...]

The requirements arising from Paragraph 1 of Article 69 of the Constitution and the constitutional principle of a state under the rule of law are inseparable from the constitutional concept of the state budget and the constitutional imperatives established for drafting, considering, and approving the state budget.

The state budget is a plan of the state revenue and expenditure (allocations) for a specific period, i.e. a financial plan of the state, according to which public funds are redistributed; in the legal sense, the state budget is a law, by means of which a plan of the state revenue and expenditure (allocations) for a budget year is approved (the Constitutional Court’s ruling of 14 January 2002 and its decision of 13 November 2007). According to the constitutional concept of the state budget, the state revenue and expenditure planned for the budget year must be provided for in the state budget approved by law (the Constitutional Court’s ruling of 14 January 2002). Article 129 of the Constitution provides that the budget year starts on 1 January and ends on 31 December.

The revenue of the state budget is raised from taxes, compulsory payments, levies, income from state-owned property, and other income (Paragraph 2 of Article 127 of the Constitution). Taxes – compulsory and unrequited payments established by means of a law and paid to the state budget by legal and natural persons at a fixed time – are one of the main sources of the revenue of the state budget (the Constitutional Court’s ruling of 17 November 2003); they are established by means of laws (Item 15 of Article 67 and Paragraph 3 of Article 127 of the Constitution).

Under the Constitution, the Seimas approves the state budget and supervises its execution (Item 14 of Article 67). The budgetary function of the Seimas is its classical function; when account is taken of the essential influence of the situation of public finances on the implementation of state functions, the budgetary function is one of the most important functions of the parliament of a democratic state under the rule of law. Paragraph 1 of Article 131 of the Constitution prescribes that the draft state budget is considered by the Seimas and is approved by law before the start of the new budget year.

Drafting the state budget is the exceptional competence of the Government: under the Constitution, the Government draws up a draft state budget and presents it to the Seimas not later than 75 days before the end of the budget year (Item 4 of Article 94, Article 130). The Government and no one else has the powers to estimate in the draft budget of the state how much revenue will be received and from which sources, how much funds must be allocated and for what purposes, etc. (the Constitutional Court’s ruling of 11 July 2002). All planned revenue and expenditure of the state budget must be specified sufficiently clearly by concretely indicating the state revenue sources and the estimated sums of funds that could be received from those sources,
the purpose of the expenditure for financing various spheres, the precise sums of the allocated funds and the subjects to which those funds would be allocated. Otherwise, no conditions would be created for implementing the real and effective parliamentary supervision over the execution of the state budget.

Under the Constitution, the Government has the exceptional powers to execute the state budget (Item 4 of Article 94). As noted in the Constitutional Court’s ruling of 14 January 2002, 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 revenue and that these funds are transferred to the subjects specified in the law on the state budget.

As mentioned before, the Government, while implementing its powers to prepare a draft state budget, is bound by the constitutional requirement to submit it to the Seimas not later than 75 days before the end of the budget year, i.e. not later than on 17 October, whereas the Seimas is under the obligation to consider this draft and approve it by law for the next budget year before its beginning, i.e. not later than on 31 December. The deadlines, consolidated expressis verbis in the Constitution, for presenting a draft state budget to the Seimas and for its approval mark the limits that may not be overstepped by the Government and the Seimas; however, the said deadlines do not imply that a draft state budget should be prepared, considered and approved only just before the expiry of those deadlines. In this context, it needs to be mentioned that, under Paragraph 1 of Article 64 of the Constitution, the autumn session of the Seimas begins on 10 September; thus, a draft state budget may be submitted to the Seimas and the Seimas may start considering it much earlier than the deadline for its submission provided for in Article 130 of the Constitution.

Paragraph 1 of Article 132 of the Constitution provides that, 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. Consequently, under the Constitution, if the Seimas does not approve the state budget before the beginning of a budget year, the application of the provisions of the state budget of the previous year would in fact be prolonged. At the same time, it needs to be emphasised that this constitutional provision may and must be understood only as one providing for a certain way out in a situation where the Seimas, in exceptional circumstances, does not approve the state budget within the time specified in Paragraph 1 of Article 131 of the Constitution; however, the said provision must not be interpreted as allowing the Seimas to disregard the established term.

The constitutional concept of the state budget and the constitutional principle of responsible governance mean that the state budget must be realistic and that the revenue and expenditure provided for therein must be grounded upon an assessment of the needs and possibilities of society and the state. The Constitutional Court has held that the constitutional imperative of an open, just, and harmonious civil society, as well as the necessity to ensure the constitutional rights and freedoms of persons and to protect other values entrenched in the Constitution, implies the duty of the Government, in the course of preparing a draft state budget, and the duty of the Seimas, in the course of considering and approving the state budget, to take into consideration the state functions established in the Constitution, the existing economic and social situation, the needs and possibilities of society and the state, the available and potential financial resources and state obligations (inter alia, international ones), as well as other important factors (the Constitutional Court’s ruling of 11 July 2002). In this context, it also needs to be mentioned that, under the Constitution, inter alia, under the constitutional principle of responsible governance, the state institutions forming and pursuing state economic and financial policies must take all possible measures in order to predict the tendencies in the economic development of the state.
and to prepare for possible occurrence of very difficult economic and financial situations (the Constitutional Court’s decision of 20 April 2010).

The Constitutional Court has also held that the question whether certain needs (objectives) are provided with sufficient or insufficient funds from the state budget is not about the compliance of the state budget with the Constitution, but about budget planning, the evaluation of the needs of society and the state, their balance with the possibilities of society and the state, and, consequently, social and economic expediency (the Constitutional Court’s rulings of 14 January 2002 and 21 December 2006); however, this official constitutional doctrinal provision may not be interpreted as also including the cases where the law on the state budget establishes such a legal regulation in which it is clear from the start that the said law clearly provides for insufficient or no finance for certain needs (objectives) by not providing at the same time for any other (alternative) sources of financing, where the said sources of financing, under the Constitution, may be provided for certain needs, and where such insufficient financing or the absence of such financing is clearly in conflict with the welfare of the nation, the interests of society and the State of Lithuania, and clearly denies the values entrenched in and defended and protected by the Constitution (the Constitutional Court’s ruling of 21 December 2006).

The Constitutional Court has held in its acts on more than one occasion that the Seimas is bound not only by the Constitution, but also by its own laws. Thus, while considering and approving a draft state budget, the Seimas must follow the laws that imply a certain amount of estimated state revenue and expenditure, i.e. it must follow the tax laws and other laws that create the preconditions for planning and collecting the revenue of the state budget, as well as the laws determining state financial obligations and relevant planned state budget expenditure. The Constitutional Court has noted that, under the Constitution, the legislature, when passing a law or another legal act the implementation of which requires funds, must provide for the funds necessary for implementing such a law or another legal act; under the Constitution, the legislature may not create any such legal situation where, after passing a law or another legal act the implementation of which requires funds, such funds are not allocated or the allocation thereof is not sufficient (the Constitutional Court’s rulings of 13 December 2004, 21 December 2006, and 29 June 2010).

The Government executes laws (Item 2 of Article 94 of the Constitution); therefore, it is evident that, while preparing a draft state budget, it must also invoke the laws that affect the amount of planned state revenue and expenditure. As held in the Constitutional Court’s ruling of 14 January 2002, a draft state budget prepared by the Government must provide for funds necessary for the implementation of laws.

Since the Government, when preparing a draft state budget, and the Seimas, when considering and approving it, are bound by valid laws that affect the amount of planned state revenue and expenditure and, at the same time, have the duty to predict the tendencies in the development of the economy of the state, to assess the needs and possibilities of society and the state, it may become necessary to amend such laws correspondingly. It needs to be noted that, if amendments to such laws established certain duties or limitations with respect to persons, regard must be paid to the constitutional requirement to provide for a sufficient vacatio legis, i.e. enough time should be left before the entry into force of those amendments (the beginning of the application thereof) so that the interested persons could properly prepare for them. In this context, it needs to be mentioned that, in the course of making amendments (establishing new taxes, increasing the existing ones, etc.) exerting a decisive influence on the state budget revenue, this fact is of special importance, since a sufficient vacatio legis in the sphere of tax law is an important guarantee that persons (first of all, taxpayers) would be able not only to familiarise themselves with new requirements of tax laws in advance, but also to adapt their property interests and
perspectives of economic activity to the said requirements. Thus, while preparing a draft state budget and considering it, it is necessary, among other things, to assess whether, prior to the approval of the state budget at the Seimas, relevant amendments should be made to tax laws and other laws that affect state revenue and expenditure where the constitutional requirement for a sufficient *vacatio legis* is applicable to the entry into force of such laws.

All this implies that, when account is taken of the constitutional principle of responsible governance, the preparation of a draft state budget should be started on the day that would make it possible, if need arises, to adopt the necessary amendments of the aforesaid laws on time. A deviation from these requirements might be allowed only in exceptional circumstances if this is justified by an important public interest.

**The transfer of state-owned property into the ownership of other subjects (*inter alia*, privatisation)**

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

Under the Constitution, the state, when regulating economic activity, must ensure that state property is managed in such a manner that there would be no contradiction to the requirement, consolidated in Paragraph 3 of Article 46 of the Constitution, that the state must regulate economic activity so that it serves the general welfare of the nation (the Constitutional Court’s rulings of 24 January 1996 and 2 March 2009).

[…]

The Constitutional Court has held on more than one occasion that it is not permitted to establish any such legal regulation according to which property that belongs to the state by right of ownership would be transferred into the ownership of other subjects in order to satisfy the interests or needs of only one social group or separate persons where this would not serve the public interest, the needs of society, or the welfare of the nation (the Constitutional Court’s rulings of 30 September 2003, 8 July 2005, 5 July 2007, 23 November 2007, and 20 March 2008).

In the Constitutional Court’s jurisprudence, it has been held on more than one occasion that the implementation of the public interest, as an interest of society recognised by the state and protected by law, is one of the most important conditions for the existence and evolution of society itself (*inter alia*, the Constitutional Court’s rulings of 6 May 1997, 13 May 2005, 21 September 2006, and 6 January 2011).

The transfer of state-owned property into the ownership of other subjects (including privatisation) may be constitutionally justified only when this may provide larger benefits to society, when the purpose of such transfer is the satisfaction of important and constitutionally grounded needs and interests of society; such transfer (both repayable and non-repayable) would be constitutionally unjustified if it inflicted evident harm on society and violated the rights of other persons (the Constitutional Court’s rulings of 30 September 2003, 8 July 2005, and 23 November 2007).

[…]

The legislature, when paying regard to the Constitution and taking account of various factors, may establish the regime (conditions and procedure for the use) of the property that is transferred into the ownership of other subjects in order to continue to ensure the interests of society and the welfare of the nation and to implement the values consolidated in the Constitution (the Constitutional Court’s rulings of 30 September 2003 and 8 July 2005).

Not only laws adopted by the legislature for regulating the transfer of state-owned property into the ownership of other subjects (*inter alia*, the privatisation of such property), but also the decisions of executive power regarding the implementation of these laws, must serve the public interest and the general welfare of the nation.
[...] the legislative and executive state powers, when amending the regulation of economic activity related to privatisation, are not allowed to deny the public interest and the requirements stemming from Article 46 of the Constitution (inter alia, Paragraph 3 thereof, under which the state regulates economic activity so that it serves the general welfare of the nation), as well as the constitutional principle of responsible governance.

The regulation of economic activity in cases where, inter alia, legal acts related to privatisation are adopted may be linked to the implementation of the rights and legitimate interests of various economic subjects, shareholders, or creditors. The Constitution, inter alia, Article 46 thereof, as well as the constitutional principle of responsible governance, gives rise to the duty of the legislature, when it regulates the relations of privatisation, to precisely define the powers of employees and officials of state and municipal institutions and to determine their responsibility. Decisions adopted by institutions of executive power in the area of privatisation (especially those through which certain previous decisions establishing particular obligations are amended) must be rationally reasoned and the impact of such decisions on, inter alia, the economy of this country and the finances of the state must be properly assessed. The said decisions may not be arbitrary.

[...] It needs to be emphasised that such practice of adopting resolutions by the Government is defective that ignores the requirements (stemming with respect to the institutions of executive power from Article 46 of the Constitution and the constitutional principle of responsible governance) that decisions adopted in the area of privatisation (particularly those through which certain previous decisions establishing particular obligations are amended) must be rationally reasoned and that the impact of such decisions on, inter alia, the economy and finances of the state must be properly assessed. No cases may be tolerated where the said government resolutions perfunctorily approbate such privatisation agreements (amendments thereto) the content of which is not known to the public and which fail to concretely specify any circumstances [...].
Main findings
The Constitutional Court of the Republic of Moldova (hereinafter — “the Court”) declared as unconstitutional the provisions of the Law on fighting extremist activity, that defined extremist activity as “dispalying, making, spreading, and holding for public broadcasting of fascist attributes or symbols, national-socialist (Nazi) or an extremist organisation, as well as the attributes or symbols created by the stylisation of the fascist, national-socialist (Nazi) symbols or symbols of an extremist organisation that can be confused with them.”

Facts
On 21 February 2003, the Parliament of the Republic of Moldova adopted the Law on fighting extremist activity. It provided for measures to counter extremist inclinations.

A Member of Parliament lodged an application with the Court on the constitutional review of Article 1.b of the Law No 54 of 21 February 2003 on fighting extremist activity.

In this case, the Court examined whether the challenged provision is aimed at limiting the freedom of association of organisations using “attributes or symbols that can be confused with the Nazi attributes or symbols.” Given that the use of these attributes or symbols amounts to expressing an opinion in the form of symbolic speech, the prohibition directly refers to the freedom of expression. Therefore, freedom of association is indirectly affected by limiting the freedom of expression.

Reasoning
The Court underlined that the freedom of expression is one of the fundamental elements of a democratic society and a condition for progress and personal fulfilment. The Constitution guarantees to every person, by Article 32, the right to freely express themselves in public through words, images or any other means possible.

Freedom of expression is not an absolute right, as it may be subject to restrictions provided by Article 54 of the Constitution. Also, freedom of expression may be susceptible to restrictions based on special provisions imposed by Paragraphs 2 and 3 of Article 32 of the Constitution. In this connection, the constitutional provision states that exercising the freedom of expression may not harm the honour, dignity or the rights of other people to hold and express their own opinions or judgements. Furthermore, the constitutional provision allows public authorities to forbid and prosecute all actions aimed at denying and slandering of the State and people, instigation to sedition, war of aggression, national, racial or religious hatred, incitement to discrimination, territorial separatism, public violence, or other manifestations encroaching upon constitutional order.
In its case law, the European Court of Human Rights established that, although the freedom of expression may be subject to a number of exceptions, they “should be narrowly interpreted” and “the necessity for any restrictions must be convincingly established” (see Observer and Guardian v the United Kingdom, judgment of 26 November 1991, § 59).

Also, the European Court of Human Rights established that measures that restrict the freedom of expression, other than those applied in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain opinions may appear to the authorities – do a disservice to democracy and often even endanger it (see Sergey Kuznetsov v Russia, judgment of 23 October 2008, § 45).

In the same context, Article 11 of the European Convention on Human Rights provides that the freedom of assembly or association may also be subject to restrictions necessary for national security, public safety, prevention of disorder or crime, protection of health or morals or the rights and freedoms of others, to the extent that these limitations do not affect the very existence of the law.

The Court pointed out that, under Article 4 of the Constitution, constitutional provisions regarding the rights and freedoms are interpreted and applied in accordance with the covenants and treaties to which the Republic of Moldova is party. In this respect, the provisions of Paragraph 2 of Article 23 and Article 54 of the Constitution, requiring the state to publish and to make accessible all laws and to guarantee that the exercise of the rights and freedoms is not subject to any restrictions other than those prescribed by law, must be interpreted in the light of the criteria imposed by the European Court of Human Rights.

Thus, the condition of accessibility imposes a requirement that legal texts are accessible to the applicant (see Silver and Others v the United Kingdom, judgment of 25 March 1983, §§ 87–88). If invoking texts and rules supplementing the broad language of a primary and public norm, these shall be accessed by the applicant.

The condition of sufficient precision or predictability implies the existence of a detailed legal provision referring to the subject under discussion (see Kruslin v France, judgment of 24 April 1990, § 27). It requires a more rigorous analysis of the rule of law. The European Court of Human Rights ruled that the level of precision required of the domestic legislation “depends to a considerable degree on the content of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed” (see Chorherr v Austria, judgment of 25 August 1993, § 25). The accuracy test requires that a law that confers a discretion must indicate the scope of that discretion (see Silver and Others v the United Kingdom, judgment of 25 March 1983, § 88) – the European Court of Human Rights held that “the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”

A discretionary power that is not delimited, even if subject to judicial review in formal terms, does not pass the test of foreseeability (see Ostrovar v Moldova, judgment of 13 September 2005, § 98, §§ 105–108). The same applies for unlimited discretion of the courts of law.

Referring to the challenged provision that restrictions regarding freedom of conscience and of expression are laid down in the context of public propagation and demonstration of some attributes/symbols that are so similar that it could amount to confusion with Nazi attributes or symbols.

The Court found that the challenged provision is accessible to the general public, given that the Law No 54 of 21 February 2003 was published in the Official Gazette No 56-58 of 28 March 2003. This finding is motivated by the presumption of people’s awareness of the law, which stems from the general legal principle of nemo censetur ignorare legem.
At the same time, the Court could not ignore that in the event of noncompliance with the challenged provision, Paragraph 6 of Article 6 of the Law No 54 of 21 February 2003 creates the possibility for the court to deliver an order on cessation or suspension of activity of public or religious associations or of another organisation. The application of these provisions amounts to a criminal sanction, given the nature, purpose and severity of the penalties provided for therein.

The Court noted that the legislature must be particularly accurate, clear and correct with regard to criminal matters, as required by the principle of *nulla poena sine lege*, enshrined in Article 7 of the European Convention on Human Rights.

The Court noted that the entire wording of Article 1(b) of the Law No 54 of 21 February 2003 on fighting extremist activity is formulated in an imprecise and unclear manner, granting the courts extremely wide discretion, a fact that generates court judgments with diametrically opposed interpretation. Under such circumstances, the uncertainty of the legal situation affects the people who, out of different reasons, want to use attributes or symbols similar to Nazi ones that could amount to confusion.

Inexistence of an exhaustive list of Nazi attributes and symbols in the law, as well as attributes and symbols that are similar to these make the challenged normative provisions a regulation that lacks sufficient specification.

Thus, the formulation “attributes or symbols similar to Nazi ones that could amount to confusion” has led to a state of incertitude under the following aspects:

1. lack of definitions or descriptions of Nazi attributes and symbols in the law;
2. lack of delimitation of the margin of discretion regarding the “similarity that could amount to confusion” with Nazi attributes or symbolic.

The Court pointed out that identification of “attributes and symbols similar to confusion with the Nazi attributes and symbols” is contrary to the principle of prohibition of the analogy or extensive interpretation in criminal matters if this is a disadvantage for the accused person. These attributes or symbols may be determined in an arbitrary manner *ad casu*.

The Court noted that, due to the lack of a precise list or definition of Nazi attributes and symbols in Article 1(b) of the Law No 54 of 21 February 2003, its provisions become imprecise and unclear, thus not allowing citizens to understand which symbols similar to the Nazi ones are forbidden.

At the same time, the Court noted that Article 1(b) of the Law No 54 of 21 February 2003 in conjunction with Paragraph 6 of Article 10 of the same law may be interpreted, given the ambiguity of the phrase “public propagation and demonstration of Nazi attributes or symbols, of attributes and symbols that can amount to confusion with Nazi attributes or symbols”, that the mere use or demonstration of symbols brings in criminal liability. As a matter of fact, according to Paragraph 6 of Article 10, persons guilty of illegal preparation, spreading or storing for further broadcasting of above-mentioned materials shall be held criminally liable or subject to contravention/administrative liability.

In its Judgment No 12 of 4 June 2013, § 39, on the constitutional review of provisions on banning communist symbols and the promotion of totalitarian ideologies, the Constitutional Court of Moldova held, referring to the judgment of the European Court of Human Rights in the case of *Vajnai v Hungary* of 8 July 2008, that “[…] potential propagation of communist totalitarian ideology […] cannot be the sole reason to limit the use of a symbol, especially one with several meanings, by way of criminal sanction. The mere display or use of the symbol […] with no known totalitarian ambitions, cannot be equated with dangerous propaganda”.

In the same context, the European Court of Human Rights established that, to justify the interference with the defendant’s rights, the Government has to prove that the sign used by the defendant is identified exclusively with totalitarian ideas (see *Fratanoló v Hungary*, No 29459/10,
Relevant jurisprudence of the Constitutional Court of the Republic of Moldova

judgement of 3 November 2011, § 27). In this case, the European Court of Human Rights mentioned that, assuming that the displayed symbol by the defendant has multiple meanings – i.e. may be viewed as a historical symbol and, at the same time, as reminiscent symbol of the Nazi party of Hungary only in a thorough examination of the context when these offending expressions are used, – an essential distinction may be traced between shocking and abusive expressions protected by Article 10 and those that lose the right to be tolerated in a democratic society. Showing negative emotions or feelings of resentment in the absence of intimidation cannot represent an imperious social necessity in the light of the provisions of Paragraph 2 of Article 10 of the Convention.

Having regard to the case law of the European Court of Human Rights, the Court found that the public display of symbols prohibited by national law in the absence of other actions that show support for totalitarian ideas cannot be equated with promoting totalitarian ideologies dangerous for society.

In conclusion, the Court noted that Article 1(b) of the Law No 54 of 21 February 2003 did not satisfy the conditions of Articles 32 and 40 in conjunction with Articles 23 and 54 of the Constitution and represents a restriction of freedom of expression and freedom of association.

JUDGMENT OF 12 DECEMBER 2017
Party membership ban on the President of Moldova

Main findings
The constitutional right of citizens to freely associate in parties and other social-political organisations is not absolute. It may be subject to restrictions as prescribed by law.

The Electoral Code bans the President of Moldova from holding membership of a political party. The provision aims to prevent the President from promoting party political interests. Within the constitutional architecture, the President is a neutral arbiter between state powers, society and political parties. As such, the President is obliged to act in the interests of society as a whole and not for the benefit of only a part of it.

Facts
On 12 December 2018, the Constitutional Court of the Republic of Moldova (hereinafter – the Court”) performed constitutional review, upon the request of an MP, of Paragraph 2 of Article 112 of the Election Code reading as follows: “Prior to the validation of the office, the candidate elected to the position of President of the Republic of Moldova shall submit to the Constitutional Court a confirmation of the fact that s/he is not a member of any political party and does not hold any other public or private office.” The applicant challenged, in particular, that the incompatibility instituted by the law is contrary to the constitutional right to association in political parties.

Reasoning
General principles
Having examined the case files and having heard the arguments of the parties, the Court held that, according to Paragraph 1 of Article 41 of the Constitution, citizens can freely associate in parties and other social-political organisations. This contributes to defining and conveying the political will of citizens. Political rights of citizens are also a condition to be met and a safeguard for the functioning of democracy. Therefore, pluralism and political parties are essential in a democratic society.
At the same time, the Court pointed out that the freedom of association is not absolute, it being subject to restrictions under the conditions provided for by the law, although not in a limitative manner. The Court thus noted that the limitations imposed on the right to associate in political parties are expressly governed by constitutional provisions and refer to:

1. the purposes or activity of political parties, and
2. the quality of persons capable to acquire the status of party member.

The Court held that, according to Paragraph 7 of Article 41 of the Constitution: “Public office holders who may not join political parties are established by organic law.” Similarly, the European Convention on Human Rights allows the restriction of the freedom of association in respect of three categories of persons:

1. members of the armed forces,
2. police forces, and
3. state administration.

In this respect, the European Court of Human Rights has recognised the legitimacy of restricting political activity of certain public authorities, taking into account the need to ensure their political neutrality and to ensure the proper fulfilment of their obligations in an impartial manner, thus implying the equal and fair treatment of all citizens. As to the application the Court was presented with in this case, the Court underscored that, although it is a constitutional safeguard, freedom of association in parties shall be interpreted having in mind Paragraph 7 of Article 41 of the Constitution, which provides for a list of public office holders who may not join political parties to be laid down in an organic law, among them: judges of the Constitutional Court, judges of the courts of law, prosecutors, members of the Central Electoral Commission or of the Court of Accounts, president and vice-president of the National Authority for Integrity etc. Accordingly, the Court observes a number of constitutional and legal incompatibilities for the Head of State. Under Article 81 of the Constitution, the office of President of Moldova is incompatible with any paid office. At the same time, according to the challenged provision, the mandate of the President of the Republic is incompatible with membership in any political party (Article 112 para. (2) of the Election Code).

The role of “neutral power” of the President of Moldova

The Court held that the Opinion No 1 of 3 April 2008, invoked by the applicant, was examining an initiative to supplement Paragraph 1 of Article 81 of the Constitution with new provisions aimed at establishing the incompatibility of the position of President of Moldova with the status of member of a party. Hence, the aforementioned Opinion was delivered in respect of the initiative to supplement the Constitution with an interdiction already admissible by virtue of Paragraph 7 of Article 41.

In that context, the Court held that Paragraph 7 of Article 41 of the Constitution allows for certain categories of public offices to be banned from party membership by organic law. Therefore, regulation of such incompatibilities by other constitutional provisions is rather superfluous. Moreover, following the Opinion delivered in 2008, the Court has reconsidered its own case law when issuing its Judgment No 32 of 29 January 2016, its Judgment No 2 of 24 January 2017, and its Judgment No 24 of 27 July 2017. The Court noted that, in the above-mentioned judgments, it held that, following the taking of the oath, the President of the Republic of Moldova undertakes a legal commitment before the entire nation of the Republic of Moldova. Thus, the President of the Republic must prove his/her impartiality and political neutrality. Concurrently, in its Judgment No 24 of 27 July 2017, the Court emphasised that the head of state plays the role of a neutral arbitrator, or a neutral power, being detached from political parties. The president is an important actor of the political system; however, he is not a political partisan.
The Court did not accept the argument of the applicant that the President of the country should be allowed to hold the membership of a party, similarly to members of Parliament and Government. In this regard, the Court noted that they are in different legal situations, and the criterion of “political neutrality” cannot be applied to the members of Parliament and Government in the same manner as it is applied to the President of the country, given that the members of Parliament and the members of the Government by definition cannot be politically neutral (see mutatis mutandis the ECtHR judgment of 16 March 2006 in the case of Ždanoka v Latvia [GC]).

The Court, therefore, held that the President of Moldova is obliged to act in the interests of the entire society, and not for the benefit of only a part thereof, of a political group or a party. For these reasons, the President of the Republic of Moldova cannot be a member of any political party and cannot promote in any way the interests of a political party. Thus, the Court held that the ban imposed on the President of Moldova to hold the membership of a political party falls within the permissible limits of restriction of the right to associate in political parties and is, therefore, compatible with Paragraphs 1 and 7 of Article 41 of the Constitution.

This chapter provides summaries of the relevant acts of the Constitutional Court

THE RULING OF 15 MARCH 2017
On criminal liability for illicit enrichment

In this ruling, having investigated the case subsequent to the petitions of the Supreme Court of Lithuania, the Vilnius Regional Court (Vilniaus apygardos teismas), the Šiauliai Regional Court (Šiaulių apygardos teismas), the Marijampolė District Local Court (Marijampolės rajono apylinkės teismas), and the Joniškis District Local Court (Joniškio rajono apylinkės teismas), the Constitutional Court declared Paragraph 1 of Article 1891 of the Criminal Code (CC), which provides for criminal liability for illicit enrichment, to be not in conflict with the Constitution. Under Paragraph 1 of Article 1891 of the CC, a person who holds by right of ownership property whose value exceeds 500 minimum subsistence levels (MSLs) (18 830 euros), while being aware or having to be and likely to be aware that this property could not have been acquired with legitimate income, is punished by a fine or by arrest, or by the deprivation of liberty for a term of up to four years.

According to the petitioners, the impugned legal regulation provides for a disproportionate, inexpedient, and ineffective legal liability measure, which imposes a disproportionate limitation on the ownership rights of persons; under the impugned legal regulation, in determining the guilt of a person, it is assumed that his/her income has been illegal and the burden of proof is shifted to the accused; thus, the principle of the presumption of innocence and the prohibition on compelling anyone to give evidence against themselves are violated; the impugned legal regulation is contradictory, vague, and ambiguous; therefore, it precludes the possibility of formulating a charge in such a manner that counsel for the defence would be fully aware of its actual and legal ground in order to effectively challenge this charge; consequently, the right of a person to defence is violated; relating the application of the impugned legal regulation to the possession, but not the acquisition of this property after the entry into force of this regulation, the constitutional prohibition on the retroactive effect of a criminal law may be violated; the impugned legal regulation also creates the preconditions for violating the constitutional prohibition on punishing twice for the same offence, since not only criminal liability may be applied for the acquisition of property and failure to pay taxes on it, but also a fine may be imposed under the Law on Tax Administration.

The Constitutional Court noted that, under the Constitution, the criminalisation of concrete acts and the differentiation of criminal liability for them is, first of all, a matter of the criminal policy pursued by the state, which is decided by the legislature by using its wide discretion and taking into account the dangerousness and scale of the said acts, the priorities of crime prevention, as well as other important circumstances, but without violating the Constitution and the imperatives arising therefrom. Thus, even though the legislature must evaluate in every concrete case the expediency of declaring a concrete act as a criminal one by assessing at the same time what results may be achieved by means of other measures, as such, the mere existence of doubts as to the expediency of criminalising a certain act or as to the effectiveness of such a legal regulation does not give grounds for questioning the compliance of this legal regulation with the Constitution, unless it transpires that the same legal regulation at the time of its consolidation in legal acts was clearly directed against the welfare of the nation, the interests of the State of Lithuania and its society, and clearly denied the values consolidated in and defended and protected by the Constitution (such a fact has not been established in this case).

The Constitutional Court held that, when implementing the criminal policy pursued by the state, the legislature has declared illicit enrichment as a dangerous criminal act and prohibited it by Paragraph 1 of Article 1891 of the CC, seeking to make economically not viable
the commission of crimes related to corruption, property, economy, finance, as well as other selfish crimes, and to prevent such acts and damage inflicted on the state and society. Thus, the legislature has implemented its wide discretion to choose the norms of a particular branch of law in order to define certain violations of law and to impose concrete sanctions for these violations. Having assessed the purpose of the impugned legal regulation, the dangerousness of illicit enrichment, and the sanction imposed for this crime in Paragraph 1 of Article 1891 of the CC, the Constitutional Court held that there is no ground for stating that, as a legal measure, criminal liability established for illicit enrichment is disproportionate.

Under the Constitution, the right of ownership is not absolute, it may be limited by law in pursuit of legitimate aims by paying regard to the constitutional principle of proportionality; the ways of acquiring the right of ownership may be varied ones; however, they may not be in conflict with the requirements that stem from the Constitution, among others, with the principles of justice and good faith. Thus, having held that Paragraph 1 of Article 1891 of the CC does not violate the constitutional principle of proportionality, there is no ground for stating that this provision disproportionately limits the rights of ownership.

In this ruling, the Constitutional Court also held that Article 1891 of the CC does not regulate the procedure for proving the criminal act provided for therein. This procedure is regulated under the norms of the Code of Criminal Procedure by which the prosecutor is obliged to prove the commission of a crime, while the court must investigate the case comprehensively, assess evidence, and substantiate its judgment with this evidence. Implementing his/her right to defence, a suspect (accused person) has the right to give evidence and challenge the suspicions (charges) brought against him/her; however, the suspect (accused person) is not obliged to prove the fact that the criminal act of illicit enrichment has not been committed. Thus, the legal regulation laid down in Paragraph 1 of Article 1891 of the CC does not shift the burden of proof to a person suspected of (charged with) illicit enrichment, such a person is not compelled to give evidence against himself/herself, and the principle of the presumption of innocence is not violated.

Responding to the argument of the petitioners that the impugned legal regulation violates the right of persons to defence, since its vagueness precludes the possibility of formulating a charge, due to which counsel for the defence cannot effectively challenge it, the Constitutional Court noted that Paragraph 2 of Article 190 of the CC clearly provides that legitimate income is income derived from activities not prohibited by legal acts, irrespective of whether or not it has been accounted for in accordance with the procedure laid down by legal acts, whereas the impugned legal regulation makes it clear that a person may be held criminally liable for illicit enrichment provided that he/she has committed this crime intentionally or as a result of reckless criminal negligence; illicit enrichment due to reckless negligence is only possible when a person accepts property whose value exceeds 500 MSLs where this property could not have been acquired with legitimate income of other persons. Thus, according to the Constitutional Court, the legal regulation laid down in Paragraph 1 of Article 1891 of the CC does not violate the requirement, stemming from the principle of a state under the rule of law, for the clarity of a legal regulation or the right of a person to defence and the right to the due court process.

Having assessed whether the legal regulation established in Paragraph 1 of Article 1891 of the CC violates the constitutional prohibition on the retroactive effect of a criminal law, the Constitutional Court noted that this regulation applies only in cases where a person acquired certain property as ownership not earlier than on the day (11 December 2010) when Article 1891 of the CC came into force; the acquisition by a person of the above-mentioned property before the specified date where this person holds (held) it after the entry into force of Article 1891 of the CC means that he/she may not be held liable under this article. Since the impugned and related
legal regulation is to be understood exclusively in this way, there are no legal grounds for stating that the impugned legal regulation has established the retroactive effect of a criminal law.

At the same time, the fact that a person who acquired certain property before the entry into force of Article 1891 of the CC may not be held criminally liable under the same article does not mean that state institutions and officials are released from the duty to investigate other criminal acts or other violations of law if elements of such acts or violations are found.

According to the Constitutional Court, the legal regulation laid down in Paragraph 1 of Article 1891 of the CC does not violate the constitutional prohibition on punishing twice for the same offence, either. As noted in the ruling, as such, this legal regulation and the one established in the Law on Tax Administration do not imply that illicit enrichment and a violation of tax laws are identical things; the fact whether the said things are identical can be established only in the course of considering concrete criminal cases and cases of tax law violations; consequently, the establishment whether illicit enrichment and a violation of tax laws are identical things is a matter of the application of law.

In view of the above arguments, the Constitutional Court ruled Paragraph 1 of Article 1891 of CC to be not in conflict with Articles 23 and 31 of the Constitution and the constitutional principle of a state under the rule of law.

THE RULING OF 4 JULY 2017
On exempting priests from mandatory military service

By this ruling, having considered the case subsequent to the petition of the Vilnius Regional Administrative Court, the Constitutional Court declared Item 7 of Article 3 of the Law on National Conscription (wording of 23 June 2011), insofar as priests of the religious communities and associations considered traditional in Lithuania and recognised by the state were exempted from mandatory military service, to have been in conflict with Article 29 and Paragraph 2 of Article 139 of the Constitution.

The Constitutional Court noted that, under Article 139 of the Constitution, each citizen of the Republic of Lithuania has the right and duty to defend the State of Lithuania against a foreign armed attack and must perform military or alternative national defence service according to the procedure established by law. These duties are the only duties of a citizen to the state that are expressis verbis consolidated in the Constitution and arise from the citizenship of the Republic of Lithuania as a special legal interrelationship between the state and its citizens. The constitutional duty of citizens, which is consolidated in Paragraph 2 of Article 139 of the Constitution, to perform military or alternative national defence service is not an objective in itself— it is directly related to the duty, consolidated in Paragraph 1 of the same article, to defend the state against a foreign armed attack and, in a certain respect, it is also related to the right of citizens, consolidated in Paragraph 2 of Article 3 of the Constitution, to resist anyone who encroaches on the independence, territorial integrity, and constitutional order of the state. In order that citizens who have the constitutional duty to defend the state against a foreign armed attack could properly implement this duty, they must be well-prepared for that; such preparation is ensured, inter alia, by military service.

According to Paragraph 2 of Article 139 of the Constitution, alternative national defence service may be assigned instead of military service. The establishment of the constitutional institution of alternative national defence service is connected with the constitutionally guaranteed freedom of thought, religion, and conscience. In this ruling, the Constitutional Court noted that, under Paragraph 2 of Article 139 of the Constitution as interpreted in conjunction
with Article 26 thereof, which establishes freedom of thought, religion, and conscience, persons who are not able to perform military service due to their religious or other convictions have the right to perform alternative national defence service instead of military service in accordance with the procedure established by law. In regulating the organisation of national defence, the legislature is obliged to provide for the conditions for implementing this constitutional right by citizens, including the length of alternative national defence service and the procedure for its performance. In doing so, the legislature has wide discretion but must not provide for any such conditions for performing alternative national defence service that would render this service ineffective or inconsistent with its essence; the legislature must also establish such a procedure for assigning citizens to perform alternative national defence service that would allow assessing the requests of citizens to perform this service in terms of their validity.

In this context, the Constitutional Court pointed out that, in view of its content, Article 26 of the Constitution is linked with Articles 27 and 28: convictions, practised religion, or belief may not serve as a justification for a crime or failure to observe laws (Article 27) and, while implementing his/her rights and exercising his/her freedoms, everyone must observe the Constitution and laws and must not restrict the rights and freedoms of other people (Article 28). Among other things, this means that, on the grounds of his/her convictions, practised religion, or belief, no one may refuse to fulfil constitutionally established duties, inter alia, the duty of a citizen to perform military or alternative national defence service, or demand the exemption from these duties.

While interpreting Paragraph 2 of Article 139 of the Constitution in its ruling of 24 September 2009, the Constitutional Court held that a law may establish such conditions for exemption from mandatory military service that would be related to objective circumstances due to which the citizens cannot perform this service (age, state of health, etc.). In the present ruling, the Constitutional Court added that, under Paragraph 2 of Article 139 of the Constitution, a law may establish no such conditions for exemption from the constitutional duty of citizens to perform military service or alternative national defence service that would be unrelated to objective circumstances due to which the citizens cannot perform this duty; failure to comply with this requirement could deny the said constitutional duty of citizens and, at the same time, would prevent the establishment of preconditions for the proper fulfilment of the constitutional right and duty of each citizen to defend the state against a foreign armed attack.

The Constitutional Court also noted that, under Paragraph 2 of Article 139 of the Constitution, the legislature may provide for the possibility of deferring the fulfilment of the constitutional duty of citizens to perform military or alternative national defence service in cases where the citizen is temporarily unable to perform this service due to the important reasons specified in the law or the important interests of the person, family, or society might be injured if such service were not deferred at a given time. Once the reasons for deferring service are no longer applicable, the citizen must perform military or alternative national defence service.

In regulating the relations connected with military or alternative national defence service, including the assignment of alternative national defence service instead of military service, exemption from the duty to perform military or alternative national defence service, and the deferral of the fulfilment of this constitutional duty, the legislature must observe the requirements stemming from the Constitution, among other things, the constitutional principles of the equality of the rights of persons, proportionality, reasonableness, and justice.

As it was noted in the explanations submitted by the representatives of the Seimas, the party concerned, in establishing the impugned legal regulation, the legislature had paid regard to the special (exclusive) status of traditional churches and religious organisations in
Lithuania as provided for under Paragraph 1 of Article 43 of the Constitution. In this respect, the Constitutional Court emphasised that a different constitutional status between the churches and religious organisations that are traditional in Lithuania and other churches and religious organisations as collective legal entities does not deny the prohibition, enshrined in Article 29 of the Constitution, on discriminating against individuals and on granting them privileges, among other things, on the grounds of religion; thus, under the Constitution, the fact that certain churches and religious organisations are considered traditional does not provide a basis for treating their members, including priests, differently from other citizens in terms of the fulfilment of their constitutional duties.

The Constitutional Court has held in its previous jurisprudence that the principle of the separateness of the state and the church, which is entrenched in the Constitution, is the basis for the secularity of the State of Lithuania, its institutions, and their activities; this principle, together with the constitutionally consolidated freedom of convictions, thought, religion, and conscience, as well as the constitutional principle of the equality of the rights of persons and other constitutional provisions, determines the neutrality of the state in matters of worldview and religion; the fact that the State of Lithuania and its institutions are neutral as regards the matters of worldview and religion means the separation of the areas of the state and religion, as well as the separation of the mission, functions, and activities of the state from those of churches and religious organisations. It was noted in the ruling that the neutrality and secularity of the state also means that, under the Constitution, religion professed by a person does not constitute a basis for exempting the person from the constitutional duties of a citizen to the state, including the duty to perform military or alternative national defence service, consolidated in Paragraph 2 of Article 139 of the Constitution.

Assessing the impugned legal regulation, under which exemption from the constitutional duty of a citizen to perform military or alternative national defence service is granted by virtue of a certain social status of the person – being a priest of a religious community or association that is considered traditional in Lithuania and is recognised by the state, the Constitutional Court noted that the fact that a person is a priest of a church or religious organisation (i.e. holds a certain social status relating to the professed religion) is not related to any such circumstances due to which the citizens would be objectively unable to perform the duty in question and which could constitutionally justify their exemption from this duty, especially in view of the fact that, under the Constitution, persons who are unable to perform military service due to their religious or other convictions have the right to perform alternative national defence service instead of military service, as well as that the fulfilment of the constitutional duty to perform military or alternative national defence service may be deferred due to important reasons. Consequently, under Paragraph 2 of Article 139 of the Constitution, the status of a priest of a church or religious organisation does not provide a basis for exempting the person from his constitutional duty of a citizen to perform military or alternative national defence service.

Thus, interpreting Paragraph 1 of Article 43 and Paragraph 2 of Article 139 of the Constitution systemically and taking account of the principle of the equality of the rights of persons under Article 29 of the Constitution and the constitutional principles of the neutrality and secularity of the state, the Constitutional Court noted in this ruling that a different constitutional status between the churches and religious organisations that are traditional in Lithuania and other churches and religious organisations as collective legal entities may not serve as a basis for constitutionally justifying the exemption of priests of the churches and religious organisations that are traditional in Lithuania from the constitutional duty held by them as citizens to perform military or alternative national defence service.
According to the Constitutional Court, the legal regulation authorising exemption from mandatory military service, i.e. from the constitutional duty of citizens to perform military or alternative national defence service, in the absence of any constitutionally justifiable basis violated the requirement, stemming from Paragraph 2 of Article 139 of the Constitution, that a law may establish only such conditions for exempting citizens from their constitutional duty to perform military or alternative national defence service that are related to objective circumstances due to which the citizens are unable to perform this duty; in addition, such a legal regulation led to a constitutionally unjustifiable difference of priests of the religious communities and associations considered traditional in Lithuania from other citizens; therefore, this legal regulation also violated the principle of the equality of the rights of persons under Article 29 of the Constitution.

THE DECISION OF 20 OCTOBER 2017
On the interpretation of the provisions of the acts of the Constitutional Court related to the prohibition of dual (multiple) citizenship

In this decision, subsequent to the petition of the Seimas, the Constitutional Court interpreted the provisions of its rulings of 30 December 2003 and 13 November 2006 and its decision of 13 March 2013: the provision of Article 12 of the Constitution that a person may be a citizen of the Republic of Lithuania and, at the same time, a citizen of another state only in individual cases provided for by law means that such cases established by law can be very rare (individual), that cases of dual citizenship must be particularly rare – exceptional, also that, it is not permitted to establish any such legal regulation under which cases of dual citizenship would be not particularly rare exceptions, but a widespread phenomenon; under the Constitution, also such an expansive interpretation of the provisions of the Law on Citizenship is impermissible, under which dual citizenship would be not individual, particularly rare exceptions, but a widespread phenomenon. The Court also interpreted the provision of the decision of 13 March 2013 according to which the specified provisions of the above-mentioned rulings mean that, unless amendments to the Constitution are made under the procedure specified therein, a law may not prescribe that citizens who departed from the Republic of Lithuania to reside in other states after the restoration of the independence of the Republic of Lithuania on 11 March 1990 and acquired citizenship of those states may be citizens of the Republic of Lithuania and another state at the same time.

The Constitutional Court was requested to interpret whether the changed factual circumstances, under the Constitution, had given rise to the preconditions for such a legal regulation under which citizens of the Republic of Lithuania could, at the same time, be citizens of the member states of the European Union (EU) or/and the North Atlantic Treaty Organisation (NATO).

The Constitutional Court stated that, according to the Constitution, as long as Paragraph 2 of Article 12 of the Constitution is not amended by referendum, the Seimas may not establish by law that citizens of the Republic of Lithuania who departed from the Republic of Lithuania after the restoration of the independence of the Republic of Lithuania on 11 March 1990 and acquired citizenship of a member state of the European Union and/or the North Atlantic Treaty Organisation may be citizens of the Republic of Lithuania and another state at the same time.

By arguing its decision, the Constitutional Court emphasised that, when the final acts of the Constitutional Court are interpreted, the official constitutional doctrine may not be modified and that the social and demographic changes that took place after the adoption of the final acts, as well as arguments of political expediency, may not serve as a basis for modifying the provisions of the official constitutional doctrine. Thus, while interpreting the provisions of its rulings of
30 December 2003 and 13 November 2006 and its decision of 13 March 2013, the Constitutional Court may not interpret the provisions of the official constitutional doctrine formulated in these legal acts in a different way and it may not deviate from other provisions of the reasoning and operative parts of these acts. In addition, social and demographic changes, as well as arguments of political expediency, may not serve as a basis for modifying the provisions of the official constitutional doctrine. Therefore, the circumstances specified in the petition of the Seimas, the petitioner, – the Republic of Lithuania became a member of the EU and NATO and a great number of the citizens of the Republic of Lithuania departed from Lithuania to reside in other countries and acquired citizenship of other states; the number of marriages of citizens of the Republic of Lithuania who departed to other states with citizens of other states has increased, and children born in these marriages also acquired citizenship of another state; as the United Kingdom has decided to exit from the EU, a lot of citizens of the Republic of Lithuania who reside there may seek to become citizens of the United Kingdom; and, if they become UK citizens, they would lose citizenship of the Republic of Lithuania, etc. – may not as such change the content of the regulation provided for in Paragraph 2 of Article 12 of the Constitution.

The Constitutional Court recalled that Paragraph 2 of Article 12 of the Constitution consolidates the general prohibition on holding citizenship of both the Republic of Lithuania and another state: “no one may be a citizen of both the Republic of Lithuania and another state at the same time”. However, this prohibition of dual citizenship consolidated in the Constitution is not absolute: under Paragraph 2 of Article 12 of the Constitution, a law may and must provide for individual cases when a person may be a citizen of both the Republic of Lithuania and another state at the same time. The wording “with the exception of individual cases provided for by law” of Paragraph 2 of Article 12 of the Constitution means that the law regulating citizenship relationships may establish only exceptional cases when a person may be a citizen of both the Republic of Lithuania and another state at the same time, i.e. the legal regulation must be such under which the cases of dual (multiple) citizenship would be an exception to the prohibition on this citizenship expressed by the formula “no one may” and not a rule denying this prohibition; under the Constitution, it is not allowed to establish such a legal regulation under which the cases of dual citizenship would be not particularly exceptional cases but a widespread phenomenon. In establishing the grounds for the acquisition of citizenship of the Republic of Lithuania and regulating of the procedure for the acquisition and loss of citizenship, the legislature has discretion. However, the legislature may not deny the nature and meaning of the institution of citizenship, it must pay regard to the constitutional requirement that a citizen of the Republic of Lithuania may at the same time be a citizen of another state only in individual cases established by law. Under the Constitution, the legislature may not follow the attitude that the cases of dual (multiple) citizenship need to be limited.

In the Constitutional Court’s decision of 13 March 2013, it is held that the legal regulation under which citizens of the Republic of Lithuania who departed from the Republic of Lithuania to reside in other states after the restoration of the independence of the Republic of Lithuania on 11 March 1990 and acquired citizenship of those states could be citizens of the Republic of Lithuania and another state at the same time would create the preconditions for dual (multiple) citizenship to be not a particularly rare exception, but a widespread phenomenon; thus, such a legal regulation would be incompatible with Paragraph 2 of Article 12 of the Constitution. In this case, the Constitutional Court noted that there is no ground to assess differently the possibility of establishing, by means of a law, a legal regulation under which the of dual (multiple) citizenship would be granted to the citizens of the Republic of Lithuania who departed to member states of the EU and/or NATO after the specified date and acquired citizenship of those states; on the
contrary, such a legal regulation would also create the preconditions for a large part of citizens of the Republic of Lithuania to hold simultaneously citizenship of other states, i.e. for dual (multiple) citizenship to be not a particularly rare exception, but a widespread phenomenon; such a legal regulation would also be incompatible with Paragraph 2 of Article 12 of the Constitution.

In this context, the Constitutional Court noted that the membership of the Republic of Lithuania in the EU and NATO and international obligations related to this membership, as well as the geopolitical orientation of the State of Lithuania that is consolidated in the Constitution, do not give rise to the obligation of the Republic of Lithuania to create the preconditions for acquiring dual (multiple) citizenship by the citizens of the Republic of Lithuania who departed to member states of the EU and/or NATO and acquired citizenship of those states. The Law of the European Union also does not impose any obligations on the member states to create, by means of a legal regulation, the conditions for their citizens to hold citizenship of other member states. The European Union respects the constitutional and legal traditions of its member states, including national constitutional traditions relating to the regulation of the relationships of dual (multiple) citizenship. It was also noted that the Constitutional Act on Membership of the Republic of Lithuania in the European Union does not regulate the relationships of citizenship of the Republic of Lithuania; therefore, the said act could not replace the provision of Paragraph 2 of Article 12 of the Constitution, which limits dual (multiple) citizenship, and it is immaterial for the interpretation of this provision.

In the decision, it was noted that, if the legislature follows the attitude that the limitation of dual citizenship is unnecessary, it must, first of all, review the relevant provisions of the Constitution, *inter alia*, Article 12 thereof, and do so by following the procedure established in the Constitution. Article 12 of the Constitution, which consolidates the bases for the legal regulation of the relationships of citizenship of the Republic of Lithuania, is in Chapter I “The State of Lithuania” of the Constitution; the provisions of this chapter are under particular constitutional protection: they may be altered only by referendum. The geopolitical orientation of the State of Lithuania may also serve as a criterion for reviewing Paragraph 2 of Article 12 of the Constitution.

The Constitutional Court refused to give its interpretation regarding other parts of the petition, as it assessed them as requesting an interpretation whether the established practice of the application of the legal regulation of the relationships of citizenship of the Republic of Lithuania is compatible with the Constitution and whether there is the possibility of establishing, by means of a law, a legal regulation of citizenship based on the revision (modification) of the provision of the official constitutional doctrine stating that it is not permitted to establish any such legal regulation under which cases of dual citizenship would be not particularly rare exceptions, but a widespread phenomenon as incompatible “with the legal practice that has developed in reality”.

THE CONCLUSION OF 19 DECEMBER 2017
On the actions of Seimas member Kęstutis Pūkas

In this case, subsequent to an inquiry submitted by the Seimas, the Constitutional Court assessed the constitutionality of the actions of Seimas member Kęstutis Pūkas against whom an impeachment case had been instituted. The Constitutional Court examined and evaluated the actions of Seimas member Kęstutis Pūkas specified in the conclusion of the Special Investigation Commission of the Seimas, by which Seimas member Kęstutis Pūkas had degraded the dignity of the persons holding the positions of his secretaries assistants and that of the persons applying
for these positions, interfered with their private life, and discriminated them. In this conclusion, the Constitutional Court held that, by these actions, Seimas member Kęstutis Pūkas had grossly violated the Constitution and breached the oath.

The Constitutional Court recalled the fact that, in a democratic state under the rule of law, all state institutions and officials must follow the Constitution and law. In order that the citizens – the national community – could reasonably trust state officials so that it would be possible to ascertain that all state institutions and all state officials follow the Constitution and law and obey them, and that those who do not obey the Constitution and law would not hold the office for which the confidence of the citizens – the national community – is needed, it is necessary to ensure a public democratic control over the activity of the state officials and their accountability to society. One of the forms of such public democratic control is the constitutional institute of impeachment. Under the Constitution, the Seimas may, by at least a 3/5 majority vote of all the members of the Seimas, remove from office the President of the Republic, justices of the Constitutional Court, justices of the Supreme Court, and judges of the Court of Appeal, as well as have the mandate of a member of the Seimas revoked if the Constitutional Court presents the conclusion that the person against whom an impeachment case has been instituted has grossly violated the Constitution and breached his/her oath, or if he/she is found to have committed a crime.

The duty of a member of the Seimas to respect constitutional human rights

In this conclusion, the Constitutional Court held that the requirements, arising from the oath of a member of the Seimas and the constitutional status of a member of the Seimas, to respect and uphold the Constitution and laws, to perform honestly the duties of a representative of the Nation, to act in the interests of the Nation and the State of Lithuania, and to refrain from conduct degrading the reputation and authority of the Seimas also determine the duty to respect the human rights entrenched in, and protected by, the Constitution and not to use the constitutional status of a member of the Seimas as a representative of the Nation to violate the constitutional rights and freedoms of other persons. The constitutional nature of the Seimas as the state institution through which the Nation exercises the supreme sovereign power and the peculiarities of the constitutional status of a member of the Seimas as a representative of the Nation determine the fact that the actions of a member of the Seimas that violate the constitutional rights or freedoms of other persons, especially if they are carried out using the constitutional status of a member of the Seimas, regardless of whether such conduct of a member of the Seimas is related to his/her parliamentary activities, can grossly violate the Constitution and breached the oath of a member of the Seimas, as well as degrade the reputation and authority of the Seimas – the representation of the Nation.

The Constitution, inter alia, Article 21 thereof, contains the prohibition on humiliating human dignity, as well as the duty of the state to ensure the protection and defence of human dignity. Dignity is an inalienable characteristic of a human being as the greatest social value. Every member of society has innate dignity. Only such a state that has respect for the dignity of every human being can be considered to be truly democratic. State institutions and officials have the duty to respect human dignity as a special value.

The dignity of a human being as a free personality is inseparable from the inviolability of his/her person, which is a necessary prerequisite for the expression of his/her freedom of physical activity, of his/her intellectual and creative freedoms, thus, also the expression of his/her free personality. An encroachment on the inviolability of the human person disturbs his/her physical, mental, or spiritual state; thus, human dignity as a special constitutional value is also violated.
Under the Constitution, the protection of human dignity is inseparable from the protection of the private life of a person; the guarantee of the inviolability of a person’s private life must be regarded as one of the elements of the constitutional protection of human dignity.

The prohibition, arising from Article 29 of the Constitution, on discrimination against persons on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views should also be considered to be an element of the constitutional protection of human dignity. If human rights are restricted on the aforementioned grounds, the dignity of a discriminated individual is degraded at the same time.

**Harassment is one of the forms of discrimination**

One of the forms of discrimination (including the degrading of human dignity), prohibited under Article 29 of the Constitution, is harassment, which is understood as offensive, unacceptable, or unwanted conduct that has the purpose or effect of violating a person’s dignity, or of creating an intimidating, hostile, humiliating, or offensive environment for him/her on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views, as well as other attributes such as disability, age, or sexual orientation. Harassment encroaches on a person’s physical or psychological integrity, among other things, disturbs his/her physical, mental, or spiritual state, restricts the expression of his/her freedom of physical activity, of his/her intellectual and creative freedoms, thus, also the expression of his/her free personality, and can make his/her relations with other persons more complicated. Harassment can lead to long-term or even permanent consequences that adversely affect a person’s private and social life. Thus, harassment violates the human rights to the protection of dignity and to the inviolability of the human person and of private life, as well as the right not to be discriminated against, which are protected under Paragraphs 1, 2, and 3 of Article 21, Paragraphs 1 and 4 of Article 22, and Article 29 of the Constitution.

Harassment based on gender is understood as unacceptable or unwanted conduct related to a person’s gender, which is expressed by physical, verbal, or non-verbal actions (by means of touch or gestures, verbally, in writing, or by means of pictures) and which, among other things, has the purpose or effect of violating a person’s dignity, or of creating an intimidating, hostile, humiliating, or offensive environment for him/her. The characteristic feature of sexual harassment, which is one of the forms of harassment based on gender, is conduct of a sexual nature seen as unwanted by a harassed person.

In order to identify sexual harassment, it is not necessary that a harassed person should clearly and categorically oppose such conduct where it is clear that this person found it unwelcome and objectively offensive; assessing whether certain conduct is to be considered harassment, as well as harassment based on gender (including sexual harassment), consideration must be given to the fact how the harassed person perceived such conduct (it is not necessary to establish that an individual who allegedly committed harassment did so with the purpose of violating a person’s dignity or of creating an intimidating, hostile, humiliating, or offensive environment for him/her). In the light of the said nature and consequences of harassment, including harassment based on gender and sexual harassment, and in view of the fact that, under Paragraph 4 of Article 22 of the Constitution, courts protect everyone from arbitrary or unlawful interference with his/her private and family life, as well as from encroachment on his/her honour and dignity, committed harassment may not be denied simply because it is denied by a person who allegedly committed it, but it is necessary to take into account all relevant circumstances in order to identify committed harassment.

In this conclusion, it was emphasised that, due to the discriminatory nature of harassment, which brings about the degradation of human dignity, as well as because of the consequences of
harassment, such conduct of a member of the Seimas that may be considered to be harassment inevitably undermines the reputation and authority of the Seimas – the representation of the Nation – and discredits state authority irrespective of whether the said conduct of a member of the Seimas is related to his/her parliamentary activity or the use of his/her constitutional status. Such conduct of a member of the Seimas that is discriminatory, degrades human dignity, and can also be regarded as harassment based on gender, as well as sexual harassment, should be considered to be a gross violation of the Constitution (that of the provisions of Paragraphs 1, 2, and 3 of Article 21, Paragraphs 1 and 4 of Article 22, and Article 29 thereof), as well as a breach of the oath of a member of the Seimas.

The assessment of the constitutionality of the actions of Seimas member Kęstutis Pūkas

Having evaluated the evidence collected and examined in this case, the Constitutional Court held that Seimas member Kęstutis Pūkas interacted in an uncivil and disrespectful manner with his female secretaries assistants at work and with the persons applying for these positions during job interviews; when talking to them, he did not refrain himself from picking intimate, disturbing, sex-related, and other exclusively personal topics, which were not related with the responsibilities of a secretary assistant of a member of the Seimas, but were connected, among other things, with the private life of these persons; he commented on their appearance and physical characteristics, he emphasised that his own social status was higher compared to the other employees or the women applying for the positions of his secretaries assistants, he made comments humiliating and degrading the women; he gave his secretaries assistants tasks of a personal nature, which were not related to parliamentary activities and direct responsibilities of a secretary assistant of a member of the Seimas; he invited only young women (girls) for job interviews for the position of a secretary assistant of a member of the Seimas, he gave preference to unmarried female candidates who did not maintain personal relations with anyone at the time, he made no attempt to find out whether the female candidates met the requirements set out in the job description for the position of a secretary assistant of a member of the Seimas, but only gave them disturbing and ambiguous proposals that were incompatible with job interview ethics; he met with the candidates applying for the position of his secretary assistant not only at his workplace, but also in his living quarters at the hotel of the Seimas. The testimony of the witnesses given in the case shows that the conduct of Seimas member Kęstutis Pūkas was seen by his secretaries assistants and the female candidates applying for this position as unwanted, unpleasant, and humiliating; such conduct was systematic and continuous.

According to the Constitutional Court, such actions of Seimas member Kęstutis Pūkas virtually correspond to the characteristics of harassment based on gender and sexual harassment and thus can be regarded as harassment based on gender and as sexual harassment. Even though Seimas member Kęstutis Pūkas asserted that he had not humiliated the above-mentioned persons, that he had not treated them in a disrespectful manner, and had not harassed them, the collected evidence did not confirm these statements of Seimas member Kęstutis Pūkas.

In view of this fact, in this conclusion, the Constitutional Court held that Seimas member Kęstutis Pūkas had disregarded the requirements, arising from the oath of a member of the Seimas and the constitutional status of a member of the Seimas, to respect and uphold the Constitution and laws, to refrain from conduct degrading the reputation and authority of the Seimas – the representation of the Nation, as well as not to violate the constitutional human rights and freedoms; in addition, Seimas member Kęstutis Pūkas had not followed the Constitution and the values protected by it, and had violated the laws. Thus, he had failed to act in the way that the oath taken by a member of the Seimas obliged and had discredited the reputation and authority of the Seimas as the representation of the Nation. The Constitutional Court recognised that Seimas...
member Kęstutis Pūkas had grossly violated the Constitution (the provisions of Paragraphs 1, 2, and 3 of Article 21, Paragraphs 1 and 4 of Article 22, and Article 29 thereof) and had violated the provisions of the Statute of the Seimas and the laws.

In view of the fact that, under the Constitution, impeachment does not constitute the application of criminal liability (although sometimes the same unlawful actions may incur both constitutional and other legal liability), this conclusion of the Constitutional Court results in the application of constitutional liability to Seimas member Kęstutis Pūkas, however, does not imply, *ipso facto*, the application of other liability to him.

*The requirements of fair legal proceedings applicable in impeachment proceedings*

The constitutional concept of impeachment implies fair legal proceedings, in which the priority is given to the protection of the rights of a person, which is guaranteed only if the proceedings are public, the parties to the proceedings enjoy equal rights, and the legal disputes, in particular, those regarding the rights of a person, are decided by ensuring that the person has the right and opportunity to defend these rights; in order that impeachment proceedings could be recognised to be in compliance with the principles of a state under the rule of law, these proceedings must be fair, which means that individuals must be equal both before the law and before the institutions carrying out impeachment, they must have both the right to be heard and a legally guaranteed opportunity enabling them to defend their rights; in a state under the rule of law, the right of persons to defend their rights is unquestionable; 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 requirement for fair legal proceedings gives rise to the duty of the legislature to establish a legal regulation that would create the preconditions for a member of the Seimas or a state official against whom impeachment is, or has been, instituted to defend his/her rights at all stages of impeachment proceedings.

However, these requirements for fair legal proceedings applicable to impeachment, under the Constitution, are not absolute.

*Limiting the publicity of impeachment proceedings*

In view of the fact that the values enshrined in the Constitution form a harmonious system and that neither of them can be denied or unreasonably restricted, the requirement for the publicity of impeachment proceedings that is aimed at ensuring the rights of an impeached person must be interpreted in the context of other constitutional values. For the protection of the private or public interest, among other things, in order to protect human dignity and the inviolability of private life, certain elements of proceedings before the Constitutional Court in the course of considering a case on the constitutionality of the actions of an impeached person (including the hearing of the Constitutional Court in which evidence is examined, witnesses are questioned, and court pleadings take place) may be not open to the public by a decision of the Constitutional Court. This is applicable *mutatis mutandis* at the beginning of, and in the course of carrying out, impeachment proceedings at the Seimas.

*Ensuring the rights of persons before the beginning of, and during, impeachment proceedings*

The requirement to enable a member of the Seimas or a public official against whom impeachment is about to be, or has been, instituted to defend his/her rights at all stages of the impeachment proceedings should also be interpreted in the context of other provisions of the official constitutional doctrine.
Under the Constitution, impeachment proceedings begin only after the Seimas adopts a resolution on the beginning in the Seimas of impeachment proceedings against a concrete person. Thus, actions preceding the beginning of impeachment, i.e. before the Seimas adopts such a resolution (where such actions include, for instance, the initiative of members of the Seimas to begin impeachment or the investigation of the reasonableness of the charges brought by them in the Special Investigation Commission formed by the Seimas or in another structural unit of the Seimas), do not constitute a stage of impeachment proceedings; therefore, in the course of such actions, a person against whom impeachment has not been instituted yet need not be given the same conditions for the protection of his/her rights as a person against whom impeachment has been instituted and is under way. Giving a person against whom impeachment may be instituted other conditions for the protection of his/her rights may also be based on the purpose of protecting the private or public interest, among other things, on the objective to protect human dignity and the inviolability of private life.

In its nature and essence, the Seimas is a political institution, whose decisions reflect the political will of the majority of the members of the Seimas and are based on political agreements and various political compromises. Therefore, the actions preceding the beginning of impeachment is a parliamentary procedure that cannot be regarded as a legal process *stricto sensu*: in the course of such a parliamentary procedure, the Seimas does not decide on the application of constitutional liability of a person, but only whether there is a basis for impeachment. This parliamentary procedure must be regulated in such a way that would ensure due process, which means, among other things, that a person against whom impeachment may be instituted must have a real opportunity to know what he/she is being accused of, to submit his/her explanations to the Seimas, or to a commission formed by the Seimas or another structural unit of the Seimas that investigates the reasonableness of the charges brought against the said person, or, at the sitting of the Seimas in which it is decided on whether to begin impeachment, to respond to the arguments on which the charges against this person are based.

Under the Constitution, only the Constitutional Court has the powers to decide whether the persons specified in Article 74 of the Constitution, against whom an impeachment case has been instituted, have grossly violated the Constitution; therefore, when ensuring that impeachment proceedings as a whole comply with the requirements of fair legal proceedings, the proceedings before the Constitutional Court become particularly significant. The rights of an impeached person are properly ensured in such a hearing of the Constitutional Court that is held in compliance with the principles of the right to defence, adversarial argument, and the equality of the rights of the parties, by giving a person against whom impeachment has been instituted and/or his/her representatives an opportunity to put forward their arguments concerning the evaluation of all significant evidence in deciding the issue of constitutional liability and by enabling the person concerned and/or his/her representatives to use other rights that are envisaged for the person concerned and/or his/her representatives.

Thus, under the Constitution, impeachment proceedings as a whole should be considered fair and appropriate if, in compliance with the requirements of due process, a member of the Seimas the issue of whose constitutional liability is being decided and/or his/her representatives are given an opportunity to defend their interests both at the hearing of the Constitutional Court and at the Seimas where, following the entry into force of the conclusion of the Constitutional Court that the concrete actions of the person against whom the impeachment case was instituted are in conflict with the Constitution, impeachment proceedings are continued in accordance with the procedure established by the Statute of the Seimas.
Ensuring the requirements for fair legal proceedings in the impeachment proceedings against Seimas member Kęstutis Pūkas

In this conclusion, the Constitutional Court held that, before the Seimas adopted a decision to begin impeachment proceedings, Seimas member Kęstutis Pūkas had had an opportunity to know, at the Seimas, what he had been accused of, and had been able to provide his explanations and respond to the arguments on which the accusations against him had been based.

When considering this case at the Constitutional Court, a closed hearing of the Constitutional Court was held in order to protect the dignity and inviolability of the private life of the persons who gave testimony at the same hearing, the rights of Seimas member Kęstutis Pūkas to defend his rights in the court were ensured by allowing him and his representatives access to the case material, giving him the right to be heard, either by himself or his representatives, and present explanations in the case, as well as the rights to submit requests, to make disqualification motions, to put questions to witnesses, to participate in court pleadings, and to have the last word.

In view of the fact that there was no violation of the requirement to ensure due process in the course of performing corresponding actions at the Seimas before the adoption of the resolution of the Seimas to begin impeachment, as well as the fact that the rights of Seimas member Kęstutis Pūkas to defence were ensured at the hearing of the Constitutional Court, the impeachment proceedings as a whole concerning the compliance of the actions of Seimas member Kęstutis Pūkas with the Constitution were fair and appropriate.

THE CONCLUSION OF 22 DECEMBER 2017
On the actions of Seimas member Mindaugas Bastys

In this case, subsequent to an inquiry submitted by the Seimas, the Constitutional Court assessed the constitutionality of the actions of Seimas member Mindaugas Bastys, against whom impeachment proceedings had been instituted. The Constitutional Court held that Seimas member Mindaugas Bastys had grossly violated the Constitution and breached his oath insofar as, in providing answers to the Questionnaire for persons who are candidates to obtain authorisation to handle or access classified information, specifically in replying to the question “Do you know (did you know) any persons who are working (worked) in the intelligence or security services or related institutions of other states? If so, provide information in this regard”, Mindaugas Bastys had concealed his relationships with former KGB official Piotr Voyeyko; in this way, having violated the requirement laid down in the Law on State Secrets and Official Secrets to provide information about relationships affecting the decision to grant authorisation to handle or access classified information, and acting in bad faith, he had sought to obtain authorisation to handle or access classified information; upon obtaining this authorisation, due to his relationships, he could pose a threat to the protection of state secrets.

Other specific actions of Seimas member Mindaugas Bastys that were specified in the inquiry by the Seimas were not investigated by the Constitutional Court, as they did not fall under its jurisdiction.

The Constitutional Court recalled that, in order that the citizens – the national community – could reasonably trust state officials and it would be possible to ascertain that all state institutions and all state officials follow the Constitution and law and obey them, while those who do not obey the Constitution and law would not hold any office for which the confidence of the citizens – the national community – is needed, it is necessary to ensure public democratic control over the activity of state officials and their accountability to society. One of the forms of such public
democratic control is the constitutional institution of impeachment. Under the Constitution, by not less than a 3/5 majority vote of all its members, the Seimas may remove the President of the Republic, a justice of the Constitutional Court, a justice of the Supreme Court, and a judge of the Court of Appeal from office, also revoke the mandate of a member of the Seimas, if the Constitutional Court has given a conclusion that the person concerned against whom impeachment proceedings have been instituted has grossly violated the Constitution and breached his/her oath, or that the person concerned is found to have committed a crime.

The duty of a member of the Seimas to provide all the required information in a fair manner for the state institutions that make a decision regarding the right to handle or access classified information; assessment on the constitutionality of the action of Seimas member Mindaugas Bastys insofar as he concealed his relationships with Piotr Voyeyko while seeking in bad faith to obtain authorisation to handle or access classified information

The Constitutional Court held in its conclusion that the oath and constitutional status of a member of the Seimas give rise to the duties of a member of the Seimas to be loyal to the Republic of Lithuania, respect and observe its Constitution and laws, conscientiously perform the duties of a representative of the Nation, and act in the interests of the Nation and the State of Lithuania. These constitutional duties of a member of the Seimas also lead to the duty to protect state secrets that become known to a member of the Seimas in the course of performing his/her duties of a representative of the Nation. This duty, as well as the requirement for a member of the Seimas to act in good faith, gives rise to the duty to provide, in a fair manner, the state institutions that make a decision regarding the right to handle or access information constituting a state secret (or other classified information) with all the required information, including information about relationships with other persons with whom communication can affect the protection of state interests and the protection of state secrets. Failure to fulfil this duty can give grounds for doubting the integrity of the member of the Seimas (including his/her fulfilment of other duties of a representative of the Nation), his/her acting in the interests of the Nation and the State of Lithuania, his/her respect for the Constitution and laws, and thus his/her loyalty to the Republic of Lithuania. The unfair provision of information for the state institutions that make a decision regarding the right to handle or access information constituting a state secret (or other classified information) can also lead to a situation where a person who is not reliable and loyal to the State of Lithuania will be able to access a state secret and, thereby, pose a threat to the protection of state secrets and, thus, also to the values consolidated and protected under the Constitution.

In this constitutional justice case the following was established:

– by the resolution of the Seimas of 13 December 2016, Seimas member Mindaugas Bastys was elected a Deputy Speaker of the Seimas;

– according to the ordinance of the Speaker of the Seimas of 13 May 2015, a person holding the office of a Deputy Speaker of the Seimas must have authorisation to handle or access information classified as “Top Secret”;

– from 14 December 2016 until 5 January 2017, Seimas member Mindaugas Bastys was completing and, on 5 January 2017, signed the Questionnaire for persons who are candidates to obtain authorisation to handle or access classified information (hereinafter referred to as the Questionnaire); in reply to the question “Do you know (did you know) any persons who are working (worked) in the intelligence or security services or related institutions of other states? If so, provide information in this regard” in Item 55 of this Questionnaire, he answered “no”; thus, Mindaugas Bastys did not indicate that he knew persons who worked (had worked) in the intelligence or security services or related institutions of other states;
– on 15 February 2017, while being questioned by the officials of the State Security Department (Valstybės saugumo departamentas (VSD), hereinafter referred to as the VSD), Seimas member Mindaugas Bastys testified that he knew former KGB official Piotr Voyeyko and was definitely aware that Piotr Voyeyko had been a KGB officer, but had forgotten to indicate this;

– the nature of the personal relationships of Seimas member Mindaugas Bastys with Piotr Voyeyko was defined by the VSD as “rather close communication”;

– in the information provided by the VSD for the Speaker of the Seimas, it was indicated that Piotr Voyeyko had worked in the Lithuanian SSR KGB and USSR KGB units that had conducted intelligence and that he had maintained contact with former Lithuanian SSR KGB and USSR KGB staff members residing in Lithuania and Russia;

– having carried out the security screening of Seimas member Mindaugas Bastys, the VSD informed the Speaker of the Seimas about its objection to grant Seimas member Mindaugas Bastys authorisation to handle or access information classified as “Top Secret”, because the relationships of Mindaugas Bastys with the persons indicated in the notification, who were connected with the implementation of the interests of the Russian Federation that were contrary to the interests of the Republic of Lithuania, among them with former KGB official Piotr Voyeyko, as well as other circumstances, provided the grounds for doubting the reliability of Seimas member Mindaugas Bastys, also made him vulnerable, and would endanger the protection of information constituting a state secret if it were entrusted to him; the VSD also notified that Seimas member Mindaugas Bastys had taken part in the international art festival “Open Sea”, which had been held annually in Lithuania and which is regarded as a project of Russian soft power;

– it was not the first time that Seimas member Mindaugas Bastys had completed the Questionnaire for persons who are candidates to obtain authorisation to handle or access classified information; however, in the Questionnaire filled in on 4 September 2006, he similarly did not indicate his personal relationships with Russian diplomats.

Assessing the explanation provided by Seimas member Mindaugas Bastys that, purportedly, while completing the Questionnaire, he had forgotten to indicate former KGB official Piotr Voyeyko, the Constitutional Court drew attention to the fact that Mindaugas Bastys knew Piotr Voyeyko rather well (according to Mindaugas Bastys, they had been acquainted for sixteen years), had maintained rather close communication with him (they had asked each other for support, Mindaugas Bastys had visited Piotr Voyeyko’s home on several occasions, and knew his family members), and had been aware of his activities in the KGB (Piotr Voyeyko had told him about this himself and had mentioned that their communication might be unfavourable to Seimas member Mindaugas Bastys); Mindaugas Bastys himself stated in his explanations that he had understood that communication with Piotr Voyeyko might cause him inconveniences.

Considering the explanation provided by Seimas member Mindaugas Bastys that, purportedly, he had not understood the content of the question contained in Item 55 of the Questionnaire, attention was paid to the fact that he had been elected a member of the Seimas more than once, has higher education, and holds a PhD degree. Given the above, Seimas member Mindaugas Bastys must have understood that Item 55 of the Questionnaire refers to persons having ever worked in the intelligence or security services or related institutions of any other states (including the USSR); he should also have been aware of the activities carried out by the repressive internal affairs and security structures of the USSR in Lithuania, as well as of the historical and political circumstances of these activities; therefore, he could not have had any doubts that the relationships of a person with former officials of USSR security services could be of relevance in screening that person to verify his/her reliability as a candidate to obtain authorisation to handle or access classified information.
It is noted in the conclusion that, for completing the Questionnaire, Seimas member Mindaugas Bastys had enough time to go into the detail of the questions set out in the Questionnaire. He did not address the officials of the VSD to explain to him the question concerning acquaintances with the representatives of the intelligence or security services of other states; nor did he make use of the provided additional opportunities to put down answers to the Questionnaire on a separate sheet and submit them along with the Questionnaire to a person responsible for the protection of classified information in a sealed envelope or, not later than within 20 working days, to send them by post, or to submit them personally to the institution carrying out his screening. In addition, neither during his first or repeated questioning at the VSD, did Seimas member Mindaugas Bastys state that he had not understood the content of the question at issue; this argument was put forward later; therefore, it should be seen as a defensive position of Seimas member Mindaugas Bastys.

The Constitutional Court noted that it was not the first time that Mindaugas Bastys had completed the Questionnaire for persons who are candidates to obtain authorisation to handle or access classified information, and it was not the first time that he had not indicated all his personal relationships affecting the decision to grant authorisation to handle or access classified information.

If the officials of the VSD had not had information about the relationships between Mindaugas Bastys and Piotr Voyeyko and had not asked Seimas member Mindaugas Bastys about these relationships, but had relied solely on the information provided in the Questionnaire by Mindaugas Bastys himself, these relationships would not have transpired. As it was clear from the material of the case, the said relationships had been disclosed not by Seimas member Mindaugas Bastys, but on the initiative of the officials of the VSD, who had relied on the data available to them.

In view of all the above circumstances, the Constitutional Court held in its conclusion that Seimas member Mindaugas Bastys, in replying to the question in Item 55 of the Questionnaire, had concealed his relationships with Piotr Voyeyko while seeking in bad faith to obtain authorisation to handle or access information classified as “Top Secret”. Thereby, he violated the requirement laid down in Item 11 of Paragraph 2 of Article 17 of the Law on State Secrets and Official Secrets not to conceal any information about relationships affecting the decision to grant authorisation to handle or access classified information. Thus, Mindaugas Bastys did not fulfil the duty, stemming from the oath of a member of the Seimas, to respect and observe the laws of the Republic of Lithuania.

By such his action, Mindaugas Bastys failed in the duty of a member of the Seimas to provide, in a fair manner, the state institutions that make a decision regarding the right to handle or access information constituting a state secret (or other classified information) with all the required information, including information about relationships with other persons with whom communication can affect the protection of state interests and the protection of state secrets. Thus, Mindaugas Bastys failed to fulfil the duties of a member of the Seimas to be loyal to the Republic of Lithuania, respect and observe its Constitution and laws, conscientiously perform the duties of a representative of the Nation, and act in the interests of the Nation and the State of Lithuania.

Assessing whether this violation of the Constitution committed by Seimas member Mindaugas Bastys was gross and whether, thereby, the oath of the member of the Seimas had been breached, the Constitutional Court took into account the significance of the constitutional institution of state secrets, the nature of the action committed by Seimas member Mindaugas Bastys by concealing his relationships with Piotr Voyeyko, and the potential threat to the fundamental and other constitutional values related to state secrets.
The Constitutional Court noted that, under the Constitution, a state secret is such information not to be disclosed and not to be imparted whose disclosure could cause harm to the state as the common good of the entire society and the political organisation of the entire society, i.e., could violate the most important relations regulated, defended, and protected under the Constitution; under the Law on State Secrets and Official Secrets, information classified as “Top Secret” means information constituting a state secret, which requires the highest level of protection, since its loss or unauthorised disclosure may violate the fundamental constitutional values – may pose a threat to the sovereignty or territorial integrity of the Republic of Lithuania, lead to particularly serious consequences for the interests of the state, or endanger human life.

As mentioned before, the unfair provision of information for the state institutions that make a decision regarding the right to handle or access information constituting a state secret (or other classified information) can lead to a situation where a person who is not reliable and loyal to the State of Lithuania will be able to access a state secret and, thereby, pose a threat to the protection of state secrets and, thus, also to the values consolidated and protected under the Constitution.

Seimas member Mindaugas Bastys had repeatedly failed in his duty to provide, in a fair manner, all the required information for the state institutions that make a decision regarding the right to handle or access information constituting a state secret (or other classified information).

In its conclusion, the Constitutional Court also held that a fair reply to the question of the Questionnaire concerning acquaintances with the officials of the intelligence or security services of other states should be regarded as particularly important in view of the relationships of Seimas member Mindaugas Bastys that were evident from the material of the case and had affected the decision to grant authorisation to handle or access classified information. As mentioned before, besides Piotr Voyeyko, Seimas member Mindaugas Bastys had also maintained relationships with other persons connected with the implementation of the interests of the Russian Federation that are contrary to the interests of the Republic of Lithuania.

In view of all the above circumstances, the Constitutional Court declared that Seimas member Mindaugas Bastys had grossly violated the Constitution (the requirements stemming from Paragraphs 2 and 4 of Article 59 thereof and Article 5 of the Law on the Procedure for the Entry into Force of the Constitution of the Republic of Lithuania) and, at the same time, had breached his oath.

Constitutional liability for actions committed during a previous term of office of a member of the Seimas (during the exercise of powers held previously) is possible only where the member of the Seimas is found to have committed a crime; dismissing part of the case

The Constitutional Court dismissed part of the case related to the inquiry of the Seimas regarding the conclusion on the constitutionality of the following actions of Seimas member Mindaugas Bastys: insofar as, at the end of 2012 and the beginning of 2013, he organised the meetings of representatives of the Rosatom State Atomic Energy Corporation of the Russian Federation with the heads of state authorities of the State of Lithuania while seeking to ensure political support for the plans of this corporation in Lithuania.

The Constitutional Court held that these actions had been carried out not during the current term of the Seimas, but during the 2012–2016 term of the Seimas. The powers and the validity of the oath taken by Mindaugas Bastys as a member of the Seimas of the 2012–2016 term of office had expired.

The persons specified in Article 74 of the Constitution may be removed from office (or their mandate of a member of the Seimas may be revoked) through impeachment proceedings for the actions provided for in the Constitution: a gross violation of the Constitution, a breach of the
oath, or the commission of a crime. These grounds for impeachment are not identical and may not be interpreted in the same manner.

The impeachment grounds of being “found to have committed a crime” are not linked to the time when a crime is committed. The preconditions for discrediting state power can be created not only in cases where it transpires that the persons specified in Article 74 of the Constitution have committed a crime while holding their respective office, but also where state power is exercised while implementing certain functions by persons who had committed a crime before taking up their respective office and these circumstances transpire already when they are in this office.

The other grounds for impeachment – a gross violation of the Constitution and a breach of the oath, from the aspect of the time of committing the actions constituting these grounds, should be assessed differently compared to the grounds of being “found to have committed a crime”. The wording of Article 74 of the Constitution, under which the Seimas may remove the persons specified in this article from office through impeachment proceedings if they “grossly violate the Constitution or breach their oath”, makes it clear that importance falls not only on the time when the actions grossly violating the Constitution or breaching the oath transpire; the time of committing these actions is also important, i.e. it is important that such actions are committed by the person not at any time, but while holding the respective office and being bound by the oath taken by that person.

The Constitutional Court noted that impeachment proceedings are not an objective in itself. The objective of impeachment proceedings is to decide the question of the constitutional liability of the persons listed in Article 74 of the Constitution. The content of the constitutional sanction (constitutional liability) applied through impeachment proceedings for a gross violation of the Constitution and a breach of the oath comprises both the removal of the person from office and the prohibition stemming therefrom that prevents such a person in the future from holding any constitutionally established office that can be entered only after taking an oath provided for in the Constitution. Thus, as a constitutional sanction applied through impeachment proceedings, removal from office must be related to a gross violation of the Constitution and a breach of the binding oath committed while holding this office (rather than other office or office held previously), i.e. the purpose of this sanction is to remove a person indicated in Article 74 of the Constitution specifically from the office being held by that person – such office that he/she entered after taking the respective oath and was holding at the time when he/she breached his/her binding oath. Obviously, it is impossible to remove a person from office that he/she is no longer holding after his/her powers have expired (ceased); therefore, the constitutional liability of a person indicated in Article 74 of the Constitution for a gross violation of the Constitution and a breach of the oath committed at the time when he/she was holding the said office is also impossible.

Thus, under the Constitution, among other things, Article 74 thereof, it is impossible to apply constitutional liability to a member of the Seimas through impeachment proceedings for his/her actions that may have grossly violated the Constitution and breached his/her oath if these actions were committed during a previous term of office of the member of the Seimas (during the exercise of powers held previously). Accordingly, the Constitutional Court has no powers to assess, in terms of compliance with the Constitution, such actions of a member of the Seimas that were committed during his/her previous term of office as a member of the Seimas (during the exercise of powers held previously), i.e. at the time before the member of the Seimas took his/her currently binding oath of a member of the Seimas.

The Constitutional Court drew attention to the fact that, under the Constitution, it would be possible to apply impeachment to a member of the Seimas for his/her actions that were committed
during his/her previous term of office as a member of the Seimas and may have grossly violated the Constitution and breached his/her oath binding at that time if such actions were criminal, i.e. upon the impeachment grounds of being “found to have committed a crime”. In any case, the actions of a member of the Seimas that were committed during his/her previous term of office as a member of the Seimas and may have grossly violated the Constitution and breached his/her oath binding at that time could provide the grounds, according to Article 75 of the Constitution, for expressing no confidence in such a member of the Seimas and dismissing him/her from the office at the Seimas for which he/she was appointed or elected by the Seimas; such actions of a member of the Seimas could also be an object for an investigation by an ad hoc investigation commission of the Seimas if they were of state importance.

The Constitutional Court, without assessing the constitutionality of the above-mentioned specific actions of Seimas member Mindaugas Bastys, noted in the context of this part of the inquiry by the Seimas that the constitutional principle of a free mandate of a member of the Seimas should be interpreted taking into account the constitutionally consolidated concept of pluralist democracy. Under the Constitution, a member of the Seimas may hold and freely express convictions other than those held by the majority of members of the Seimas, among other things, he/she is not obliged to follow the same concept of state interests as the one held by the majority of members of the Seimas. Therefore, under the Constitution, a member of the Seimas, as a representative of the Nation, may communicate with various people, among them with people whose views and convictions differ from those held by the majority of members of the Seimas or the majority of members of society. However, in view of the constitutional concept of a free mandate of a member of the Seimas, when communicating with other people, a member of the Seimas, as a representative of the Nation, must follow the interests of the Nation and the State of Lithuania, which are oriented towards the Constitution and values protected under the Constitution, rather than his/her own interests or the interests of his/her close persons, political parties, organisations, or interest groups, or other personal, private, or group interests, inter alia, the interests of another state or persons related to that state that are contrary to the interests of the Republic of Lithuania.

Constitutional liability is possible only for actions regarding which a subject holding the right of impeachment initiative has submitted a motion to institute impeachment proceedings; dismissing part of the case

The Constitutional Court also dismissed part of the case concerning the following actions of Seimas member Mindaugas Bastys indicated in the inquiry by the Seimas:

– while questioned at the Seimas at the Committee on National Security and Defence (Nacionalinio saugumo ir gynybos komitetas (NSGK), hereinafter referred to as the NSGK), Seimas member Mindaugas Bastys provided different explanations as to whether he knew about Piotr Voyeyka’s work in the KGB, compared to those provided at the VSD;

– while providing explanations for the officials of the VSD and for the NSGK, Seimas member Mindaugas Bastys tried to conceal his permanent and systematic relationships, as well as their significance and nature, and avoided answering questions he was asked in the course of the investigation, i.e. he sought to deny or diminish his role in organising the meetings of representatives of the Rosatom State Atomic Energy Corporation of the Russian Federation with the highest officials of the Republic of Lithuania; he sought to create the impression that he had taken care of the work related to the closure of the Ignalina nuclear power plant, rather than the implementation of the project of the Baltic (Baltiyskaya) nuclear power plant; he denied he had been given a warning by Algirdas Butkevičius because of the organisation of a meeting with
representatives of the Rosatom Corporation; he denied he had met with the officials of the VSD in 2006 and the details of the operational questioning conducted by the officials of the VSD; and provided different explanations regarding the nature, frequency, and time of his contact with Yevgeni Kostin.

Under the Statute of the Seimas, a motion to institute impeachment proceedings may be submitted to the Seimas by a group of not less than 1/4 of the members of the Seimas and by the Commission for Ethics and Procedures; the said right is not conferred on any other subjects. A special investigation commission of the Seimas has the power to investigate the reasonableness of a motion to institute impeachment proceedings only if it is submitted by subjects holding the right of impeachment initiative, also the power to prepare a conclusion regarding the grounds for instituting impeachment proceedings.

The Constitutional Court noted that, under the Constitution, the requirement of the due legal process in parliamentary procedure before instituting impeachment (inter alia, in the course of investigation by a commission set up by the Seimas or another structural subunit of the Seimas into the reasonableness of charges brought by members of the Seimas) implies such a process during which a member of the Seimas or state official against whom impeachment may be instituted could effectively exercise his/her rights, inter alia, be aware of the charges brought against him/her, provide his/her explanations, and respond to the arguments on which the charges against him/her are based. Therefore, this parliamentary procedure must be such that a commission set up by the Seimas or another structural subunit of the Seimas would investigate the reasonableness of charges brought by a subject initiating impeachment, rather than would formulate charges that are in principle new, in particular on the grounds of the explanations provided by the person against whom impeachment may be instituted. Otherwise, the preconditions would be created for deterring the person concerned from exercising the above-mentioned rights.

The Constitutional Court held in the conclusion that the group of members of the Seimas who had initiated the impeachment had not brought charges in relation to the above-mentioned actions of Seimas member Mindaugas Bastys: specifically that, during his questioning at the NSGK, he changed his explanations previously given at the VSD; that, while providing his explanations for the officials of the VSD and for the NSGK, he tried to conceal his permanent and systematic relationships, as well as their significance and nature; also that he avoided answering questions he was asked in the course of the investigation. On the grounds of the explanations provided by Seimas member Mindaugas Bastys, the Special Investigation Commission of the Seimas had formulated charges that were in principle new. The group of members of the Seimas that had initiated the impeachment had not been able to bring any charges at all in relation to the explanations provided by Mindaugas Bastys at the NSGK, since the questioning of Mindaugas Bastys at this committee took place after the said group of members of the Seimas had submitted to the Seimas their motion to institute the impeachment proceedings.

In view of the foregoing, the Constitutional Court did not investigate the constitutionality of the above-mentioned actions of Seimas member Mindaugas Bastys.

THE RULING OF 8 MARCH 2018
On the material liability of ministers

By this ruling, having considered the case subsequent to the petition of the Supreme Administrative Court of Lithuania (Lietuvos vyriausiasis administracinis teismas), the Constitutional Court recognised that the Law on the Government, insofar as it does not provide
for the material liability of a minister for direct material damage inflicted on a state institution or establishment in the course of exercising in an unlawful and faulty manner the powers of the internal administration of the ministry or of establishments under the ministry (inter alia, when imposing official penalties), is not in conflict with the Constitution.

In this ruling, the Constitutional Court noted that ministries are state governance institutions that have a special competence. A ministry fulfils the functions of state governance in the area entrusted to it by means of laws and other legal acts; in the said area, the ministry implements state policy. Fulfilling their functions, ministries inevitably participate not only in governance legal relations, but also in other legal relations of varied nature (property relations, employment relations, etc.). In the activity of a ministry, which carries out the functions of state governance in the area entrusted to it and implements state policy in the same area, there are also activities related to the performance of internal administrative functions.

The Constitutional Court noted that the competence of a minister to head his/her ministry, which is consolidated in Paragraph 1 of Article 98 of the Constitution, also includes certain powers of the internal administration of the ministry and of establishments assigned to the area entrusted to the ministry (establishments under the ministry), including the right to select, in the manner prescribed in laws and other legal acts, employees of the ministry and heads of institutions assigned to the ministry, to recruit and dismiss them, as well as the right to apply disciplinary measures to them or provide them with incentives. Under the Constitution, it is not allowed to establish such a legal regulation that would in general prevent a minister from exercising the powers arising from the provision “Ministers shall head their respective ministry” in Paragraph 1 of Article 98 of the Constitution, inter alia, the powers related to the internal administration of the ministry and of establishments assigned to the area entrusted to the ministry; in addition, such a legal regulation must not restrict the ability of the minister who exercises the constitutional powers conferred on him/her to effectively control how the ministry that he/she directs and for which he/she is responsible performs its functions, as well as how it carries out other activities (inter alia, internal administration) that are related to the functions entrusted to him/her.

The Constitution is supreme law that limits state power and consolidates the principle of responsible governance, which implies that all state institutions and officials must follow the Constitution and law while performing their functions and, by acting in the interests of the Nation and the State of Lithuania, must properly exercise the powers conferred on them by the Constitution and laws. The Constitution (among others, Paragraphs 2 and 3 of Article 5 thereof) gives rise to one of the principles of the activity of state institutions and officials – the principle of transparency, which implies accountability to the relevant community and the responsibility of decision-making officials for their decisions. Transparency is a necessary precondition for preventing the abuse of power; therefore, it is a necessary precondition for people to have confidence in public authorities and the state in general. Transparency means, among other things, that adopted decisions must be grounded and clear and that, if need may be, it must be possible to rationally reason them; other persons must have a possibility of challenging the said decisions in accordance with an established procedure. Thus, under the Constitution (among others, Paragraphs 2 and 3 of Article 5 thereof and the constitutional principle of responsible governance), ministers must properly exercise the powers (conferred on them by the Constitution and laws) of the internal administration of the ministry or of establishments assigned to the area entrusted to the ministry, among other things, adopt lawful and grounded decisions.

The Constitution establishes the political responsibility of ministers to the Seimas, the President of the Republic, and the Prime Minister for directing the areas of governance entrusted to them. Article 100 of the Constitution provides for the immunity of ministers when
criminal liability or the restriction of liberty is applied. The Constitution does not contain other provisions that would establish the exclusive status of ministers compared with other subjects to whom legal liability applies on the basis of general grounds established by law. Therefore, there are no grounds for stating that, under the Constitution, ministers are subject to other rules of legal liability (except for immunity when criminal liability or the restriction of liberty is applied) than other persons. A different interpretation of the provisions of the Constitution, according to which, purportedly, under the Constitution, also other immunity from legal liability (except for the immunity provided for in Article 100 of the Constitution) could apply with respect to ministers, would be inconsistent with the responsibility of the authorities to the public, which is consolidated in the Constitution, with the provisions of Paragraphs 2 and 3 of Article 5 thereof, as well as with the constitutional principles of responsible governance and a state under the rule of law, and would imply the privilege prohibited under Paragraph 2 of Article 29 of the Constitution.

The competence of a minister to head his/her ministry, as established in Paragraph 1 of Article 98 of the Constitution, implies his/her personal responsibility for the activities of the ministry. Such responsibility means his/her personal responsibility for all his/her activities, thus, also for the proper exercise of the powers of the internal administration of the ministry and of establishments assigned to the area entrusted to the ministry (for instance, the powers to dismiss employees of the ministry as well as heads of establishments assigned to the area entrusted to the ministry).

The right of a person to claim compensation for damage inflicted by unlawful actions arises from Paragraph 2 of Article 30 of the Constitution. One of the main ways of protecting violated rights and freedoms is compensation for damage inflicted as a result of unlawful actions. Under the Constitution (among others, Paragraph 3 of Article 5 and Paragraph 2 of Article 30 thereof, as well as the constitutional principle of a state under the rule of law), a person who has suffered material and/or moral damage as a result of unlawful actions by state institutions and officials must be compensated while taking into account reasonable and grounded criteria, as established by law, in order to determine the size of the damage. This duty of the state is to be interpreted as including its obligation to compensate a person for material and/or moral damage suffered by him/her as a result of unlawful actions carried out by a minister in the course of exercising his/her powers of the internal administration of the ministry and of establishments assigned to the area entrusted to the ministry.

The Constitutional Court emphasised that, under the Constitution, if state officials, including ministers, when improperly exercising the powers conferred on them by the Constitution and laws, by their unlawful actions (or inaction) inflict material and/or moral damage on persons, such their actions cannot be equated with actions (or inaction) of the state itself (or institutions thereof), and state officials, including ministers, who have inflicted damage, must be liable in the prescribed manner for their actions that have caused damage. In this context, it was also noted that, according to the Constitution, property that belongs to the state by right of ownership should be managed in such a way that it would serve the general welfare of the Nation and the interest of society at large; the provisions of the Constitution give rise to the requirement that state-owned property must be treasured, not wasted, and possessed rationally. Thus, under the Constitution, while ensuring the proper observance of the interests of all society, it is necessary to create the preconditions for the state that has fulfilled (through its institutions) its constitutional duty to compensate a person for material and/or moral damage inflicted by unlawful actions (or inaction) of its institutions and officials, including ministers, for obtaining reimbursement for the losses (in whole or in part), suffered by the state due to this, from the state officials, including ministers, who have improperly exercised the powers conferred on them by the Constitution and
laws. This is the only way to ensure that property owned by the state will serve the common welfare of the Nation. Meanwhile, without creating such preconditions, it would not be ensured that state officials, including ministers, who caused damage would be held liable for their actions according to the established procedure, and that people would have confidence in public authorities and the state in general.

The Supreme Administrative Court of Lithuania based its petition on the fact that, in view of the constitutional status of a minister and the powers conferred on him/her by the Constitution, the law must clearly and specifically define the legal relations concerning the material liability of a minister for direct material damage inflicted on a state institution or establishment in the course of carrying out in an unlawful and faulty manner the internal administration of the ministry, among other things, when imposing official penalties. Such a legal regulation, in the opinion of the petitioner, should be laid down in the Law on the Government, which regulates the competence, liability, and accountability of ministers, but does not consolidate the said legal regulation. Thus, the petitioner did not impugn the legal regulation consolidated in the Law on the Government, but rather it impugned something that was not established in this law, which, however, in the opinion of the petitioner, should have been established therein, i.e., the petitioner raised the question of a legislative omission.

The Constitutional Court recalled the fact that a legal gap, including a legislative omission, always means that the legal regulation of certain social relations is established neither explicitly nor implicitly, neither in a particular legal act (part thereof) nor in any other legal acts, even though there exists a need for a legal regulation of these social relations, as well as that the said legal regulation, in the case of a legislative omission, must be established precisely in the particular legal act (particular part thereof), since this is required by a certain higher-ranking legal act, inter alia, the Constitution itself. If a concrete law (part thereof) does not contain a special legal regulation designed for governing certain relations, it does not necessarily mean that there is a legal gap, including a legislative omission, in that area, since such relations might be regulated by means of general explicit or implicitly established norms that supplement and extend the explicit legal regulation.

The Constitutional Court noted that the special legal regulation of activities carried out by ministers, as consolidated in the Law on the Government, had not established the material liability of ministers, nor had it established a possibility of applying the legal regulation entrenched in the Labour Code and the Law on State Service in solving the issue of reimbursement for direct material damage inflicted on a state institution or establishment by unlawful actions of a minister in the course of exercising the powers of the internal administration of the ministry or of establishments under the ministry, inter alia, when imposing official penalties. However, the legal regulation whose establishment is mandatory under the Constitution, which entails the right of the state that has compensated a person for damage inflicted by the said unlawful actions of a minister to obtain reimbursement for the losses (in whole or in part), suffered by the state due to this, from the minister who has improperly exercised his/her powers and which for the state creates the preconditions, as well as determines the conditions, for implementing the said right, is enshrined in the Law on Compensation for Damage That Appeared Due to Unlawful Actions of State Institutions and on Representing the State and the Government of the Republic of Lithuania. Thus, in the Law of the Government, there is no legal omission that was specified the petitioner. It was held that the impugned legal regulation is not in conflict with Paragraph 3 of Article 5 and Paragraph 2 of Article 30 of the Constitution, as well as the constitutional principles of responsible governance and a state under the rule of law.

The Constitutional Court also held that there are no arguments for stating that, according to the overall legal regulation, the ministers are unjustifiably distinguished from the heads of
other institutions in the aspect of material liability for direct material damage inflicted on a state institution or establishment in the course of exercising in an unlawful and faulty manner the powers of internal administration, i.e. that the impugned legal regulation violates Paragraph 1 of Article 29 of the Constitution.

In this ruling, it was also emphasised that the particularities of the constitutional status of the Government that are related to the exercise of power and the separation of powers determine the fact that the legislature, while seeking to ensure as far as possible the coherence and internal harmony of the legal system, may implement its discretion to regulate the social relations connected with the liability of the members of the Government (the Prime Minister and ministers) for the damage inflicted on a person by their actions in the course of exercising the powers of internal administration by establishing a corresponding legal regulation, for example, in the special legal act regulating the activities of the Government – the Law on the Government.

THE RULING OF 12 APRIL 2018
On the requirements for government resolutions that recognise projects as important to the state

By this ruling, having considered the case subsequent to a petition of the Supreme Administrative Court of Lithuania, the Constitutional Court declared the government resolution (No 865) of 19 July 2000 on the recognition of the economic project of the cadastral area of Kariotiškės in the village of Moluvėnai in the Trakai district as a project of state importance to be in conflict with the Constitution.

The doubts of the petitioner concerning the compliance of this government resolution were based, among other things, on the fact that, although the resolution itself was announced in the Official Gazette Valstybės žinios, neither this resolution, nor any other officially announced legal act, specified the essential conditions of the project that had been recognised to be of state importance; the doubts were also based on the fact that, without announcing these conditions and identifying what specific economic project, which was to be implemented in the cadastral area of Kariotiškės in the village of Moluvėnai in the Trakai district, had been recognised by the Government to be of state importance, it was not clear whether this project was still in the public interest and served for general welfare of the nation.

The Constitutional Court noted that Paragraph 2 of Article 7 of the Constitution, the constitutional principle of a state under the rule of law, and the principle of the transparency of activities of public authorities and officials, which stems from Paragraphs 2 and 3 of Article 5 of the Constitution and the constitutional principle of responsible governance, imply the requirement for the Government, when recognising social, economic, cultural or other projects to be of state importance, not only to express, in a government resolution, a formal decision to recognise a certain project to be of state importance, but also to establish, in this ruling (or its constituent parts) or another officially announced legal act, the essential conditions for the implementation of the project important to the state, such as the aim, object, implementation deadlines, sources of funding, essential obligations of the developer (developers) of the project, etc.

In the ruling, it was held that the essential conditions for the said economic project of importance to the state, which was to be implemented in the cadastral area of Kariotiškės in the village of Moluvėnai in the Trakai district, had only been specified in the documents accompanying the draft resolution of the Government of 19 July 2000; these conditions had not
been specified in the government resolution itself, thus, they had not been announced; they had not been established and officially announced in any other legal act.

With regard to the above, the Constitutional Court recognised that the impugned government resolution was non-compliant with Paragraph 2 of Article 7 of the Constitution and the constitutional principle of a state under the rule of law, as well as with the principle of the transparency of activities of public authorities and officials, which stems from Paragraphs 2 and 3 of Article 5 of the Constitution and the constitutional principle of responsible governance.

The Constitutional Court also noted that, under Paragraph 2 of Article 46 of the Constitution, state support for efforts and initiative useful to society must be regulated so that it would comply with the imperative of the general welfare of the nation consolidated in Paragraph 3 of Article 46 of the Constitution, \textit{inter alia}, would not be in conflict with the public interest; under Paragraphs 2 and 3 of Article 46 of the Constitution, while regulating economic activity, the state must, among other things, refer to the dynamism and variability of the public interest; therefore, it must also adjust the regulation of economic activity accordingly. The principle of responsible governance, as consolidated in the Constitution, implies that all state institutions and officials are obliged to follow the Constitution and law while performing their functions, to act in the interests of the nation and the State of Lithuania, and they must properly implement the powers granted to them by the Constitution and laws. In the light of the above-mentioned, it was emphasised in the context of this case that, after certain projects are recognised to be of state importance under the procedure established by legal acts, Paragraphs 2 and 3 of Article 46 of the Constitution and the constitutional principle of responsible governance give rise to the duty of the Government to exercise the effective control of the implementation of these projects, among other things, to recognise government resolutions giving certain projects the status of state importance as no longer valid where these projects no longer meet the criteria for declaring them as important to the state.

**THE RULING OF 6 JUNE 2018**

**On the priority to enter state service given to citizens who have fulfilled their military obligation**

By this ruling, having considered the case subsequent to a petition of the Government, the Constitutional Court declared unconstitutional the provisions of the Law on State Service and the Law on National Conscription under which, if several applicants taking part in a competition for the position of a state servant receive the same assessment, the priority to be appointed to this position was given to the applicant who had fulfilled his/her military obligation.

The Constitutional Court held that entering state service of the Republic of Lithuania on equal terms is a constitutional right of citizens. The constitutional imperative of entering state service on equal terms implies competition between those who enter it, as well as the objective and impartial assessment and selection of persons who enter state service. The functioning and efficiency of all the system of state service particularly depends on the selection of persons who enter state service. State service must be qualified and persons employed in state service must be able to fulfil tasks assigned to this service; as a rule, those who wish to become state servants or officials must have relevant education, professional experience, and certain personal characteristics; in addition, the higher the position or the more important the area of activities, the higher the requirements are raised with respect to persons holding these positions.

When a person is selected to the position of a state servant by means of a competition (through examination), such a procedure may not be regarded as a purely formal matter. The
examination must be targeted and it must focus on testing and assessing of the knowledge and skills necessary for a state servant. The winner of the competition to a certain position of a state servant – a person who will perform specific functions of a state servant – is determined according to the examination results of the participating applicants; therefore, the questions (tasks) of the examination must, first of all, be related to the position in state service for which the applicants have filed their applications (for which the competition is held).

In the context of the constitutional justice case at issue, it should be noted that the constitutional right of citizens to enter state service on equal terms should be linked to the principle of the equality of the rights of persons, which is consolidated in Paragraph 1 of Article 29 of the Constitution. Citizens who seek to become employed in state service must not be discriminated, nor must they be granted privileges on the grounds specified in Paragraph 2 of Article 29 of the Constitution or any other constitutionally unjustified grounds.

Thus, one the requirements stemming from Paragraph 1 of Article 33 of the Constitution, which guarantees the right of citizens to enter state service on equal terms, for the legal regulation governing state service is equal competition between applicants; it implies that applicants entering state service must be assessed according to their knowledge and skills necessary for the performance of the relevant functions of a state servant and that the imperatives of the equality of the rights of persons, non-discrimination, and non-granting of privileges, which stem from Article 29 of the Constitution, must also be observed.

In this context, the Constitutional Court emphasised that the duty of citizens to perform military or alternative national defence service, which is consolidated in Paragraph 2 of Article 139 of the Constitution, is not an objective in itself – it is directly linked to the duty to defend the state against a foreign armed attack, which is enshrined in Paragraph 1 of the said article. However, a law may establish such conditions for exemption from mandatory military service that are linked to the objective circumstances due to which the citizens cannot perform this service (age, state of health, etc.); in addition, under Paragraph 2 of Article 139 of the Constitution, the legislature may provide for the possibility of deferring the fulfilment of the constitutional duty of citizens to perform military or alternative national defence service in cases where a citizen is temporarily unable to perform this service due to the important reasons specified in the law or in cases where the important interests of the person, family, or society might be injured if such service were not deferred at a given time. In implementing its discretion consolidated in Paragraph 3 of Article 139 of the Constitution to regulate the organisation of the national defence system, the legislature must, in laws, establish such a regulation of the organisation of this system, including the organisation of military service, that would ensure the protection of some of the constitutional values of the utmost importance – the independence, territorial integrity, and constitutional order of the state – and the adequate defence of the state against a foreign armed attack. These powers of the legislature imply that, having regard to the constitutional significance of military service and seeking to establish the effective organisation of military service, as well as, among other things, to ensure the necessary number of citizens properly trained to defend the state, the legislature may establish such special guarantees for citizens who have performed military service that would encourage them to perform this service and would facilitate the social and economic integration of those citizens.

On the other hand, while regulating the relations of entry to state service, the legislature must pay regard to the requirement, stemming from Paragraph 1 of Article 33 of the Constitution, to ensure equal competition between persons entering state service and, therefore, also take into account the fact that, under the Constitution, the legislature may, by means of a law, establish the grounds for exemption from the duty to fulfil military obligation, as well as the grounds
Consequently, under the Constitution, a law may not create less favourable conditions for entering state service for citizens who are exempted from the military obligation due to objective circumstances on the grounds established by law, as well as for citizens whose mandatory military service or alternative national defence service is deferred or who are released from it earlier on the grounds established by law due to their state of health or other important personal, family, or social circumstances, compared to those citizens who have performed military or alternative national defence service established by law.

Under the provisions of the Law on State Service impugned in the constitutional justice case at issue, the priority to be appointed to the position of a career state servant or the head of an establishment, in cases where several applicants participating in the competition receive the same assessment, is given to the applicants who have performed continuous mandatory initial military service or completed basic military training, or who have performed alternative national defence service; however, such priority is not granted to those applicants exempted from the military obligation who are not able to fulfil it for objective reasons (such as the state of health or age) or who are exempted from it because of their gender, or to the applicants whose mandatory initial military service or alternative national defence service is deferred or who are released from this service without having completed it.

Additionally, under these provisions of the Law on State Service, the winner of a competition to the position of a career state servant or the head of an establishment, in cases where several applicants participating in the competition receive the same assessment, is determined according to the fact whether the applicant meets the condition established by the legislature that is linked to the performance of mandatory initial military service or alternative national defence service. This means that, in a situation where the applicants having participated in this competition receive the same assessment, the applicants who are exempted from the military obligation for objective reasons, as well as the applicants whose mandatory initial military service or alternative national defence service is deferred or who are released from this service without having completed it, no longer have any possibilities to compete on equal terms with the applicants who have performed the said service, since the winner is ex lege regarded to be the applicant who, having obtained the same number of points at the competition, meets the above-mentioned condition prescribed by the legislature.

Thus, according to the Constitutional Court, the impugned legal regulation created less favourable conditions for being appointed to the position of a career state servant or the head of an establishment in state service for those citizens who were exempted from the military obligation due to objective circumstances such as their state of health (among other things, disability), age or gender on the grounds established by law, as well as for those citizens whose mandatory military service or alternative national defence service was deferred or who were released from it earlier due to their state of health or other important personal, family, or social circumstances, compared to citizens who had performed mandatory initial military service or alternative national defence service. By means of such a legal regulation, citizens who are in the same situation in terms of entry to state service were treated differently on the constitutionally unjustifiable grounds.

In view of the above, it was recognised that the provisions of Paragraph 2 (wording of 5 June 2012, which came into force on 1 June 2013) of Article 11 and Paragraph 2 (wording of 5 June 2012, which came into force on 1 June 2013) of Article 13 of the Law on State Service, establishing that the priority to be appointed respectively to the position of a career state servant
or the head of an establishment (in cases where several applicants having participated in the competition received the same assessment) was given to the applicant who had performed continuous mandatory initial military service or completed basic military training, or who had performed alternative national defence service, were in conflict with Article 29 and the provision “Citizens shall have the right [...] to enter on equal terms the State Service of the Republic of Lithuania” of Paragraph 1 of Article 33 of the Constitution.

On the grounds of the same arguments, Item 3 of Paragraph 1 of Article 41 (wording of 16 June 2016) of the Law on National Conscription, under which, in cases where several applicants participating in a competition for the position of a state servant receive the same assessment, the priority to be appointed to the said position is given to the applicants who have performed continuous mandatory initial military service, was also declared to be in conflict with the above-mentioned provisions of the Constitution.

THE RULING OF 19 JUNE 2018
On the evaluation of study fields and their provisional accreditation

By this ruling, having considered the case subsequent to the petition of a group of members of the Seimas, the Constitutional Court declared unconstitutional the provisions “Until 1 March 2018, study fields are evaluated and provisionally accredited in accordance with the requirements and procedure approved by the Minister of Education and Science. The term of a provisional accreditation of study fields is set by the Minister of Education and Science. If an evaluated study field does not comply with the requirements established by the Minister of Education and Science, the higher education school may not admit students to studies in that field, while the further study opportunities of those studying in the said field are determined by the Minister of Education and Science” of Paragraph 26 (wording of 13 January 2018) of Article 2 of the Law Amending the Law (No XI-242) on Science and Studies (hereinafter referred to as the Law), to the extent that these provisions provide for the evaluation and provisional accreditation, to be completed by 1 March 2018, of study fields that are being carried out.

The Constitutional Court noted that the autonomy of schools of higher education, which is granted to them under Paragraph 3 of Article 40 of the Constitution, is traditionally conceived as the right to independently determine and establish in their regulations or statutes the organisational and governmental structure, relations with other partners, the order of research and studies, study programmes, the procedure of student enrolment, as well as how to resolve other related questions. On the other hand, the principle of the autonomy of schools of higher education must be balanced with the principle of responsibility and accountability to society, other constitutional values, with the duty of schools of higher education to observe the Constitution and laws. Providing autonomy to higher education schools does not relieve the state from the constitutional obligation to ensure the effectiveness of the system of higher education. Therefore, the autonomy of schools of higher education does not mean that the activity of such schools may not be subject to state control. Quite to the contrary, this activity, since it is related to the implementation of the constitutional human rights and freedoms, as well as with the use of state budget funds, must be subject to regulation and supervision. This also arises from Paragraph 4 of Article 40 of the Constitution. However, the right of the state to regulate the external relations of higher education schools must not restrict the freedom of scientific and educational activities of higher education schools.

The Constitutional Court emphasised that the autonomy of higher education schools, which is granted to them under Paragraph 3 of Article 40 of the Constitution and which means that they...
have the right to independently determine, among other things, the order of science and studies as well as study programmes, does not deny the right of the state (which forms and pursues a higher education policy and is under the obligation, arising from Paragraph 4 of Article 40 of the Constitution, to ensure the effectiveness of the higher education system) to establish quality standards for higher education provided by institutions of science and studies, as well as measures for evaluating the quality of studies and of their implementation, their compliance with the established quality standards for higher education, including periodically applied measures for the quality evaluation of studies. As needs for progressive development of the state and society for a certain period change, under Paragraph 4 of Article 40 of the Constitution, the quality standards for higher education provided by institutions of science and studies should be changed accordingly, thus aiming to ensure that higher education schools effectively carry out their mission, linked with their autonomy, in training professionals in various fields with higher education and perform their responsibility for higher education quality.

When establishing or changing quality standards for higher education provided by institutions of science and studies, as well as establishing or changing measures making it possible to evaluate the quality of studies and of their implementation, as well as their conformity with the established quality standards for higher education, the legislature must respect the Constitution, inter alia, the requirements implied by the constitutional principles of a state under the rule of law and of responsible governance, including the requirement not to establish such a legal regulation that would demand impossible things (lex non cogit ad impossibilia) and the requirement for envisaging an appropriate vacatio legis – a reasonable period of time from the moment of the official publication of the law laying down such new standards and such new measures until its entry into force (date of its application) during which, inter alia, higher education schools would be able to prepare in an appropriate manner for the implementation of the changed requirements, resulting from the said law, for the quality of studies and of their implementation.

When overviewing the legal regulation impugned in this case and the related legal regulation, the Constitutional Court noted that, according to the provisions of the Law on Science and Studies, the quality of studies is assured, among other things, by applying the external evaluation and accreditation of studies; the Law on Science and Studies as set out in its wording of 29 June 2016 consolidates a new measure for assuring the quality of studies – the evaluation and accreditation of study fields – instead of the former accreditation of study programmes; before the application of the general procedure for the external evaluation and accreditation of studies, which is laid down in the Law on Science and Studies (wording of 29 June 2016), inter alia, in Article 48 thereof, the impugned legal regulation had consolidated special provisions that envisaged a provisional procedure (which was different from the general one established in the Law on Science and Studies and which provided for the evaluation of study fields and their provisional accreditation) for the external evaluation and accreditation of studies; a failure of a study field to receive accreditation according to the impugned special provisions consolidated in Paragraph 26 of Article 2 of the Law brings about the same effects as in a failure of a study field to receive accreditation according to the general procedure: it results in both cases in the prohibition precluding the higher education schools from admitting students to studies in a non-accredited field of study. Having regard to this, the Constitutional Court did not assess the legal regulation laid down in Paragraph 2 of Article 26 of the Law as one establishing the transitional provisions intended to prepare for the application of the procedures for the external evaluation and accreditation of studies under the Law on Science and Studies. On the contrary, Paragraph 26 of Article 2 of the Law established a completely new, albeit provisionally applicable, legal regulation of the evaluation of study fields and their provisional accreditation.
The Constitutional Court held that the provisions of Paragraph 26 of Article 2 of the Law had envisaged a very short period of time for higher education schools to prepare for the upcoming substantial changes in the accreditation of studies; its exact duration depended on the moment of the implementation of the powers granted to the Minister of Education and Science by Paragraph 26 of Article 2 of the Law to approve the requirements and procedure for the evaluation of study fields and their provisional accreditation.

The Minister of Education and Science adopted the order approving the Description of the Procedure for the Evaluation of Study Fields and Their Provisional Accreditation on 26 February 2018 only (this order was officially published in the Register of Legal Acts on 27 February 2018 and came into force on 28 February 2018). Thus, this description could be applicable only for two days, i.e. until 1 March 2018, when the evaluation of study fields and their provisional accreditation had to be completed. In addition, the Minister of Education and Science approved the Description of the Procedure for the Evaluation of Residency Study Fields and Their Provisional Accreditation on 27 April 2018, i.e. almost after two months after the deadline for the implementation of the powers granted to him to approve the procedure for the evaluation of study fields and their provisional accreditation; part of the study fields were assessed after the expiry of the period of provisional accreditation, which was provided for in Paragraph 26 of Article 2 of the Law.

In view of the fact that the provisions of Paragraph 26 of Article 2 of the Law, which established a new, albeit provisionally applicable, legal regulation of the evaluation of study fields and their provisional accreditation (i.e. made substantial, albeit provisional, changes to the legal regulation aimed at assuring higher education quality, which led (could have led) to the extremely adverse consequences for higher education schools) and provided for a very short period of time intended for higher education schools to prepare for the upcoming substantial changes in the accreditation of studies, as well as in view of the actual circumstances of the implementation of these provisions, the Constitutional Court assessed these provisions as requiring impossible things, inter alia, higher education schools were required to prepare, within three days, for the evaluation of study fields and their provisional accreditation, and the Centre for Quality Assessment in Higher Education was required to evaluate and accredit all study fields of all higher schools within two days.

Thus, when establishing the impugned provisions, the legislature did not comply with the requirements, implied by the constitutional principles of a state under the rule of law and of responsible governance, not to establish such a legal regulation that would demand impossible things (lex non cogit ad impossibilia) and to envisage a reasonable vacatio legis, improperly implemented the duty, implied in Paragraph 4 of Article 40 of the Constitution, to regulate the activities of higher education schools in order to assure higher education quality, ignored the autonomy guaranteed to higher education schools under Paragraph 3 of Article 40 of the Constitution, and disregarded Paragraph 2 of Article 5 of the Constitution, according to which the scope of powers is limited by the Constitution.

In view of the above, the impugned legal regulation was declared to be in conflict with Paragraph 2 of Article 5 and Paragraphs 3 and 4 of Article 40 of the Constitution, as well as with the constitutional principles of a state under the rule of law and responsible governance.

Defining the legal consequences of declaring unconstitutional the provisions of Paragraph 26 of Article 2 of the Law, the Constitutional Court noted that the concept of constitutional justice, which stems from the Constitution, implies not a perfunctory and nominal constitutional justice, but such final acts of the Constitutional Court that are not unjust according to their content. Otherwise, if the Constitutional Court could not adopt, in accordance with the powers conferred
upon it, such a final act that would meet the criteria of justice, the supremacy of the Constitution in the legal system would not be guaranteed, the administration of constitutional justice and the ensuring of constitutional legality would be prevented. The powers of the Constitutional Court to administer constitutional justice and ensure constitutional legality are inseparable from the imperatives of the constitutional principle of a state under the rule of law, among other things, the requirements for the protection of legitimate expectations, legal security, legal certainty, justice, reasonableness, *impossibilium nulla obligatio est* (there is no obligation to perform impossible things), and *lex non cogit ad impossibilia* (legal acts may not demand impossible things).

Under the Constitution, *inter alia*, the constitutional principle of a state under the rule of law, a law that requires impossible things must not produce legal consequences for subjects of the legal relations regulated by the said law, since they would be obliged to do something that could not be done at all. Also, no attempts to implement the provisions of such a law by means of substatutory acts (including those of the application of law) produce legal consequences for such subjects.

Therefore, having held that the provisions of Paragraph 26 of Article 2 of the Law did not meet the requirement, arising from the constitutional principle of a state under the rule of law, not to establish such a legal regulation that would demand impossible things, the Constitutional Court also held that the application of these provisions, *inter alia*, by adopting substatutory acts (including those of the application of law), does not give rise to legal consequences for subjects of the legal relations, including higher education schools. In addition, under the Constitution, no legal consequences can arise from attempts to implement the impugned provisions after the expiry of the term of their application after 1 March 2018, i.e. in the absence of any legal basis for the application of these provisions. This means that the orders adopted by the Minister of Education and Science approving the Description of the Procedure for the Evaluation of Study Fields and Their Provisional Accreditation and the Description of the Procedure for the Evaluation of Residency Study Fields and Their Provisional Accreditation, as well as the orders of the Director of the Centre for Quality Assessment in Higher Education, issued on the basis of the said orders adopted by the Minister of Education and Science, on a provisional accreditation of study fields, should be deemed, under the Constitution, not to have produced any legal consequences for higher education schools. A different interpretation would not allow administering constitutional justice and ensuring constitutional legality, since the negative consequences for subjects of the legal relations arising from the fact that they did not abide by such a legal regulation that required them to do something that they could not do at all, or that there was an attempt to implement something whose implementation was not possible at all, would be recognised to be in conformity with the Constitution.

Even prior to the adoption of this ruling of the Constitutional Court, the study fields of all higher education schools had to be accredited by applying the general procedure for the external evaluation and accreditation of studies, as stipulated in the Law on Science and Studies. This procedure applies to all higher education schools, regardless of whether the study fields carried out by them were evaluated and provisionally accredited by the orders of the Director of the Centre for Quality Assessment in Higher Education before 1 March 2018 or after this date. Under the valid regulation laid down in the Law on Science and Studies, higher education schools may implement studies according to all accredited study programmes until the first accreditation of study fields according to the general procedure for the external evaluation and accreditation of studies, which is established in the said law.

Since, after the entry into force of the Law on Science and Studies as set out in its wording of 29 June 2016 and after the application of the procedures for the external evaluation and
accreditation of studies under this law had come due, the Minister of Education and Science
approved neither a description for the procedure of the external evaluation and accreditation of
studies nor the areas and indicators subject to evaluation, as required for the application of the said
procedures, the Constitutional Court emphasised in this ruling that, according to the constitutional
principle of responsible governance, the Minister of Education and Science is obliged to do so
within the shortest possible time so that there would be no obstacles to carry out the accreditation of
study fields in accordance with the general procedure for the external evaluation and accreditation
of studies. Otherwise, no preconditions would be created to ensure that higher education schools
effectively carry out their mission, linked with their autonomy, in training professionals in various
fields with higher education and perform their responsibility for higher education quality.
V. THE RULE OF LAW IN THE CONSTITUTIONAL DIMENSION
The rule of law is a prominent multifaceted and uniquely structured constitutional principle. Just as has been stated in the Vilnius Communiqué (adopted upon the conclusion of the 4th Congress of the World Conference on Constitutional Justice), despite the differences in the comprehension of the principle of the rule of law in every country, it not only constitutes the cornerstone of every legal system in the modern world, but is also integrally linked to democracy and the protection of human rights. Accordingly, the principle of the rule of law is inseparable from the constitution itself. As a fundamental constitutional principle, it requires that the law be based on certain universal values, thus it is essentially inherent in every constitutional issue.

As the constitutional courts play the predominant role in guarding the constitutional order and ensuring the supremacy of law and the constitution as the supreme law, they have a strong influence on shaping the content of the principle of the rule of law. Therefore, many different aspects of this principle are revealed in constitutional justice cases.

The purpose of this comparative analysis is to identify the developments of the case law of the constitutional courts of Georgia, the Republic of Moldova, and Ukraine (hereinafter together referred to as – the Constitutional Courts and, separately, respectively as – the CCG, CCM, and CCU), namely by analysing their jurisprudence of the years 2008–2018, which contributes to the strengthening of the constitutional identity of the state, the further qualitative development of official constitutional doctrine with regard to the implementation and protection of the principles of the rule of law, as well as to characterise these developments.

One of the framework conclusions, further demonstrated by the analysis, is that the case law of the Constitutional Court of Georgia (which is the “judicial body of constitutional

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control”2 of the country, exercising its “judicial power by virtue of constitutional litigation”3), the Constitutional Court of the Republic of Moldova (being the “the sole authority of constitutional jurisdiction”4), and the Constitutional Court of Ukraine (the “unique organ of constitutional jurisdiction in Ukraine”5) is first and foremost aimed at protecting democracy and the rule of law within the state, as well as at ensuring human rights as the core elements of the constitutional identity of the respective states. This conclusion not only implicitly, but also explicitly follows from the jurisprudence of the Constitutional Courts.6

The mentioned elements, to a greater or lesser extent, common to all three of the states, serve as solid criteria for the identification of the developments of the constitutional jurisprudence of the constitutional courts of Georgia, the Republic of Moldova, and Ukraine. Therefore, the following four aspects of the development of the principles of the rule of law in the constitutional jurisprudence of the Constitutional Courts of 2008–2018 will be further analysed in the article:

1. protection of constitutional guarantees of human rights and freedoms;
2. complexity of the issues dealt with in the constitutional jurisprudence;
3. implementation of the principle of separation of the state powers;
4. regional challenges in ensuring the implementation and protection of the principles of the rule of law.

In relevant instances, the case law of the Constitutional Court of the Republic of Lithuania (hereinafter referred to as the CCL) will also be provided for comparative purposes.

I. Protection of constitutional guarantees of human rights and freedoms

The Constitutional Court of the Republic of Moldova, exercising the power to interpret the Constitution, in the judgement of 9 February 2016 (on the interpretation of constitutional provisions regulating the powers of the constitutional court)7 elaborated the jurisprudential provision that not only the Supreme Court of Justice, as it was defined in Article 135 of the Constitution, but also the first instance courts and the Courts of Appeal are entitled to submit complaints to the constitutional court with the view to raise the exception of unconstitutionality.
of legal provisions that are to be applied while examining a case pending before that court. The CCM explained in detail the concept of the “exception of unconstitutionality”, the grounds and the process thereof before the constitutional court.

It was stressed that, by definition, the exception of unconstitutionality is conceived as a constitutional guarantee of the rights and freedoms granted to citizens in order to protect themselves against eventual deviations of the legislature in adopting legal provisions that are contrary to the Constitution. Given the fact that the Supreme Law does not provide expressly the right of citizens to submit complaints to the constitutional court, the exception of constitutionality is thus a way granting indirect access of individuals to the constitutional court and this fact falls within the chain of actions taken with a view to guarantee the right to a fair trial. Accordingly, following the mentioned judgment of the CCM, courts of all levels have been granted the opportunity to address the constitutional court when, while adjudicating a case, the parties or the judge face an uncertainty with regard to the constitutionality of the legal provision that should be applied.

A similar institute of indirect referral to the constitutional court for protection of human rights (through the court adjudicating an individual case), performed by ordinary courts, is entrenched in the Constitution of the Republic of Lithuania (the system of protection of individual rights is not yet supplemented by direct referral to the constitutional court). Upon requests of parties of the case or ex officio, all ordinary courts (i.e. courts of general jurisdiction, as well as administrative courts) of all instances, while examining a particular case, may refer the issue to the constitutional court if there are grounds to believe that a law or another legal act that should be applied in a concrete case is in conflict with the Constitution. The Constitutional Court of the Republic of Lithuania, in its recent decision of 28 June 2016, related to interpretation of the constitutional concept of the right of petition, once again stressed that, under Article 106 of the Constitution, individual persons are not entitled with the right to apply to the constitutional court in order to challenge the legality of acts adopted by the Parliament (Seimas), the President of the Republic, or the Government, which may violate rights and freedoms of these persons.

However, the legal situation concerning the indirect judicial protection of rights and freedoms of individuals in the Republic of Moldova and the Republic of Lithuania is slightly different from the position of the ordinary judge who addresses the constitutional court with regard to an issue of the constitutionality of certain legal provisions that are to be applied in the case before him/her. In the Republic of Moldova, the ordinary judge, when applying to the constitutional court, will not rule on the grounds of the complaint or in respect of conformity of the challenged legal provisions with the Constitution and will limit himself/herself only to verification of the compliance with certain criteria. In the petitions filed with the Constitutional Court of the Republic of Lithuania by the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional and local courts (as well as administrative courts) the legal arguments presenting the opinion of the court on the conflict of a law (or another legal act) with the Constitution must be specified.

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8 Ibid.
10 These are:
   (1) the object of the exception falls into the category of acts provided in Article 135 para. (1) p.a) of the Constitution;
   (2) the exception is raised by a party or its representative, or it is indicated that it is raised by the trial court ex officio;
   (3) the challenged provisions shall be applied while settling the case;
   (4) there is no earlier judgment of the Court in respect to the challenged provisions.
Despite the mentioned difference, this indirect path (i.e. ensured possibility to address the constitutional court only through the court adjudicating the case) in general offers the constitutional court the possibility, in its position as guarantor of the supremacy of the Constitution, to exercise control over the legislative power in terms of respect for the fundamental human rights and freedoms.\(^\text{12}\) It could be added that the competence to refer directly to the constitutional court, provided to every court of the main proceedings, fulfils options to have more mechanisms that are open to ensure constitutional access to justice and, consequently, the greater chance to better protect fundamental rights.\(^\text{13}\)

In this regard, it is to be noted that, among the constitutions of the four countries – Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine, only the constitutions of the Republic of Lithuania and the Republic of Moldova do not establish, to this day, direct access of all individuals to the respective constitutional courts.\(^\text{14}\)

Another distinct tendency in the development of the case law of the Constitutional Courts in the sphere of ensuring constitutional guarantees of human rights and freedoms is the openness towards international human rights law and, sometimes, maybe even its role as of potential inspiration of interpretation of international human rights standards.

The case law of the European Court of Human Rights (ECtHR) and, accordingly, the provisions of the European Convention on Human Rights (ECHR) are of evident relevance, \textit{inter alia}, for the \textbf{Constitutional Court of the Republic of Moldova} and direct source in the decisions adopted by the latter; moreover, in certain circumstances, they play an essential role in the examination of constitutional litigation. This is valid in particular when the constitutional litigation refers in essence to the issue of guaranteeing or observing a constitutional right enshrined both in the Constitution of the Republic of Moldova and in the ECHR.\(^\text{15}\) In its previous judgments, the CCM has delivered its opinion on the extents of fundamental freedoms and human rights where it grounded its reasoning both on the national constitutional norms as well as on the provisions of the ECHR and the case law of the ECtHR. It is conceived that, at the same time, reference made to the case law of the ECtHR, which, according to the CCM, stipulates a minimum level of protection of human rights for the state, contributes to a higher level of protection of human rights and fundamental freedoms by the constitutional court through the judgments delivered.\(^\text{16}\)

The jurisprudence of the ECtHR, certainly, is a relevant source in the context of jurisprudence of other Constitutional Courts as well. For instance, the \textbf{Constitutional Court of Ukraine}, when implementing constitutional justice, takes account of the requirements of the effective international treaties ratified by the Verkhovna Rada of Ukraine, and the practice


\(^{14}\) On 2 June of 2016, the Verkhovna Rada of Ukraine adopted the constitutional amendments, which guarantee the right of everyone to apply to the Constitutional Court with a constitutional complaint. Article 55.4 provides: “Everyone shall be guaranteed the right to lodge a constitutional complaint to the Constitutional Court of Ukraine on grounds defined in this Constitution and under the procedure prescribed by law.” Available at https://www.legislationline.org/documents/section/constitutions/country/52 [accessed 1 September 2018].


\(^{16}\) Ibid.
of interpretation and application of these treaties by international bodies whose jurisdiction is recognised by Ukraine, including the ECHR. It also should be noted in this context that the Constitutional Court of the Republic of Lithuania, when providing its conclusion on the compliance of certain articles of the ECHR with the Constitution, has concluded that the purpose of ECHR is universal, i.e. to strive for universal and effective recognition of the rights declared in the Universal Declaration of Human Rights and to achieve that they were observed while protecting and further implementing human rights and fundamental freedoms; with respect to its purpose, the ECHR performs the same function as the constitutional guarantees for human rights, because the Constitution establishes the guarantees in a state, and the ECHR does so on an international scale. Accordingly, the CCL, when deciding constitutional justice cases, also refers to the jurisprudence of the ECtHR.

In this context, the judgment of 18 May 2016 of the Constitutional Court of the Republic of Moldova on the exception of unconstitutionality of Paragraph 4 of Article 10 of the Law on Governmental Agent should be mentioned. It is noteworthy because of the fact that its reasoning and conclusions have later been confirmed by the ECtHR, aiming at establishing the common European standard with regard to the protection of specific rights and/or freedoms, which is recognised by the ECHR.

In the said case, the provision at issue was that of the Law on Governmental Agent that restricted access to information held by the Governmental Agent before the ECtHR. More specifically, it excluded access to the correspondence of the Governmental Agent with the ECtHR and other authorities, and the casefiles of the proceedings before the Governmental Agent. The reference to the CCM was based on the argument that this regulation unduly restricted the right to information under Article 34 of the Constitution of the Republic of Moldova.

What makes this case exceptional is that the CCM decided it at a time when the Grand Chamber of the ECtHR was in the process of reconsidering the scope of Article 10 of the ECHR, i.e. when it had been deciding whether this article encompasses the right to receive information from the public authorities. Although Article 10 famously enshrines that the right to freedom of expression includes the freedom to hold opinion and to receive and impart information and ideas without interference by public authorities, it was by the decision of the Grand Chamber of the ECtHR of 8 November 2016 that it became clear that this right is actually of a wider scope. As a result of this decision, it turned out that, under Article 10 of the ECHR, the public authorities are not only under the negative obligation not to interfere into the exercise of this right, but actually they have a positive obligation under certain circumstances to provide the information themselves.

In its judgment of 18 May 2016, the CCM has duly noted the current status by reference to the judgment of the ECtHR of 2006, in which it had concluded that it “found it challenging

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19 For example, the ruling of 26 June 2017 No KT8-N6/2017 on the consideration of criminal cases under the appeal procedure upon coming into light of essentially different factual circumstances; the ruling (No KT9-N7/2017) of 4 July 2017 on exempting priests from mandatory military service; etc.


21 Under Article 10.4 of the Law on Government Agent No 151 of 30 July 2015, the provisions of the Law No 982-XIV of 11 May 2000 regarding the access to information shall not apply to the correspondence of the Government Agent with the European Court and other authorities, neither to the casefiles of the proceeding before Government Agent.

22 Decision of the European Court of Human Rights of 8 November 2016 in the case of Magyar Helsinki Bizottsag v Hungary [GC], No 18030/11.
to read Article 10 as enshrining the general right of access to public documents”.

The CCM nonetheless did not go into details of the issue and moved on to establish the applicable international standard in view of the three recommendations of the Committee of Ministers on the right of access to information.

Accordingly, the CCM concluded that the national legal provision at issue was unconstitutional. Among others, the CCM considered that, under the circumstances of the case, the restriction at issue was not necessary in the democratic society, as different categories of data were already protected by other national laws. Thus, the challenged provision imposed excessive restrictions on the information that was at the disposal of the Governmental Agent and did not allow for the individualisation of the categories of information that are restricted.

Consequently, as a result of the judgment of the CCM of 30 July 2016, it is clear that currently a right of access to information of a wider scope is protected under the Constitution of the Republic of Moldova than the relevant right which is protected under the ECHR.

When revealing the trends of development of constitutional jurisprudence in the field of protection of human rights and freedoms, another tendency may be identified – the further comprehensive elaboration of the relevant doctrine in the customary areas of protection of human rights and freedoms.

Based on the case law of the Constitutional Court of Georgia, relevant in this respect are the issues of protection of human rights and freedoms, related to the constitutional guarantees of the right to a fair trial, especially its relevant elements in criminal proceedings and at the pretrial stage.

It is to be noted, that, for example, in the judgment of 19 December 2008, the right to a fair trial gained a central role. In the latter case, the CCG considered the constitutionality of the provisions of the Code of Criminal Procedure of Georgia that did not allow the victim to appeal against a plea bargain, though this right was granted to the parties to a plea bargain – a convicted person and a prosecutor. Nonetheless, the CCG stressed in this respect 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. The CCG held in this respect that the contested provision is in compliance with the Constitution, as the victim had a 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, hence the victim was guaranteed all the necessary legal means for the protection of his/her interests.

Accordingly, in its judgment of 5 November 2013, the CCG addressed the relevant aspects of a right to a fair trial in the civil proceedings. The CCG held that the provision of the Civil Procedure Code of Georgia, under which application to the court to claim the annulment of the judicial decision or reopening of proceedings due to the newly discovered circumstances

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23 Decision of the European Court of Human Rights of 10 July 2006 in the case of Sdruženi Jihočeské Matky v the Czech Republic ((dec.), No 19101/03. See reference by the Constitutional Court of the Republic of Moldova in its judgment of 18 May 2016.

24 Recommendation No 19(81) of the Committee of Ministers of the Council of Europe of 25 November 1981 on the access to information held by public authorities; Recommendation No 1037(1986) of the Committee of Ministers of the Council of Europe of 3 July 1986 on data protection and freedom of information; Recommendation of the Committee of Ministers Rec(2002)2 of 21 February 2002 on access to official documents.

25 The Constitutional Court of Moldova judgment of 18 May 2016.

26 The circumstances of this case are, to a certain extent, reminiscent to those that led to the judgment of 8 November 2016 of the Grand Chamber of the ECtHR in the case of Magyar Helsinki Bizottsag v Hungary (No 18030/11).

27 The judgment of the Constitutional Court of Georgia of 19 December 2008 (No #1/1/403, 427) in the case Citizen of Canada Hussein Ali and citizen of Georgia Elene Kirakosian v the Parliament of Georgia.

28 The judgment of the Constitutional Court of Georgia of 5 November 2013 (No 3/1/531) in the case Citizens of Israel Tamaz Janashvili, Nana Janashvili, and Irma Janashviliv v the Parliament of Georgia.
was not allowed after 5 years following the moment when the judicial decision became final, was unconstitutional. The CCG assessed that the aim of the application limitation period (the period during which a person can claim for his/her rights through application to court) is legitimate – it 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, it is one of the effective safeguards to ensure that cases are correctly decided, it also serves the purpose of preventing artificial burdening of courts. When evaluating the proportionality of the said restriction, the CCG 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. However, according to the CCG, the balance of interest differed in respect of decisions of courts made in favour of the private persons and decisions in favour of the state. The CCG held that, though the request for annulment of the court decision was still legitimate in its aims in the case if 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 that would have resulted in the decision favourable to them, if these circumstances had been presented to the court earlier, 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. Thus, the Court pointed out that, in these cases, there should still be a possibility to annul the court decision. Therefore, the disputed provision was held to be not a proportional means to achieve the legitimate aim.

Accordingly, in its most recent case law, the CCG continues to deal with problematic issues of constitutional guarantees of human rights and freedoms also beyond the more conventional sphere of constitutional jurisprudence. It also deals with qualitatively new challenges in protecting human rights and freedoms and, accordingly, in ensuring the rule of law. These challenges have lately tended to arise in specific areas, or even, in a sense, unique ones, as the existing European consensus on the relative issues is not evident. For example, the CCG by its judgment of 30 July 2018 declared unconstitutional the provisions of the Administrative Offences Code that set administrative responsibility for non-prescribed use of marijuana. The CCG ruled that the use of marijuana is protected by the constitutional right to free development of one’s personality. According to the CCG although the ban on the use of marijuana, as a mean to prevent its distribution, serves a legitimate aim – the protection of the well-being of users, the role of an individual user in the distribution of marijuana and threats emanating from an individual use are very minimal. Therefore, the restriction on the use of marijuana was held to be disproportionate to the legitimate aim. However, the CCG also noted that the responsibility on use of marijuana is in line with the Constitution when, under specific circumstances, individual use of marijuana poses a threat to third persons (for example, in educational facilities, public transport, in presence of adolescents, etc.).

It should be noted that this judgment was, in a sense, a continuation of protection of human rights and freedoms in this respect, as the CCG had already held to be unconstitutional to criminally prosecute people for consuming cannabis in its judgment of 30 November 2017, i.e. the consumption of cannabis had been decriminalised. The question related to the prohibition of the use of cannabis had been included into the agenda of the CCG for quite a long time: various issues related to the consumption of the said substance (ranging from criminal liability for usage of certain amount of cannabis (less than 70 g) to administrative responsibility) have been on the table of the constitutional court since 2015.


30 Article 16 of the Constitution of Georgia states: “Everyone shall have the freedom to develop their own personality.”
The latest developments in the case law of the **Constitutional Court of Ukraine** allow for a conclusion that the latter court also focused its due attention on the protection of human rights and freedoms related to the right to a fair trial, as well as guarantees for suspects and other persons in criminal proceedings.

For example, the CCU in its decision of **23 November 2017** declared unconstitutional the provision of the Code of Criminal Procedure of Ukraine according to which the application of measures to ensure criminal proceedings, selected at the stage of pretrial investigation, upon the unavailability of relevant petitions of the parties to the criminal proceedings is considered to be continued. The CCU stressed that the substantiation for the application of preventive measures related to the restriction of the right to freedom and personal inviolability, in particular home arrest and detention, should be subject to judicial review at specific intervals, periodically, by an objective and impartial court for the purpose of examining whether the risks that imply the application of such preventive measures exist, including when pretrial investigation is over, or when some risks may have already disappeared. According to the CCU, once the procedural status of a person is changed from a suspect to an accused (defendant) at the beginning of the stage of the judicial proceedings at the court of first instance, the automatic continuation of the application of preventive measures chosen by the investigating judge with respect to such a person (at the stage of pretrial investigation) as a suspect is precluded. Consequently, in the absence of a substantiated relevant decision of the court, such a person should be released immediately. The CCU stated that the contested legal regulation violates the principle of the equality of all participants in the trial, as well as the principle of the independence and impartiality of the court, as the court takes sides with the prosecution in determining the existence of risks that affect the need to prolong home arrest or detention at the stage of the judicial proceedings at court of the first instance.

Another aspect relevant to human rights protection, which was reflected in the recent constitutional jurisprudence, is related to guaranteeing the rights of persons who were held in the facilities of criminal-executive service.

The CCU in its decision of **24 April 2018** examined the constitutionality of the provisions of the Criminal Procedure Code of Ukraine which established that authorities of the State criminal-executive service (Service) conduct pretrial investigation of crimes committed on the territory or on the premises of the Service. The CCU relied in this respect on the positive obligation of the state in respect of protecting the right of a person to life. The CCU stressed in this respect that the positive duty of the state regarding the introduction of an adequate system of the protection of life, health, and dignity of a person envisages ensuring an effective investigation of the facts of deprivation of life and ill-treatment, including those persons who are in custody under full state control. The effectiveness of such an investigation is measured by its completeness, comprehensiveness, efficiency, independence, etc. The independence of the investigation of violations of human rights to life and respect for their dignity in places of deprivation of liberty means, in particular, that, from the point of view of the impartial observer, there should be no doubt about the institutional (hierarchical) independence of a public authority (its officials) authorised to conduct an official investigation of such violations. In this aspect, the Court held that the independence of the investigation cannot be achieved if the competent public

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31 The decision of the Constitutional Court of Ukraine of 23 November 2017 (No 1-r/2017) in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the compliance of certain provisions of the Code of Criminal Procedure of Ukraine with the Constitution of Ukraine.

32 The decision of the Constitutional Court of Ukraine of 24 April 2018 (No 3-r/2018) in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance of certain provisions of the Criminal Procedure Code of Ukraine with the Constitution of Ukraine.
authority (its officials) is institutionally dependent on the authority (its officials) to whom the system of places of detention is subordinated and who is responsible for its functioning. As it was the case under the impugned legal regulation, it was held to be not in conformity with the Constitution.

However, other issues related to the application of constitutional guarantees of protection of human rights and freedoms were also dealt with by the CCU. For example, in its decisions of 8 September 2016, the CCU dealt with constitutional guarantees of the right to freedom of convictions and religion. The CCU stressed in this respect that the right to freedom of convictions and religion along with other fundamental rights and freedoms are the basis for the establishment and functioning of a democratic society. The aim to comprehensively strengthen and ensure these rights and freedoms is the main duty of Ukraine as a democratic legal state. The Court then went to conclude that the legal regulation that set up a requirement to obtain in advance permission for specific peaceful religious gatherings in public places (i.e. different procedure of peaceful assembly depending on the organisers and participants, purpose, etc.) was not in conformity with Constitution.

Thus, the analysis of the jurisprudence of the Constitutional Courts in this respect allows making for several generalised observations:

– the implementation of constitutional justice in all the countries under consideration is, inter alia, traditionally aimed at ensuring the protection of human rights and freedoms; though the scope and manner of implementation of constitutional justice to a greater or lesser extent differ in all the analysed countries, ensuring of constitutional guarantees of protection of human rights and freedoms is the core task for all the Constitutional Courts;

– the extent of the protection of a particular human right may be different under diverse Constitutions; however, the supreme law of all the countries under consideration provide for the constitutional guarantees of the protection of the main human rights and freedoms; the Constitutional Courts, while ensuring their observance, refer, among others, to the jurisprudence of ECtHR, as the relevant guarantees provided for by the ECHR are considered to be, in the light of the constitutional justice, a minimum standard.

II. Complexity of the issues dealt with in the constitutional jurisprudence

As the constitutionality of constitutional amendments is one of the most important and complicated issues of constitutionalism, the judgment of the Constitutional Court of the Republic of Moldova of 4 March 2016 should be, first of all, mentioned as one of the most evident examples of the growing complexity of the issues dealt with by the Constitutional Courts. Additionally, it corresponds with the growing trend in global constitutionalism not only to impose material and procedural limitations on constitutional amendments, but also to ensure the compliance with such limitations by means of substantive judicial review of constitutional amendments.35

33 The decision of the Constitutional Court of Ukraine of 8 September 2016 (No 6-rp/2016) in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights concerning the conformity to the Constitution of Ukraine of certain provisions of Law of Ukraine on “On Freedom of Conscience and Religious Organisations” (the case of notification in advance of public services, religious rites, ceremonies and processions).
This CCM judgment concerns the review of constitutionality of certain provisions of the Law of 5 July 2000, amending the Constitution of the Republic of Moldova (to be more precise – amending the manner of electing the President of the Republic). The CCM declared unconstitutional the provisions of the contested law in regard of the procedure of electing the President of the Republic of Moldova by the vote of 3/5 of the Members of the Parliament. As a consequence, the provisions of Articles 78 and 89 of the Constitution, which were in force prior to the amendments operated by the contested law, have been reinstated in force.36

In its judgment, the CCM noted that the constitutional provisions that establish certain limitations with regard to constitutional revision entail legal force and cannot be circumvented, and are based on the existence of principles and provisions stated by the original constituent legislator, which are mandatory for the derivative constitutional power.37

The CCM held that compliance with the procedures governing constitutional revision granting time for public and institutional debates can contribute in a significant manner to the legitimacy and acceptance of the Constitution, and to the development and strengthening of democratic constitutional traditions. Instead, if the rules and procedures for constitutional revision are subject to interpretation and controversy, or if these are applied in a hastily manner or in absence of democratic debates, this could undermine political stability and, ultimately, the legitimacy of the Constitution itself. Thus, in the realm of protecting the constitutional order and the rule of law and with a view to guarantee the supremacy of the Fundamental Law, constitutional justice shall intervene. The logic of the need of constitutional review carried out by a body that is independent from the Parliament results from the perception that, if the Parliament itself is the judge of its own legislation, it may be easily tempted to resolve any doubt in its favour.38

In this judgment, the CCM faced an issue of the constitutionality of constitutional amendments and took into account comparative constitutional law in order to facilitate its own consideration under the Constitution of the Republic of Moldova. In its legal analysis, it extensively applied the comparative method of analysis referring to the constitutional judgments of the constitutional courts of Austria, Bulgaria, South Africa, Turkey and the ruling of 24 January 2014 of the Constitutional Court of the Republic of Lithuania.

It is to be noted that the CCM, in its judgment on the procedures of the election of the President, reflected the doctrinal statements of the ruling of 24 January 2014 of the Constitutional Court of the Republic of Lithuania.39 In the latter judgment on the amendment of the provisions of the Constitution, the CCL recognised the Law Amending Article 125 of the Constitution, in view of the procedure of its adoption, in conflict with the Constitution.40

Consequently, the CCL in its case law revealed the substantive limitations on the alteration of the Constitution that are both explicitly and implicitly consolidated in the Constitution. The Court noted the powers of the constitutional court to review the constitutionality of constitutional amendments were similarly strengthened specifically by means of its official doctrine, i.e.

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37 Ibid.
38 Ibid.
40 The official constitutional doctrine related to the control of constitutionality of constitutional amendments was further elaborated in the ruling of 11 July 2014 of the Constitutional Court of the Republic of Lithuania on the compliance of the provisions of the Republic of Lithuania’s Law on Referendums with the Constitution of the Republic of Lithuania (on organising and calling referendums).
jurisprudence (which had also taken into consideration that, in the constitutions of states around the world, the possibility of the review of the constitutionality of constitutional amendments is rarely mentioned *expressis verbis*). 41

The issues of the constitutionality of constitutional amendments has not yet been on the stake for the other two constitutional courts, i.e. for the Constitutional Court of Georgia and the Constitutional Court of Ukraine. Nonetheless, should this question be addressed to any of these courts, there is, without doubt, the possibility of having reference to the mentioned jurisprudence of the Constitutional Court of the Republic of Lithuania and the Constitutional Court of the Republic of Moldova (if such necessity arises).

Another example illustrating the complexity of issues referred to the constitutional court could be the judgment of 2 May 2017 of the Constitutional Court of the Republic of Moldova.42 It concerns the constitutional concept of “permanent neutrality”, i.e. the CCU disclosed the content of Article 11 of the Constitution, which stipulates that the “Republic of Moldova proclaims its permanent neutrality”. The CCM explained that, according to Article 11 of the Constitution, there are two distinctive characteristics of the permanent neutrality instrument of the Republic of Moldova. First, permanent neutrality means that the Republic of Moldova commits itself to stay neutral in any present or future conflict, irrespective of the identity of the belligerents, location, and its onset. Second, the neutrality of the Republic of Moldova means that the Republic of Moldova does not admit the stationing of foreign military troops on its territory. This, however, does not impede the Republic of Moldova to make use of all its means to defend itself militarily against any aggressor and to prevent any act that is incompatible with its neutrality, which may be committed by the belligerents on its territory.

The CCM also noted that the Soviet occupation of the present territory of the Republic of Moldova (1944–1991) until the present day means that the Soviet/Russian occupation has never stopped in the Eastern part of the country, although the independence of the Republic of Moldova has been proclaimed. Therefore, the fact that the Russian Federation did not withdraw its occupation troops from the Eastern region of the country, but, on the contrary, has consolidated its military presence in the Transnistrian region of the Republic of Moldova, constitutes a violation of constitutional provisions regarding the independence, sovereignty, territorial integrity, and permanent neutrality of the Republic of Moldova, as well as of international law. According to the CCM, inasmuch the Republic of Moldova remains under military occupation, the more relative are rendered its independence and autonomy, which are required by the status of neutrality.

It also noted that the security of the country should be ensured considering the geopolitical factors that exercise their influence in the South-Eastern European region and directly on the State. The CCM held that the Constitution is not a suicide pact. Hence, if there is any threat against fundamental constitutional values, such as national independence, the territorial integrity or the security of the state, the authorities of the Republic of Moldova are under the obligation to take all the necessary measures, including military, to defend itself efficiently.

Consequently, the CCM ruled that: first, the military occupation of a part of the territory of the Republic of Moldova in the context of its neutrality and lack of international recognition and guarantees of this status do not affect the validity of constitutional provisions on neutrality;

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second, in the event of any threats to constitutional fundamental values, as well as national independence, territorial integrity, or state security, the authorities of the Republic of Moldova are obliged to take all necessary measures, including military, that would allow it to efficiently defend against these threats; third, the stationing of any military troops or bases on the territory of the Republic of Moldova, managed and controlled by foreign states, is unconstitutional; and, finally, the participation of the Republic of Moldova in collective security systems, such as the United Nations security system, peacekeeping operations, humanitarian operations, etc., which would impose collective sanctions against aggressors and international law offenders, is not in contradiction with its neutrality status.

This important judgment has, among other aspects, once again confirmed not only the complexity of the issues arising within the constitutional jurisdiction, but it also reflects the density of the challenges in the region.

The case law of the Constitutional Court of Ukraine also proves that the ever-evolving concept of the rule of law leads to an ever-increasing complexity of the issues dealt with in constitutional jurisprudence. The most evident instance of such complexity of constitutional issues relates to one of areas of authority of the constitutional court, namely to provision of an opinion on the draft law amending the Constitution.43 On 20 January 2016,44 the CCU gave its opinion on the compliance of the draft law on introducing amendments to the Constitution of Ukraine (related to implementation of justice) with provision of the Constitution of Ukraine. The CCU noted that, under Article 157.1 of the Constitution of Ukraine, the Constitution cannot be amended if the amendments foresee the abolition or restriction of human and citizens’ rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. The CCU, accordingly, took to examine every provision of the draft law in this respect. For example, the CCU examined the proposed wording of Article 149 of the Constitution that specified guarantees of inviolability and independence of judges of the constitutional court. The CCU, inter alia, noted that the draft law proposed consolidating in the Constitution the provision according to which a judge of the Constitutional Court of Ukraine is legally liable for voting on decisions or opinions of the constitutional court, except for the cases of committing a crime or a disciplinary offence. The Court concluded in this respect that there is no evidence that the proposed wording of Article 149 of the Constitution provides for the abolition or restriction of human and citizen’s rights and freedoms. Following the examination of the wording of each proposed provision, the CCU held to recognise as conforming to the requirements of Article 157 and 15845 of the Constitution the draft law on introducing amendments to the Constitution.

43 Article 159 of the Constitution of Ukraine states: “A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution.”

44 The opinion of the Constitutional Court of Ukraine of 20 January 2016 (No 1-v/2016) on compliance of the draft law on introducing amendments to the Constitution of Ukraine with the provisions of Articles 157 and 158 of the Constitution.

45 Article 157 of the Constitution of Ukraine states: “The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens’ rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.” Article 158 of the Constitution of Ukraine states: “The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law. Within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution.”
An example demonstrating the complexity of the issues referred to the Constitutional Courts is also the decision of the CCO of 26 April 2018. In this decision, the CCO held that the amendments of the Law of Ukraine “On All-Ukrainian Referendum” were unconstitutional. The CCO, having referred to the procedural requirements for the adoption of laws, concluded that the adoption of the contested law had been carried out in violation of the constitutional requirement for personal voting by People’s Deputies, and, in addition, it had not been considered in the relevant committee and at the plenary session of the Verkhovna Rada. The CCO stressed that the purpose of the contested law was the creation of legislative bases and appropriate mechanisms for holding an all-Ukrainian referendum on the adoption of a new version of the Constitution, amendments to the Constitution, cancellation, loss of force or invalidation of the law on amending the Constitution. The court emphasised that, as the contested law included the legislative regulation of relations the subject of which is covered by the norms of the Constitution, the Verkhovna Rada, at the level of the ordinary law, had regulated the relations that are regulated by the Constitution. Thus, the CCO concluded that the procedure for regulating the referendum institute in the contested law was not in line with the constitutional principle of national sovereignty. In addition, the CCO stressed that the creation of a legislative mechanism for amending the Constitution, which does not conform to the procedure established by the Constitution, also entails limitation of the constitutional powers of the Parliament to amend the Constitution. Moreover, as the content of the relevant draft law may not be subject to preventive constitutional control, it would jeopardise it.

A evident example illustrating the complexity of issues considered within the means of constitutional justice is the judgment of 28 October 2015 of the Constitutional Court of Georgia, concerning provisions of the Law of Georgia “Freedom Charter”. Under the contested legal provisions, all persons who were members of the Central Committees of the Communist Party of the former USSR and Georgian SSR, secretaries of Regional and City Committees and members of the bureaus of the Central Committees of the Leninist Young Communist League offices between 25 February 1921 and 9 April 1991 were prohibited from being appointed to certain posts. This judgment, due to its particularity, inter alia, the significance of the regional challenges in ensuring the implementation and protection of the principles of the rule of law it reveals, is presented in section IV of this analysis.

Thus, the analysis of the jurisprudence of the Constitutional Courts in this respect allows for several generalised observations:

– the Constitutional Courts are tasked to deal with complex issues when implementing constitutional justice; regardless of the particular nature of these issues (i.e. whether they concern amendments of the Constitution, the very constitutional identity of the state, or legislative procedures) and due to the development of the legal system, they are subject to gradual and constant development and ever greater complexity;

– the disclosed complexity of the issues dealt with by the Constitutional Courts is, to a certain extent, determined also by the regional specificity, inter alia, that related to the historical development thereof.

46 The Decision of the Constitutional Court of Ukraine of 26 April 2018 (No 4-r/2018) in the case upon the constitutional petition of 57 People’s Deputies on conformity of the Law of Ukraine “On All-Ukrainian Referendum” to the Constitution of Ukraine.

47 The CCO noted that the Basic Law establishes, in particular, such procedural requirements for the adoption of laws: Decisions of the Verkhovna Rada of Ukraine are adopted exclusively at its plenary meetings by voting (Article 84.2); voting at the meetings of the Verkhovna Rada of Ukraine is performed by a People’s Deputy of Ukraine in person (Article 84.3); the Verkhovna Rada of Ukraine adopts laws, resolutions, and other acts by the majority of its constitutional composition, except in cases envisaged by this Constitution (Article 91). It follows from the provisions of Articles 6.2, 19.2 of the Basic Law that the Verkhovna Rada can exercise powers to adopt laws, regulations, and other acts only in the manner established by these constitutional norms.
III. The implementation of the principle of the separation of the state powers

Despite the evolving nature of the concept of the rule of law, the implementation of the principle of the separation of powers remains one of the most topical issues of constitutional jurisprudence in the region.

The judgment of 24 of January 2017 of the Constitutional Court of the Republic of Moldova serves as an important example of the implementation of the principle of the separation of the state powers. This judgment allowed the CCM to ensure respect for rule of law-based values.

The application mainly referred to the procedure of the rearrangement of the Government and the sharing of competences between the President and the Prime Minister within this procedure. In its judgment, the CCM pointed out that the contested provisions of the Constitution are to be interpreted based on the constitutional principle of checks and balances. Therefore, following this principle, in order to avoid institutional deadlocks and ensure the well-functioning of the institutions, public authorities are under the duty to cooperate. The CCM held that within the parliamentary system of the Republic of Moldova, the President of Moldova is conferred a number of competences expressly provided by the Constitution. Considering the President does not bear political responsibility for Government’s work, his role in shaping the composition of the Cabinet is a limited one.

The court recalled that in its earlier jurisprudence it had held that, following the vote of confidence of the Parliament for the Government, the President of Moldova is not entitled to refrain from appointing the Government. Failure to execute constitutional duties by the President of the country would lead in this case to a violation of the principle of checks and balances, provided for by Article 6 of the Constitution. The President of Moldova may decline the proposal of the Prime Minister to appoint a person for a vacant ministerial office and to ask for another proposal, without it generating a source of institutional deadlock or annulling competences of the Prime Minister within the co-decision procedure in a Cabinet rearrangement (“reshuffle”). In this context, rejection of a candidate proposed by the Prime Minister for a vacant ministerial office may occur only once and the refusal must be a reasoned one, grounded on legal requirements incumbent on the office of a member of the Government. Whereas if the President does not accept a candidate, the Prime Minister is entitled to come up with a second proposal for a candidate to the office of minister or to come up with the same proposal, and the President is under the duty to appoint (i.e. under a duty to appoint the second candidate).

The CCM stressed that the period pertaining to appointing the Cabinet or a minister, as well as the refusal to appoint a minister in case of a Cabinet reshuffle, must be as short as possible, i.e. within 14 days, similar to the maximum allowed period to promulgate a law.

It should be noted in this context that, following the presented judgment, three similar judgments concerning the suspension of the President’s powers to appoint new ministers have later been adopted in 2018, the latest of them being adopted on 24 September 2018.

The relevant issues related to ensuring the separation of powers do not surpass constitutional justice in Georgia and Ukraine either. Even if the issue under consideration is not explicitly

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49 The President of the Republic of Moldova may only once decline Prime Minister’s proposal of Cabinet reshuffle, http://www.constcourt.md/libview.php?l=en&id=7&idc=7388&t=/Media/News/The-President-of-Moldova-may-only-when-decline-PMs-proposal-of-Cabinet-reshuffle [accessed 1 September 2018].

related to this principle, the separation of state powers implicitly lies in the background of many constitutional justice cases.

As the principle of the separation of powers is, undoubtedly, interlinked to a certain extent with the independence of courts, the jurisprudence of the Constitutional Court of Georgia concerning, inter alia, the independence of the constitutional court should, therefore, be referred to in this respect.

The CCG in its judgment of 29 December 2016 declared several provisions of the Organic Law of Georgia on the Constitutional Court of Georgia unconstitutional. First of all, the CCG considered unconstitutional the end of a mandate in case the relevant state body fails to appoint/elect a new judge within the time required by the law and it is impossible for the constitutional court to exercise its authority due to absence of necessary quorum. It was considered that suchlike legal provisions would have created a danger for proper functioning of the court. In addition, the requirements of a quorum (necessity of consent by the majority of the full composition of the plenary session (9 members) for granting a constitutional complaint; the necessity of consent of at least 6 members of the plenary session to uphold the constitutional complaint for annulment of organic laws) were held unconstitutional. The CCG referred to the constitutional standards of implementation of constitutional justice, stating that, as a constitutional standard, the decisions by the constitutional court are adopted by the majority of judges present. Nevertheless, certain exceptions are allowed if they are related to the issues of systematic constitutional importance. The CCG also declared unconstitutional the rule that required the constitutional court to announce the full text of its decision in the courtroom. The CCG in this respect stated that suchlike legislative provision prevents the decision of the constitutional court form entering into force in an unjustified and unreasonable manner. The CCG held that it would not be compatible with the right of an individual to timely administration of constitutional justice. However, the requirement to immediately publish the entire text of the decision was held to be in line with the constitutional requirements. The provision that the candidate for the President of the Constitutional court was nominated by an agreed proposal of the President of Georgia, the President of the Parliament of Georgia, and the Chairperson of the Supreme Court of Georgia was overruled as well. The CCG considered that these legal provisions limited unreasonably the right to hold public office and restricted in an unjustified manner the independent functioning of the constitutional court.

Although the CCG in this judgment did not directly refer to the principle of the separation of powers, it is evident that the issues that were considered are related, to a greater or lesser degree, to this principle as well.

Thus, the analysis of the jurisprudence of the Constitutional Courts in this respect leads to the general conclusion that the principle of the separation of powers is, in a sense, intrinsic in the constitutional jurisprudence, whereas the specific regional circumstances condition the emergence of new related issues on the agenda of the Constitutional Courts.

IV. Regional challenges in ensuring the implementation and protection of the principles of the rule of law

Following the analysis of the jurisprudence of the Constitutional Courts, certain regional challenges that are, generally, faced by all of the Constitutional Courts may be indicated. At the same time, certain issues have been dealt with only by some of the Constitutional Courts, however, they may become relevant to other constitutional courts as well.

51 The Judgment of the Constitutional Court of Georgia of 29 December 2016 on cases Nos 768, 769, 790, 792.
It is evident that one of the examples of challenges to the rule of law within the region is corruption. As has been acknowledged by the Venice Commission, corruption leads to arbitrariness and abuse of powers, since decisions will not be made in line with the law, which will lead to decisions being arbitrary in nature. Moreover, corruption may offend equal application of the law: it therefore undermines the very foundations of the rule of law.

The fight against corruption has also been treated as an integral component of ensuring respect for the rule of law by the Constitutional Court of the Republic of Moldova. This statement was reiterated in the judgment of 5 September 2013, judgment of 6 April 2015, as well as in other court acts. For example, on 13 December 2016, the Constitutional Court of Moldova adopted a judgment on confirming the election results and validation of the mandate of the President of Moldova. In this judgment, the CCM, inter alia, dealt with the matter of alleged corruption of voters, domiciled on the left bank of the Nistru River. The CCM held that electoral corruption is a form of political corruption, when political leaders use the gained benefits in an abusive way in order to influence the elections.

The corruption of voters constitutes the offering or giving money, goods, services, or other benefits in order to determine the voter to exercise his/her electoral rights in a particular way within the elections. In this respect, the constitutional court noted that Article 38.7 of the Electoral Code provides that electoral candidates are prohibited from offering voters money or gifts, or from distributing goods free of charge, including humanitarian aid or other charity. On the other hand, the CCM found the absence of criminalisation, in the Criminal Code, of corrupting voters in presidential elections, similarly to the criminalisation of offering or giving money, goods, services, or other benefits in order to determine the voter to exercise his/her rights in a particular way within parliamentary or local elections and within the referendum (Article 181/1).

The CCM acknowledged that corrupting of voters should be regarded as a gross violation of the principles of free and democratic elections, including of the fair and transparent election process. Such violations create the preconditions for questioning the legality and legitimacy of elections. Moreover, these violations may considerably influence the election results.

Finally, the court held that the observations set forth in the judgment are not such as to determine any other conclusion than that which led to the examination of the presented submissions and the evidence submitted by the authors of the request for the annulment of the elections. The alleged fraud constitutes, in reality, as shown in this evidence, a series of sequential elements that have not formed a phenomenon capable of changing the voters’ will, meaning a modification in the assignment of the mandate. In regards to these infringements of


the law, it remains with the competent authorities to investigate the facts and apply the sanctions provided by law. In exercising its competences pursuant to the Constitution, the constitutional court confirmed the results of the presidential elections.56

The relevance of the fight against corruption and, accordingly, of the constitutionality measures aimed at combatting corruption in the legal system of Ukraine are, *inter alia*, demonstrated by one of the cases pending before the Constitutional Court of Ukraine,57 i.e. the case regarding the constitutionality of the provisions of the Criminal Code of Ukraine, which in 2014 introduced criminal responsibility for illicit enrichment. The constitutional petition (of 12 December 2017) in the mentioned case argues that Paragraph 1 of Article 368-2 of the Criminal Code of Ukraine, which establishes criminal responsibility for the acts of “acquiring by a person authorised to perform functions of the State or local self-government in ownership of assets in significant amount, the legality of grounds for acquiring of which has not been established by evidence, as well as transfer by the person of such assets to any other person” is in contradiction with the following constitutional principles: the protection against self-incrimination, the presumption of innocence, the principle of a fair trial/equality of arms, the principle of legality, the principle of *non bis in idem*, and the principle of non-retroactivity. Accordingly, the Constitutional Court of Ukraine, while examining the concrete issues raised in the petition, will have to answer these questions and, to a certain extent, consider the constitutionality of the contested provisions in the light of the principles of the rule of law.

The case law of the Constitutional Court of Georgia proves that, just as generally in the entire region, one of the specific challenges to the rule of law in Georgia, remains safeguarding democratic values, *inter alia*, guaranteeing human rights and fundamental freedoms, in the context of developments of the legal system, which, to a certain extent, concern the historical past of the region.

The CCG in its judgment of 28 October 2015 declared unconstitutional certain provisions of the Law of Georgia “Freedom Charter”. According to the challenged legal regulation, any person who was a member of the Central Committees of the Communist Party of the former USSR and Georgian SSR, secretaries of Regional and City Committees and members of the bureaus of the Central Committees of the Leninist Young Communist League offices between 25 February 1921 and 9 April 1991 were prohibited from being appointed on certain posts.58

The CCG was tasked by assessing the conformity of the prohibition on holding a specific state office for an indefinite time because of holding specific offices during the period of the Soviet Union. The CCG stressed that, considering the nearest past of Georgia, the State can

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56 Ibid.
58 These posts were: (a) members of the Government of Georgia, Deputy Ministers and the chairs of departments under the system of ministries, members of the National Security Council, members of the State Security and Crisis Management Council, members of the Central Election Commission of Georgia, members of the Governments of the Autonomous Republics of Abkhazia and Adjara, the Auditor General of the State Audit Office and their deputies, the General Director of the National Archives and their deputies – a legal entity under public law within the Ministry of Justice of Georgia, the Head of the Administration of the President of Georgia and their deputies, the Head of the Administration of the Government of Georgia and their deputies, the Head of the Special State Protection Service of Georgia, their deputies and heads of the department, Georgia’s Ambassadors Extraordinary and Plenipotentiary, envoys and consuls, the Governor of the National Bank of Georgia and the Vice-Governors, representatives of the Executive Government of Georgia in administrative-territorial units – state representatives – governors, members of national regulatory bodies, the Executive Director of National Statistics Office of Georgia (Geostat), a legal entity under public law, and their deputies; (b) employees of the Ministry of Defence and the Ministry of Internal Affairs of Georgia, the State Security Service of Georgia and the operative departments of territorial agencies of the Ministries; (c) the judges of the Constitutional Court and the common courts of Georgia; (d) rectors, vice-rectors, deans, and the heads of academic departments of state higher education institutions; the General Director of the Georgian Public.
have the legitimate interest not to allow reinstatement of communist totalitarian regime and take necessary measures in order to eliminate communist ideology. At the same time, in order to eliminate communist totalitarian ideology, a democratic state based on rule of law and human rights should use only legal mechanisms. The CCG noted that the dignity of a person is the basis to all fundamental rights, it is not separate, abstract category and is practically realised in human rights. The concept of human rights serves the main imperative, to protect the human dignity, which is then reflected in these rights.59

The CCG noted that it may not be excluded that every person who formally held leading post in the Communist Party did not directly take part in the activities of the Soviet regime, furthermore, might not have shared and might even combated with the communist ideology. In addition, the disputed provisions established a blanket prohibition without considering the scope of specific person’s activities/rights/competences and caused practically equal results to those people who were deciding internal/external/ideological policy at the time and those who did not have legal or practical means to amend the mentioned, nor did they have the possibility of influencing such decisions. Thus, an equal approach towards all individuals in a similar situation without assessing their specific functions, roles, and activities, and establishing an equally negative attitude towards all of them and the possibility of equal intensity of limiting the right violate their honour and dignity.

The CCG stressed that the legislator is obliged to consider those social results that can accompany certain regulation of social relationships and it should avoid the regulation that carries the risks of stigmatising certain groups of society or specific individuals. The interest of protecting national security and fight with totalitarian ideologies cannot outweigh the negative results of the law that is stigmatising and violating the dignity. The restriction prescribed by the disputed provisions is in force for unlimited time, so it does not allow the persons concerned to change their attitudes after a period of time. Thus, persons are stripped of the right to hold state offices unconditionally and for unlimited time. Suchlike perpetual limitation to hold indicated state offices, the CCG considered, is a repression measure with elements of punishment, rather than a means to prevent threats.

The CCG noted that, as regards certain persons who held leading party offices in the Communist Party, there might be a high legitimate public interest to prohibit them from holding relevant state offices. However, the threats arising from specific persons cannot be the constitutional basis of the blanket prohibition established by the disputed provisions. The Court considered the need for blanket and perpetual prohibition as doubtful, considering the elapsed time period since the collapse of USSR and the fact that the threat of communist totalitarian ideology and the rehabilitation of the Soviet regime is decreased.

The CCG held that the State has no right to deviate from the duty to recognise a human being as the most important constitutional value and consider him/her as a bare object and means to achieve a goal, regardless of the importance of a private or public interest that is to be achieved. The legitimacy of the State to take certain measures for protecting national security and safety, as well as the protection of human rights-freedoms or other relevant interests, is bound by this constitutional guarantee of utmost importance. The CCG considered that, in the case under consideration, the legislator had established a legal regime according to which the persons concerned were seen as objects of law instead of subjects of law and were a means for achieving specific aims. This was considered to be not in conformity with the right to dignity guaranteed by the Constitution. Thus, the disputed provisions were held to contradict Paragraph 1 of Article 17 of the Constitution of Georgia.

59 For more, see Judgement of the Constitutional Court of Georgia No 3/1/512 of 26 June 2012 on the case Citizen of Denmark Heike Kronqvist v The Parliament of Georgia, II-43.
The CCG also stressed that protection of state national security and safety, as well as overpowering communist totalitarian ideology, are valuable legitimate public aims, according to which the right to hold public office guaranteed by Article 29 of the Constitution of Georgia can be restricted. The communist totalitarian ideology contradicted the idea of independence of Georgia, was characterised by violation of human rights, various forms of massive terror, concentration camps, mass deportations, ethnic and religious persecution, and limitation of the freedom of expression. The CCG noted that the disputed provisions limit direct or indirect participants of Soviet totalitarian governance from being appointed to important offices such as a Member of the Government of Georgia, Deputy Ministers, Members of State Security Council, etc. The aim of the disputed provisions is distancing persons who participated in the process of Soviet totalitarian governance from state service. The indicated offices are different from other offices in public service by the scope of authorities, as well as the level of participation and magnitude of defining state policy, they are vital for independence, sovereignty, development, economic/financial stability, and security of any state. Due to excessive public interest towards these offices the legislative body is allowed to adopt limiting regulations in order to ensure the protection of the democratic state, as well as to create the legal order that will allow avoidance of potential risks for hindering the achievement of the legitimate aim. The CCG noted that a democratic state is not only authorised but is frequently obliged to protect the fundamental principles of democracy in the process of public governance. For this purpose, the State is authorised to set requirements for holding certain offices and has enough legitimacy not to allow persons whose participation in governance carry irreversible threats to public service. Therefore, in the current instance, the public interest to protect the legitimate aim to defend state safety and security, to overpower the Soviet totalitarian regime was considered to outweigh the right of citizens to hold state offices prescribed by the disputed provisions.

Thus, the Constitutional Court of Georgia in the analysed judgment took to defend the fundamental principles of democracy, considering the specificity of their protection determined by the historical context of Georgia specifically, and the whole region in general.

It should be noted that the constitutional jurisprudence of the Constitutional Court of Ukraine has most manifestly reflected the recent developments in the legal system of the country. Perhaps the most relevant example in this respect would the decision of the CCU of 20 December 2017. In this decision, the CCU dealt with the provisions of the Law of Ukraine “On Higher Education” that, inter alia, established that a person who voted for dictatorial laws on 16 January 2014 cannot be elected or appointed as the head of a higher education institution (including its acting head). Having analysed the impugned legal regulation, the CCU noted that it, obviously, was referring to the People’s Deputies of Ukraine of the Verkhovna Rada of Ukraine of the VII convocation who supported the mentioned laws in the process of exercising their powers, i.e. according to contested legal provisions namely these Deputies were banned from being elected or appointed as the head of a higher education institution.

The court noted in this respect, that the conventional title “dictatorial laws of 16 January 2014” applied in the contested provisions did not allow identifying the exact laws it was referring to. Since it is unclear from its content what criterion should be used in determining whether a law of Ukraine adopted by the Verkhovna Rada on 16 January 2014 is “dictatorial”, the disputed provision was considered to be unclear. Thus, the CCU held that the impugned law did not

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60 The decision of the CCU of 20 December 2017 (No 2-r/2017) in the case upon the constitutional petition of 49 People’s Deputies of Ukraine concerning the compliance with the Constitution of Ukraine of certain provisions of the Law of Ukraine “On Higher Education”.

61 Actually, as noted by the CCU, on 16 January 2014, the Verkhovna Rada adopted eleven laws, most of them without discussion, without application of the electronic system “Rada” and by raising the hand.
meet the requirement of legal certainty, which allowed for its arbitrary interpretation in law enforcement practice and may have led to arbitrariness.

In addition, the CCU went even further to discuss the parliamentary indemnity in Ukraine. The court stressed that the essence of the parliamentary indemnity in Ukraine is to protect a People’s Deputy of Ukraine from persecution for statements and voting while performing parliamentary duties in parliament and in securing his/her right to defend his/her position in the consideration of any issues in the Verkhovna Rada Ukraine or its bodies. The CCU emphasised that no one, including the Verkhovna Rada itself, can bring a People’s Deputy of Ukraine to responsibility for statements and voting in parliament and its bodies. As the parliamentary indemnity has a lifelong character, it excludes the possibility of prosecuting a People’s Deputy of Ukraine in the future, even if his/her parliamentary powers are terminated. Thus, the CCU held that the disputed provisions violate the essence of the parliamentary indemnity.

Thus, the analysis of the jurisprudence of the Constitutional Courts in this respect allows for several generalised conclusions:

– ensuring the implementation and protection of the principles of the rule of law is, as already demonstrated, the main task of the Constitutional Courts, which are the guarantors of the constitutional order, i.e. the constitutional identity of the state, democracy, and respect for human rights and freedoms;

– the Constitutional Courts, while ensuring the implementation and protection of the principles of the rule of law, confront not only the traditional relevant issues in this sphere, but also deal with the regional specificity; regional challenges in this context are determined not only by the common European tendencies, but also by the legal and historical aspects specific to the development of the respective country, as well as to the whole region.

Conclusive remarks

The comparative analysis of the case law of the Constitutional Court of Georgia, the Constitutional Court of the Republic of Moldova and the Constitutional Court of Ukraine proves the determination of these courts to ensure the protection of democracy, the rule of law, and human rights – the core elements of the constitutional identity of the state.

The analysis proves that the timing of the emergence of the issues relevant to the implementation and protection of the principles of the rule of law, the complexity thereof, as well as the pattern of approach of the Constitutional Courts towards them differ and is completely unique in all of the analysed constitutional jurisdictions. Nonetheless, the mutual values, such as the inherent respect for the independence and territorial integrity of the states, democracy, the rule of law and human rights, as well as common regional challenges, are inevitably reflected in the constitutional dimension.