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INTERSECTION OF THE JURISPRUDENCES. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CONSTITUTIONAL DOCTRINE FORMULATED BY THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA

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Abstract. *The article discusses the certain features of the constitutional doctrine of human rights developed by the Constitutional Court of Lithuania which were influenced by the jurisprudence of the European Court of Human Rights, the role of the European Convention on Human Rights as a legal source in the system of sources of constitutional law . The intersection of the jurisprudences, which came into being due to different assessments of the legal regulation in cases where the same legal act was recognized by the Constitutional Court being in compliance with the Constitution and the European Court of Human Rights recognized that the application of the said act was a cause of the violation of a certain person's rights protected by the Convention (or vice versa) is one of the most important questions and raises many theoretical and practical problems. Different assessment of the legal acts made by the European Court of Human Rights with regard to their compliance with the Convention should not be regarded as such an essential circumstance which could lead to possible repeated review of such legal act at the Constitutional Court, such intersection of the jurisprudences, should be solved by ordinary courts while following the doctrine that in cases where legal acts contain the legal regulation which competes with that established in the international treaty, the international treaty should be applied.*

Keywords: *constitutional law, sources of constitutional law, the jurisprudence of the Constitutional Court of Lithuania, intersection of jurisprudence, European Convention on Human Rights, the jurisprudence of the European Court of Human Rights.*

Introduction

The human rights are recognized as one of the most important institutes of constitutional law. The constitutions are important as much as they protect the human rights.¹ The present system of human rights reflects the philosophical and legal ideas of several centuries. During the whole period of evolution of the human rights one has developed the most important aspects of the human rights—integrity of a human being, freedom and equality, respect for the dignity of each human being. The doctrine of the human rights which is based on the priority of a person and his rights in relation with the state became not only the integral component of the constitutional systems of separate states, but it became an international system of protection of human rights. The creation of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - European Convention on Human Rights) and the system of protection of the rights defended by it which unites 47 states are one of the most successful efforts of the international community in the formation of respect for human rights not only in the European states but in the whole world.

The Convention became a pan-European instrument defending human rights and most of the states consolidated, by legal means, such level of protection of human rights which would hardly have been imagined in 1950, when the Convention was being prepared.² A particularly big role was played by the Convention while restoring democratic institutes in most states of the Eastern and Central Europe. The role of the Convention in the transformation of the constitutional legal systems of the states of the Eastern and Central Europe is unprecedented.³

In the jurisprudence of the Constitutional Court of the Republic of Lithuania (hereinafter - the Constitutional Court), the European Convention on Human Rights and the doctrine of human rights and freedoms which is formulated in the jurisprudence of the European Court of Human Rights take a particular place. Only a rare Constitutional Court ruling (act) meant for the questions of human rights does not have references to the decided cases (jurisprudence) of the European Court of Human Rights. The significance of the European Convention on Human Rights and its jurisprudence became prominent in the jurisprudence of the Constitutional Court already in the very first cases,

1 Lane, J. E. *Konstitucija ir politikos teorija* [Constitution and Theory of Policy]. Translated by Kūris, E. Kaunas, 2003, p. 209.

2 Tulkens, F. The European Convention on Human Rights between International Law and Constitutional Law. In *Dialogue Between Judges*. Strasbourg, 2007, p. 14.

3 Frowein, J. A. The Transformation of Constitutional Law through the European Convention on Human Rights. In *Dialogue Between Judges*. Strasbourg, 2007, p. 87.

even before the ratification of the Convention by Lithuania. After the Convention had been ratified, it became an important part of the legal system of the Republic of Lithuania.

The Constitutional Court interprets the jurisprudence of the European Court of Human Rights as a particularly important source for the construction of law. Such role of the Convention determines the entrenchment of the concept of constitutional human rights as innate rights which are based on the democratic values of the European culture and helps to foster the constitutional values of human rights.

The purpose of this article is to analyze certain features of the constitutional doctrine of human rights which were influenced by the jurisprudence of the European Court of Human Rights, as well as to assess the influence of the doctrine formulated by the Constitutional Court and its significance when the European Court of Human Rights is deciding cases against Lithuania. The intersection of the jurisprudences, which came into being due to different assessments of the legal regulation in cases where the same legal act was recognized by the Constitutional Court being in compliance with the Constitution and the European Court of Human Rights recognized that the application of the said act was a cause of the violation of a certain person's rights protected by the Convention (or vice versa) is one of the most important questions and raises many practical problems.

1. The European Convention on Human Rights and the System of Sources of Constitutional Law

While forming the European doctrine of protection of human rights, the European Convention on Human Rights undoubtedly exerts a huge influence on the constitutional law and the doctrine of human rights of every state (also the constitutional law and the doctrine of human rights of Lithuania) which is a signatory to the Convention. The Convention plays a role of the instrument that fills gaps in national constitutional systems for the protection of basic rights; as a consequence, there are no longer any decisive differences as to the quality of its guarantees in comparison with those of the national constitutions.⁴

While ascertaining the tendencies of the constitutional doctrine of human rights which are influenced by the Convention and the jurisprudence of the European Court of Human Rights, the role of the Convention as a legal source in the system of Lithuanian legal sources is very important. The international obligations of the state which arise upon joining international treaties enshrining the protection of human rights determine not only the changes in ordinary law but also those in constitutional law. In its conclusion of 24 January 1995⁵ the Constitutional Court described the Convention for the Protection of Human Rights and Fundamental Freedoms as a special source of international

4 Lorz, R. A. *The Emergence of European Constitutional Law/Recent Trends in German and European Constitutional Law*. Berlin: Springer, 2006, p. 57.

5 Constitutional Court conclusion of 24 January 1995. *Official Gazette*. 1995, No. 9-199.

law, the purpose of which is different from that of many other acts of international law. This purpose is universal, i.e. to strive for universal and effective recognition of the rights declared in the Universal Declaration of Human Rights and to achieve that they were observed while protecting and further implementing human rights and fundamental freedoms; with respect to its purpose, the Convention performs the same function as the constitutional guarantees for human rights, because the constitution establishes the guarantees in a state and the Convention—on the international scale.

The European Convention on Human Rights, being an international treaty, is quite often interpreted as belonging not only to the sphere of international law, but also to constitutional law. While deciding the questions on human rights which are to be attributed also to the sphere of regulation of the Convention, the courts must at the same time refer not only to the Constitution, but also to the provisions of the Convention. Therefore, the Convention and the judgments of the European Court of Human Rights have the dimension of constitutional law, even though usually the Convention law is considered as being subordinate, according to its legal power, to constitutional law. However, such formal point of view may not deny the important circumstance that, while influencing the construction of the catalogue of human rights which is enshrined in the constitutions, it essentially determines the principles of interpretation of rights, and sometimes even the content itself.⁶ In the opinion of some authors, the Convention, as an international treaty, which is applied on a daily basis while deciding individual cases, is usually treated by national judges as constitutional law.⁷ However, only in some states (the Netherlands, Austria and San Marino) one consents to the point of view that the Convention is of the level of constitutional law.⁸

The jurisprudence of the European Court of Human Rights which, together with the Convention itself, forms the so-called law of the European Convention on Human Rights is an important legal source. Among the sources of Lithuanian constitutional law, the law of the European Convention on Human Rights is to be assessed as an indirect source of law.⁹ A new doctrine of sources of constitutional law, under which one distinguishes the sources of two levels—sources of constitutional law which include the Constitution itself and the constitutional doctrine formulated by the Constitutional Court and sources of constitutional law which include also other sources such as constitutional laws, the Statute of the Seimas, etc., becomes increasingly consolidated in the tradition

6 Such role of the Convention and the jurisprudence of the European Court of Human Rights which influences constitutional law is also recognized in the constitutional tradition of Germany, see: Papier, H-J. Execution and effects of the judgments of the European Court of Human Rights in the German judicial system. In *Dialogue between judges*. Strasbourg, 2006, p. 63.

7 Rodriguez-Zapata Perez, J. *The Dynamic Effect of the Case-Law of the European Court of Human Rights and the Role of the Constitutional Courts*. 2007, p. 52

8 Wildhaber, L. *The European Court of Human Rights 1998-2006, History, Achievements, Reform*. N. P. Engel, Publisher, 2006, p. 198.

9 Such attitude towards the Convention, as an indirect source of constitutional law, was presented by Egidijus Kūris: Kūris, E. The Impact of the Decisions of the European Court of Human Rights on the National Legal Systemviewer from the Standpoint of the Constitutional Court of Lithuania. In *Dialogue Between Judges*. Strasbourg, 2006, p. 31.

of Lithuanian constitutional law. We could attribute the law of the European Convention on Human Rights, as an indirect source to the sources of constitutional law, in the so-called broad sense, however, the Convention (and its law) may not be equated to the level of sources of constitutional law, which is comprised only by the Constitution itself and the doctrine of the Constitutional Court designed for the interpretation of the provisions of the Constitution.

However, the influence of the jurisprudence of the European Court of Human Rights which interprets the Convention and its provisions for the doctrine of the constitutional rights raises no doubt irrespective of the fact whether we equate it to the level of constitutional law (and, in a certain sense, also law of the constitution) or not. The treatment of the Convention as a legal source also determines the peculiarities of constitutional interpretation of the catalogue of human rights.

The Convention is an international instrument of human rights the provisions of which should be interpreted by taking account of the Vienna Convention on the Law of Treaties adopted in 1969. In the national system we may not interpret the rights protected by the Convention in a different manner without providing them with an adequate or even bigger protection. The interpretation of national basic rights guarantees by the member states is meanwhile heavily influenced by the understanding which the European Court of Human Rights gives to corresponding guarantees in the Convention. The concept of the Constitution as a living instrument permits the courts to find an answer to most of the questions linked to human rights in the constitutions of member states and not to oppose the principles of the Constitution and the Convention. Moreover the provisions of the Convention are at least partially able to set aside or invalidate national laws, and even where this is not a formal consequence of its application, it often prompts national legislatures as well as domestic courts to adjust their legislative and adjudicative measures accordingly.¹⁰

The institutions of constitutional control—constitutional courts—continually construe the rights and freedoms of a person which are enshrined in the Constitution and in such way the final limits of law are drawn by the constitutional jurisprudence. The recognition of the evolution of the official constitutional doctrine, i.e. recognition that the process of creation of the constitutional doctrine is continuous and may not be finite is an important feature of formation of the jurisprudential constitution which influences the concept of constitutional freedoms of a person. Recognition of the jurisprudential constitution broadens not only the concept of constitutional rights but also expands the possibilities to recognize human rights as constitutional rights. The conception of the jurisprudential constitution perceives the Constitution as a concept of a link between the two inseparable elements of the constitutional normative reality—the constitution and the constitutional jurisprudence.¹¹

The Convention and the jurisprudence of the European Court of Human Rights play a vital role in the development of the doctrine of human rights which is formulated by

10 Lorz, R. A., *supra* note 4, p. 56.

11 Jarašiūnas, E. Jurisprudencinė konstitucija [Jurisprudential constitution]. *Jurisprudencija*. 2006, 12(90): 24–33.

the Constitutional Court. The Convention is important while interpreting the constitutional rights of a human being as natural which are based on the values of the European democratic culture.

In the opinion of Luizius Wildhaber, who was President of the European Court of Human Rights, whether the European Court of Human Rights is itself a “Constitutional Court“ is largely a question of semantics; we can always call it a quasi-Constitutional Court, *sui generis*. What is not in doubt is that the issues which it is called upon to decide are constitutional issues in so far as they concern fundamental rights within Europe; European control is a fail-safe device designed to catch the breaches that escape the rigorous scrutiny of the national constitutional bodies. There is a fundamental dichotomy running throughout the Convention. This is as to whether the primary purpose of the Convention system is to provide individual relief or whether its mission is more a “constitutional” one of determining issues on public policy grounds in the general interest. If the latter is the case then the mechanism of individual applications is to be seen as the means by which defects in national protection of human rights are detected with a view to correcting them and thus raising the general standard of protection of human rights.¹²

The importance of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights became prominent in the jurisprudence of the Constitutional Court from the very first cases, before Lithuania ratified the Convention.¹³ After the Seimas ratified the Convention,¹⁴ it became a part of the legal system of the Republic of Lithuania. The Constitutional Court considers the jurisprudence of the European Court of Human Rights, as a source of construction of law, to be important for the construction and application of Lithuanian law.¹⁵

The Constitutional Court has formulated the doctrine of international treaties, as a legal source, which has been gradually developed, and some elements of this doctrine were specified.¹⁶ The Constitutional Court has held that the treaties ratified by the Sei-

12 Wildhaber, L., *supra* note 8, p. 113–125.

13 Constitutional Court ruling of 27 May 1994. *Official Gazette*. 1994, No. 50-948; Ruling of 18 November 1994. *Official Gazette*. 1994, No. 91-1789. In these cases, the Constitutional Court referred to the Convention law yet before the ratification of this Convention by Lithuania, and in the Ruling of 20 April 1995. *Official Gazette*. 1995, No. 34-847 – before coming into force of the Convention in Lithuania.

14 On 27 April 1995, the Seimas of the Republic of Lithuania adopted the Law “On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Fourth, Seventh and Eleventh Protocols Thereof”. *Official Gazette*. 1995, No. 37-913; Convention for the Protection of Human Rights and Fundamental Freedoms. *Official Gazette*. 1995, No. 40-987; Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, with protocols Nos. 1, 4, 6, and 7. *Official Gazette*. 2001, No. 96-3016. This Convention came into force for Lithuania on 20 June 1995.

15 Constitutional Court ruling of 29 December 2004. *Official Gazette*. 2005, No. 1-7; Constitutional Court ruling of 21 December 2006. *Official Gazette*. 2006, No. 141-5431, and other rulings.

16 In a certain aspect, at the initial stage (in its conclusion of 24 January 1995) the Constitutional Court formulated the legal doctrine of the Convention as a legal source which is applied differently in criminal and civil law, however, later on, such differentiated application of the Convention was not developed and the Constitutional Court assesses the Convention as a directly applied legal source without differentiating the spheres of law. (The principle of a differentiated application of the Convention was widely discussed and criticized by most scientists of Lithuanian law).

mas acquire the power of the law (Constitutional Court conclusion of 24 January 1995, ruling of 17 October 1995 and decisions of 25 April 2002 and 7 April 2004). While interpreting this doctrinal provision, in its ruling of 14 March 2006¹⁷ the Constitutional Court held that it cannot be construed as meaning that, purportedly, the Republic of Lithuania may disregard its international treaties, if a different legal regulation is established in its laws or constitutional laws than that established by international treaties. Quite to the contrary, the principle entrenched in the Constitution that the Republic of Lithuania observes international obligations undertaken on its own free will and respects universally recognised principles of international law implies that in cases when national legal acts (*inter alia* laws or constitutional laws) establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied.

The Convention is applied in Lithuanian law directly. While construing the relation between the ratified international treaty and a law, in its decision of 25 April 2002¹⁸, the Constitutional Court held that, under the Constitution (Paragraph 1 of Article 105 of the Constitution), the Constitutional Court shall consider and adopt decisions concerning the conformity of laws of the Republic of Lithuania and legal acts adopted by the Seimas with the Constitution of the Republic of Lithuania. Thus, under the Constitution, the Constitutional Court shall not consider the conformity of a law with a legal act having the force of the law.

Thus, the Constitutional Court does not investigate the compliance of a law with the legal act which has the power of a law, it refuses to investigate the petitions of the petitioners regarding the compliance of laws with the international treaties, however, it investigates the compliance of substatutory legal acts with international treaties. While deciding in the Constitutional Court ruling of 16 January 2007,¹⁹ whether Decree of the President of the Republic of 22 July 2003 is not in conflict with Paragraph 2 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court for the first time directly applied the provisions of the European Convention on Human Rights (the Constitutional Court assessed the compliance of the concept of the principle of presumption of innocence—the right enshrined in Paragraph 2 of Article 6 of the Convention with the concept of the principle of presumption of innocence enshrined in Paragraph 1 of Article 31 of the Constitution of the Republic of Lithuania, and it noted that it is essentially the same). In this ruling, the Constitutional Court also noted that under the Constitution, no substatutory legal acts of the Republic of Lithuania, including decrees of the President of the Republic, may be in conflict with the Convention for the Protection of Human Rights and Fundamental Freedoms.

17 Constitutional Court ruling of 14 March 2006. *Official Gazette*. 2006, No. 30-1050.

18 Constitutional Court decision of 25 April 2002. *Official Gazette*. 2002, No. 44-1679.

19 Constitutional Court ruling of 16 January 2007. *Official Gazette*. 2007, No. 7-287.

2. The Influence of the Jurisprudence of the European Court of Human Rights for the Constitutional Doctrine of Human Rights

The European Convention on Human Rights and the law thereof which is composed of the Convention itself and the jurisprudence of the European Court of Human Rights which interprets the provisions of the Convention, as an indirect source of constitutional law, exerts an exceptionally significant influence on the constitutional concept of human rights. The Constitutional Court interprets the rights protected by the Constitution while taking account of the international documents designed for human rights and of the fact how the human rights, and their content, are understood by the international community which follows the principles of a state under the rule of law.

One should not overestimate the influence of international law for the doctrine of Lithuanian constitutional rights, as some modern problems of human rights which are often solved by the European Court of Human Rights have not yet reached the Constitutional Court, even though some other problems of such rights also arose in Lithuania.²⁰ The contemporary doctrine of human rights forms new human rights, or to be more precise—a bit different attitude towards human rights. Modern technologies determine the recognition of some new human rights as important human rights, some of these rights are directly related to the classical human rights, such as the right to inviolability of private life or the right to life. As an important element of the private life of a person, also the right to a person's identity gains recognition in the aspect that one recognizes the right to demand changing it. We would think that the introduction of the individual constitutional complaint in the future will significantly influence the constitutional doctrine of human rights also in the aspect of modern rights.

The European Convention on Human Rights and the jurisprudence of the European Court of Human Rights particularly influenced the jurisprudence of the Constitutional Court in the first decade (1994-2004)²¹ of the activity of the Constitutional Court. In this period of time, while formulating the doctrine of human rights, in more than 20 cases the Constitutional Court quoted the provisions of the Convention or referred to the jurisprudence of the European Court of Human Rights. Later on, the law of the Convention was not used so widely, however, referring to the constitutional doctrine formulated previously²² which was influenced a lot by the Convention law and the Court's precedents, the Constitutional Court essentially continued to indirectly follow the doctrinal provisi-

20 On 11 September 2007, the European Court of Human Rights adopted a judgment in the case *L v. Lithuania* (Application No. 27527/03), in which it recognized that the rights of a person which are protected in the Convention were violated. The violation of Article 8 of the Convention was held in the judgment, as due to a certain legal gap linked to gender-reassignment surgery, a person was left "in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity."

21 The Constitutional Court of the Republic of Lithuania started its activities in 1993.

22 For example, in its ruling of 21 September 2006, while construing the discretion of the legislator to establish the limits of the public interest, the Constitutional Court makes a reference to its previous rulings, those of 6 May 1997 and 22 February 2001, in which, while construing the concept of the public interest, it referred to the law of the European Convention on Human Rights.

ons of human rights enshrined in the Convention law. In its acts the Constitutional Court referred to Articles 2, 3, 5, 6, 7, 8, 10, 11 and 14 of the Convention and to the rights enshrined in Protocol No. 1 thereof as well as their interpretation in the jurisprudence of the European Court of Human Rights.

In the jurisprudence of the Constitutional Court, we could single out the following tendencies of the development of the doctrine of human rights, the formation of which was influenced by the law of Convention: formation of the doctrine of the original and derived (explicitly and implicitly consolidated) constitutional rights; recognition of the status of absolute rights for certain rights; recognition of the principle of integrity and indivisibility of human rights; recognition of social rights as individual rights, for which judicial defence must be guaranteed; grounding of the doctrine of limitation of application of rights on the principles of the Convention; and direct defence of the human rights which are entrenched in the international documents.²³ Even though some elements of these tendencies are conditioned by the development of the previous constitutional doctrine, however, also the development of the jurisprudence of the European Court of Human Rights (and the changing attitude towards human rights—it is especially applicable to the recognition of social rights as individual rights and their defence) influenced the appearance of some new tendencies in the doctrine of human rights which is formulated by the Constitutional Court.

2.1. The Doctrine of the Derived (Implicitly Consolidated) Constitutional Rights

Legal recognition of human rights is a complex problem. Even though constitutional recognition of human rights is an important guarantee of rights, however, as R. Dworkin notes, there may always arise a question whether the Constitution, even if interpreted properly, recognizes all moral rights which are enjoyed by the citizens, and it is also not clear, whether, as most of people think, the citizens have the duty to obey law even if it encroaches upon their moral rights.²⁴ However, it also needs to be noted that only the constitutional recognition of rights ensures their full-fledged protection. Even though the constitutional system contributes in one or another way to the consolidation of moral rights with regard to the state authority, it is far from being able to guarantee these rights and even to establish what they are. It means that in certain cases the last word on these questions is said not by the legislator, but by some other institution,²⁵ therefore, a special meaning falls on the possibilities of interpretation of constitutional rights. Strict interpretation of the constitutional text shows a narrow attitude towards constitutional rights as it identifies these rights with the rights which are recognized by a limited group of people at a certain historical moment. The recognition of the innate

23 For more information about these and other tendencies of the doctrine of human rights in the jurisprudence of the Constitutional Court, see: Birmontienė, T. Šiuolaikinės žmogaus teisių konstitucinės doktrinos tendencijos [Modern Trends in Constitutional Doctrine of Human Rights]. *Konstitucinė jurisprudencija. Lietuvos Respublikos Konstitucinio Teismo biuletenis*. 2007, 1(5): 202–240.

24 Dworkin, R. Rimtas požiūris į teises [Serious Approach to the Rights]. Translated from English by Klimka, K. Vilnius: Lietuvos rašytojų sąjungos leidykla, 2004, p. 263.

25 *Ibid.*

nature of human rights and freedoms is a direct ground for the Constitutional Court to continuously supplement the catalogue of fundamental rights and to highlight the new aspects of fundamental rights.

So far the Constitutional Court has been formulating the doctrine of the derived (implicitly consolidated) constitutional rights very carefully. The Constitutional Court “finds” such rights while interpreting any right which is directly enshrined in the Constitution or a constitutional principle. Sometimes it is “prompted” also by the European Court of Human Rights. The doctrine of the derived (implicitly consolidated) constitutional rights refers to the interpretation of the right which is directly enshrined in the Constitution or of a principle of the Constitution. To such implicitly enshrined rights for which the Court recognizes constitutional protection and to the appearance of which was influenced by the law of the European Convention on Human Rights, we could also attribute *inter alia* such rights as the right to a fair legal process, the right of a journalist to preserve the secret of the source of information, the right to paying of a pension granted by a law which is not in conflict with the Constitution.

2.2. The Right to a Fair Legal Process

While analyzing the influence of the Convention law for the jurisprudence of the Constitutional Court, first of all one should stress the significance of Article 6 of the Convention and its interpretation in the jurisprudence of the European Court of Human Rights. This article is designed for such an important human right as the right to a fair trial (proper legal process). This right, being one of the procedural nature, essentially determines the implementation and protection of most other (substantive) rights. We think that the concept of this right which is presented in the jurisprudence of the European Court of Human Rights and its emphasized significance implied the fact that in the jurisprudence of the Constitutional Court the right to a fair legal process is interpreted as a derived constitutional right (as the one implicitly consolidated in the Constitution) which is not *expressis verbis* entrenched in the Constitution, but is derived from various norms and principles of the Constitution. The right to a fair legal process is a constitutional right of a person for which the constitutional protection and defence is applied to the full extent.²⁶

Having held more than once that the jurisprudence of the European Court of Human Rights, as a source for the interpretation of law, is also important for the construction and application of Lithuanian law, the Constitutional Court referred to the provisions of Article 6 of the Convention or to the jurisprudence of the European Court of Human Rights which interprets the provisions of Article 6 of the Convention while deciding a number of cases. This is obvious from the Constitutional Court rulings of 18 December 1994, 18 November 1995, 5 February 1999, 19 September 2000, 12 February 2001, 15 May 2007 and 28 May 2008.

26 Sinkevičius, V. Teisės į teisingą teisinį procesą samprata Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje [Conception of the Right to a Fair Legal Process in the Jurisprudence of the Constitutional Court of the Republic of Lithuania]. *Konstitucinė jurisprudencija*. 2006, 2: 251.

In its ruling of 21 December 1999²⁷, while construing the constitutional right of a person to an independent and impartial court, the Constitutional Court analyzed the practice of the European Court of Human Rights linked to the concept of the provisions of Article 6 of the Convention regarding the independent and impartial tribunal (court), and noted that the analysis of the case-law practice of the European Court of Human Rights permits to assert that control over the activities of courts and judges or the cases when non-judicial structures exert influence on courts are considered violations of Article 6 of the Convention. (For example, in its judgment of 24 November 1994 in the case *Beaumartin v. France* (Series A, No. 296-B), the European Court of Human Rights held that only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation “tribunal” within the meaning of Paragraph 1 of Article 6 of the Convention. Such a conclusion was also based on some other judgments delivered by the European Court of Human Rights.) The Constitutional Court also noted that in the case-law of the European Court of Human Rights also such factors as an opportunity for the other branches of power, especially for the executive, to give instructions to courts or cause transference of a judge to another post in case he does not follow certain directions, as well as conditions of remuneration of judges and a possibility for the executive to exert direct or indirect influence on courts, are regarded as factors exerting direct and indirect influence on courts.

In its ruling of 8 May 2000,²⁸ while construing the requirements raised for the conditions of use of undercover investigators/agents in the criminal proceedings, the Constitutional Court referred a lot to the cases of the European Court of Human Rights in which the corresponding provisions of Articles 6 and 8 of the Convention were interpreted, and noted that in this aspect the case-law practice of the European Court of Human Rights linked with the use of undercover investigators/agents as well as the use of secret means and methods in the course of detection of crimes is important which *inter alia* shows that in themselves secret methods of detection of crimes and offenders do not violate Article 8 of the Convention. The Constitutional Court made reference to the judgment of the European Court of Human Rights of 6 September 1978 in the Case of *Klass and others v. Germany* (European Court of Human Rights, Case of Klass and others, Judgment of 6 September 1978, Series A No. 28) in which it was held that the use of secret means is not incompatible with Article 8 of the Convention, since it is the fact of not informing the individual that ensures the efficacy of this measure. The European Court of Human Rights also notes that, on the other hand, the states do not dispose of unrestricted freedom of application of measures of secret surveillance. The states must ensure that their laws contained guarantees against possible misuse in the course of secret surveillance of persons (*European Court of Human Rights, judgment of 25 March 1998 in the case of Kopp v. Switzerland*). The Constitutional Court emphasized that in its judgment of 9 June 1998 in the Case of *Teixeira de Castro v. Portugal* (Cour Eur. D. H., arrêt Teixeira

27 Constitutional Court ruling of 21 December 1999. *Official Gazette*. 1999, No. 109-3192.

28 Constitutional Court ruling of 8 May 2000. *Official Gazette*. 2000, No. 39-1105.

de Castro du 9 juin, Receuil 1998 - IV), the European Court of Human Rights held that the right to a fair administration of justice holds such a prominent place that it cannot be sacrificed for the sake of expedience; that the general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex; that on the grounds of public interest one may not justify such evidence that is obtained when the actions of police officers go beyond those of undercover agents, i.e. when the undercover agents incite the commission of the offence. The public interest cannot justify the use of evidence obtained as a result of police incitement. In this ruling, *inter alia* having assessed the corresponding principles formulated by the European Court of Human Rights, the Constitutional Court held that the obligation of the state and its institutions is prevention of crime. The mode of conduct simulating a criminal act may only serve as one of the measures in detection of a crime prepared by a person or in that of a crime at an early stage of its commission. The state institutions may not establish such legal regulation which would permit state special services to incite or provoke a person to commit a crime so that after it there would appear grounds to prosecute the said person.

In its ruling of 19 September 2000,²⁹ while construing the right of the legislator to establish such legal regulation, under which one would make the witness or victim anonymous, the Constitutional Court emphasized an exceptional character of the evidence of such persons and the conditions which must be followed in such cases so that the rights of the suspect to defence which are provided for in the Constitution would not be violated. In this case the Constitutional Court generally referred to the European Convention in Human Rights and the cases of the European Court of Human Rights as *Lüdi v. Switzerland* (European Court of Human Rights, judgment of 15 June 1992, series A No. 238), *Doorson v. the Netherlands* (European Court of Human Rights, Case of *Doorson v. the Netherlands*, Reports 1996-II), *Van Mechelen and others v. the Netherlands* (European Court of Human Rights, Case of *Van Mechelen and others v. the Netherlands*, Reports 1997-III) and noted that it is recognised in the jurisprudence of the European Court of Human Rights that in certain cases the use of anonymous witnesses does not violate the Convention.

In its ruling of 12 February 2001,³⁰ while construing the right to defence which is consolidated in Paragraph 6 of Article 31 of the Constitution, as well as the right to have an advocate, the Constitutional Court noted that such right is also enshrined in international legal acts *inter alia* Paragraph 3 of Article 6 of the European Convention on Human Rights, in which it is established that everyone charged with a criminal offence, along with the other guarantees, has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The Constitutional Court, while construing the right to defence, as well as the right to have an advocate, which are consolidated in Paragraph 6 of Article 31 of the Constitution, noted that the

29 Constitutional Court ruling of 19 September 2000. *Official Gazette*. 2000, No. 80-2423.

30 Constitutional Court ruling of 12 February 2001. *Official Gazette*. 2001, No. 14-445.

opportunity to implement these rights must be real. The Constitutional Court emphasized that the right to choose an advocate by himself, unlike the right to have an advocate, is not absolute. When interpreting the peculiarities of consolidation of the right of a person to defence by means of laws in such cases when exercise of defence of the person faces real difficulties and the right of a court to suggest that the person choose another advocate, the Constitutional Court referred to the principle formulated in the Case of *Croissant v. Germany* (European Court of Human Rights, Case of *Croissant v. Germany*, judgment of 25 September 1992, Series A No. 237-B) of the European Court of Human Rights that if this is necessary in the interests of justice, state institutions can appoint counsel for the person even in cases when the indicted person disagrees with this or when he wishes to defend himself personally.

In its ruling of 15 May 2007,³¹ the Constitutional Court construed the constitutional requirements which stem from the guaranteed right of a person to defend his violated rights in court, in the aspect of the right of a party to the case to familiarize oneself with classified information, by taking account of the principles of a fair trial which are formulated in the jurisprudence of the European Court of Human Rights, and noted that, for instance, it was held in the 27 October 2004 Judgment of the European Court of Human Rights in the case *Edwards and Lewis v. the United Kingdom* (Cour eur. D. H., arrêt Edwards et Lewis c. Royaume-Uni du 27 octobre 2004, nos 39647/98 et 40461/98) that the entitlement to disclosure of relevant evidence is not, however, an absolute right; in any criminal court proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused; in some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest; only such measures restricting the rights of the defence which are strictly necessary are permissible; in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.

In its ruling of 28 May 2008,³² while construing the relation between the criminal law and administrative law, the Constitutional Court also referred to the principles formulated in the jurisprudence of the European Court of Human Rights in the aspect that taking account of the nature (character) of the violation of law, severity of the sanction for the committed violation of law, in their essence the administrative violations of law are compared to criminal deeds, and this determines the application of all guarantees established in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Engel and others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22; *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73; *Escoubet v. Belgium*, judgment [GC], no. 26780/95, ECHR 1999-VII; *Ezeh and Connors v. United*

31 Constitutional Court ruling of 15 May 2007. *Official Gazette*. 2007, No. 54-2097.

32 Constitutional Court ruling of 28 May 2008. *Official Gazette*. 2008, No. 62-2353.

Kingdom [GC], no. 39665/98 and 40086/98, ECHR 2003-X; *Gurepka v. Ukraine*, no. 61406/00, etc.).

2.3. The Right of the Journalist not to Disclose the Source of Information

The jurisprudence of the European Court of Human Rights was influential in giving the status of constitutional rights for the right of the journalist to preserve the secret of the source of information. The interpretation of Article 8 of the European Convention on Human Rights which enshrines freedom of self-expression has special meaning on the development of the doctrine of constitutional rights. Even though the Constitutional Court does not directly define any right as a derived constitutional right, however, while having assessed its arguments set forth in the ruling of 23 October 2002³³, we may draw a conclusion that freedom of the media is considered to be such right, the right of a journalist, as a special subject, not to disclose the source of information which may be restricted only by a court and only when it is necessary to disclose the source of information due to the “greater interest” protected by the Constitution and other constitutionally defended value.

In the said ruling the Constitutional Court noted that from Article 25 of the Constitution as well as the other provisions of the Constitution consolidating and guaranteeing the freedom of an individual to seek, obtain and impart information stems the freedom of the media. Under the Constitution, the legislator has a duty to establish the guarantees of the freedom of the media by law. The Constitutional Court recognized the right of the journalist to preserve the secret of the source of information as one of such guarantees. In the said ruling, the Constitutional Court referred to the jurisprudence of the European Court of Human Rights, *inter alia* judgment in the Case *Fressoz et Roire v. France* (Cour. eur. D. H., arrêt *Fressoz et Roire c. France* du 21 janvier 1999, Recueil des arrêts et décisions 1999-I). While analyzing the arguments of the European Court of Human Rights given in the case *Goodwin v. United Kingdom* (European Court of Human Rights, Judgment in the Case *Goodwin v. United Kingdom* of 27 March 1996, Report 1996-II), the Constitutional Court emphasized that the European Court of Human Rights, while noting an important role of the press in a democratic society, also while having regard to the interest of a democratic society to guarantee and protect press freedom, has held that the restriction of the right of journalists not to disclose the source of information is justifiable if one follows the requirements set in Article 10 of the Convention and laws: such restrictions must be necessary for the protection of the interests of a democratic society; the hindrance to exercise press freedom cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. Although there is a general public interest in the free flow of information to journalists, the journalist must recognise that his express promise of confidentiality may have to yield to a greater public interest.

33 Constitutional Court ruling of 23 October 2002. *Official Gazette*. 2002, No. 104-4675.

3. Intersection of the Jurisprudences

The law of the European Convention on Human Rights exerts a big influence on the jurisprudence of the Constitutional Court. The jurisprudence of the Constitutional Court may be assessed both as construing the Constitution and law and as determining the directions of the judicial practice. In this aspect it is especially important when the European Court of Human Rights elucidates the circumstances of cases against Lithuania, in particular when the Court decides the questions of acceptability of petitions. In comparison with cases against other states, the cases against Lithuania decided by the European Court of Human Rights are not numerous, however, some of them, due to the significance of the European doctrine of human rights formed by the European Court of Human Rights, are of particular importance—they have the meaning of a precedent.

The intersection of the jurisprudences, which came into being due to different assessments of the legal regulation in cases where the same legal act was recognized by the Constitutional Court being in compliance with the Constitution and the European Court of Human Rights recognized that the application of the sad act was a cause of the violation of a certain person's rights protected by the Convention (or vice versa) is one of the most important questions and raises many practical problems. This question is very important in the cases when the Constitutional Court, under the doctrine formed by it, investigates the compliance of only statutory legal acts with provisions of the Convention, since the international treaties ratified by the Seimas acquire the power of the law, whereas the Constitutional Court does not investigate the compliance of a law with a legal act which has the power of the law.³⁴

Only in very rare cases the Constitutional Court is deciding the question of the compatibility of legal acts with the Convention. The direct defence of the human rights which are consolidated in international documents is just finding its place in the jurisprudence of the Constitutional Court. In its ruling of 16 January 2007,³⁵ while deciding whether the Decree of the President of the Republic of 22 July 2003 was not in conflict with Paragraph 2 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court directly applied the provisions of the European Convention on Human Rights for the first time. While deciding whether the Decree of the President of the Republic was not in conflict with Paragraph 2 of Article 6 of the Convention, in the opinion of the Constitutional Court, the fact was of essential importance that the concept of the principle of presumption of innocence which is consolidated in Paragraph 2 of Article 6 of the Convention is virtually the same as the concept of the principle of presumption of innocence which is entrenched in Paragraph 1 of Article 31 of the Constitution. Therefore, after it had been held that the disputed decree of the President of the Republic was not in conflict with the principle of presumption of innocence which is entrenched in Paragraph 1 of Article 31 of the Constitution, taking

34 Constitutional Court decision of 25 April 2002. *Official Gazette*. 2002, No. 44-1679; Constitutional Court decision of 7 April 2004. *Official Gazette*. 2004, No. 53-1816.

35 Constitutional Court ruling of 16 January 2007. *Official Gazette*. 2007, No. 7-287.

account of the same arguments, it was held that the said decree was also not in conflict with the principle of presumption of innocence, which is consolidated in Paragraph 2 of Article 6 of the Convention. In this ruling, the Constitutional Court also noted that under the Constitution, no substatory legal acts of the Republic of Lithuania, including decrees of the President of the Republic, may be in conflict with the Convention.

We could also mention the Constitutional Court decision of 20 November 2009, which confirmed the position of the Constitutional Court that upon establishing that a legal act is not in conflict with provisions of the Constitution, it is virtually presumed that this legal act should not be in conflict with provisions of the Convention as well, since the values protected by the Constitution and the Convention are interrelated, unless new and essential circumstances came to light the existence of which was unknown to the Constitutional Court at the time of the investigation and this would pave the way to reassess the disputed legal regulation upon initiative of the Constitutional Court. By means of the aforesaid decision one refused to consider the petition of the Court of Appeal of Lithuania, the petitioner, requesting to investigate whether the corresponding Decree of the President of the Republic was not in conflict with the provisions of the Republic of Lithuania Law on Courts to the extent that the said law provides that only a citizen of the Republic of Lithuania with impeccable reputation can be appointed as a judge of a local court, and whether it was not in conflict with Paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Decree of the President of the Republic was disputed virtually in the same aspect which was investigated in a previous constitutional justice case wherein the Constitutional Court ruling of 20 December 2007 had been adopted.³⁶

The Constitutional Court *inter alia* held that after one had investigated the compliance of the disputed Decree of the President with the Constitution—an integral and harmonious system—and with the provisions of the Law on Courts which did not conflict with the Constitution and on whose grounds and in the course of implementation whereof the aforesaid Decree of the President had been adopted, and when the Constitutional Court ruling of 20 December 2007 was in force, the compliance of this Decree with the Constitution and with the laws which were not in conflict with the Constitution could not be questioned; otherwise, one would deviate from the imperatives arising from Paragraph 1 of Article 7 and Paragraph 2 of Article 107 of the Constitution of the Republic of Lithuania, one would deviate from the constitutional principle of a state under the rule of law, one would deny the principle of the supremacy of the Constitution and the concept of the hierarchy of legal acts entrenched in the Constitution, one would distort the concept of the fact that the decisions of the Constitutional Court on the issues ascribed to its competence are final and not subject to appeal, and one would also distort the essence of constitutional justice itself.

Thus, the mere circumstance that a legal act was not investigated at the Constitutional Court with respect to a certain provision of the Constitution (or with another

36 Constitutional Court ruling of 20 December 2007. *Official Gazette*. 2007, No. 136-5529.

provision of a law, which is not in conflict with the Constitution) may not be assessed as a possibility to seek revision of the constitutionality of such legal act.

In the same decision the Constitutional Court reiterated its position which was expressed in its ruling of 28 March 2006, wherein it was stated that the Constitutional Court has the powers to review its own rulings, conclusions and decisions when they were adopted while the Constitutional Court did not know about such essential circumstances which, if had been known then, would have been able to determine a different content of the acts of the Constitutional Court.

While analysing the jurisprudence of the Constitutional Court designed for direct protection of the rights protected by the Convention (such jurisprudence is not very big), still, when one bears in mind the fact that the Constitutional Court has the powers to assess the compliance of some legal acts with the Convention, the question arises as to what should be the way of solving the issues in situations where the same legal acts are assessed in a different manner by the Constitutional Court and the European Court of Human Rights as regards the compliance of these acts with provisions of the Convention. There might be such a situation, where the Constitutional Court recognises that a statutory legal act is not in conflict with the corresponding provisions of the Convention, however, in cases such act is later challenged at the European Court of Human Rights, this Court might establish that, after all, this legal act is in conflict with other (or the same) provisions of the Convention.

There would still be a more complicated situation in cases where the laws or provisions thereof the compliance of which with the Convention is not investigated by the Constitutional Court, since in Lithuania the Convention and laws are of the same legal power, would be assessed differently from the standpoint of their compliance with the Constitution and the Convention, e.g., if the Constitutional Court recognised them as being in compliance with the Constitution, but the European Court of Human Rights recognised them as conflicting with the human rights protected by the Convention. We think that a different assessment of the provisions of legal acts made by the European Court of Human Rights with regard of their compliance with the Convention should not be considered an essential circumstance the presence of which would pave the way for the revision of such legal act at the Constitutional Court. In case of such intersection of the jurisprudences we might invoke the doctrine of international treaties as a legal source, which was formulated by the Constitutional Court, whereby in cases when national legal acts (*inter alia* laws or constitutional laws) establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied. Thus, such intersection of the jurisprudences due to different assessment of the legal regulation entrenched both in a law and a statutory legal act from the standpoint of the Constitution and the Convention might be solved by ordinary courts when they settle cases especially in the situation where the legislator would not change such legal regulation which is deficient from the point of view of the Convention.

Such legal situation came into being also when the European Court of Human Rights adopted the judgment in the case *Sidabras and Džiautas v. Lithuania* on 27 July

2004³⁷ and the judgment in the case *Rainys and Gasparavičius v. Lithuania* on 7 April 2005.³⁸ In these cases the applicants asserted that there was violation of Articles 8 and 10 of the Convention separately or in conjunction with Article 14, since after the Law “On the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of the Regular Employees of This Organisation” had been applied with regard to the applicants, they lost their job and their possibilities of employment were limited. The European Court of Human Rights *inter alia* recognised that there were violations of Articles 14 and 8 of the Convention which protected the private life of an individual and prohibited discrimination. In these judgments the European Court of Human Rights assessed the provisions (*inter alia* prohibiting to be employed according to one’s profession in various spheres of the private sector) of Article 2 of the said law; these provisions defined the concept of private life as the one including a broad prohibition to become employed in the private sector. In the opinion of the Court, the disputed prohibition was very influential for the possibilities of the applicants to pursue their professional activities and their right of ‘respect of private life’ in view of Article 8 of the Convention was thus affected. The European Court of Human Rights noted that the requirement of an employee’s loyalty to the state was an *inherent* condition of employment with state authorities responsible for protecting and securing the general interest, however, such a requirement was not inevitably the case for employment with private companies, therefore, the Court concluded that the ban on the applicants seeking employment in various private-sector spheres constituted a disproportionate measure, even having regard to the legitimacy of the aims pursued by that ban.

It needs to be noted that at the time when the European Court of Human Rights was considering the said cases, there had already been an investigation into the compliance of the provisions of Article 2 of the said law with the Constitution. On 4 March 1999, the Constitutional Court adopted the Ruling ‘On the compliance of Articles 1 and 2, Part 2 of Article 3 of the Republic of Lithuania Law ‘On the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of the Regular Employees of This Organisation’ as well as Parts 1 and 2 of Article 1 of the Republic of Lithuania Law on the Enforcement of the Law ‘On the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of the Regular Employees of This Organisation’ with the Constitution of the Republic of Lithuania’, wherein it *inter alia* recognised that Articles 1 and 2 of the Law “On the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of the Regular Employees of This Organisation” were not in conflict with the Constitution. It was held in this ruling that Article 2 of this law is not in conflict with Article 23, Paragraph 1 of Article 46 and Paragraph 1 of Article 48 of the Constitution. The Constitutional Court established that the ban imposed on former KGB agents to work in the civil service was in line with the Constitution, whereas the ban im-

37 The 27 July 2004 Judgment of the European Court of Human Rights in the case *Sidabras and Džiautas v. Lithuania* (application Nos. 55480/00 and 59330/00).

38 The 7 April 2005 Judgment of the European Court of Human Rights in the case *Rainys and Gasparavičius v. Lithuania* (Application Nos. 70665/01 and 74345/01).

posed by the law on former KGB employees to engage also in certain private activities was compatible with the constitutional principle to choose an occupation, since the state, while implementing its obligation to ensure national security and proper functioning of education and of the financial system, is entitled to establish special requirements for those who wish to work in the main areas of economy and business. The Constitutional Court also noted that the nature, objective and area of effect of the established restrictions are not regulation of ownership relations nor are they a restriction of the right of the owner freely to use, manage and dispose of his property, but a certain limitation upon the right freely to choose an occupation.

The Constitutional Court did not investigate whether the provisions of the said law were in compliance with the protection of private life of an individual entrenched in Article 22 of the Constitution, however, the European Court of Human Rights, while broadly interpreting in these cases the concept of private life as also including certain aspects of the labour activities of the individual, virtually assessed also the compliance of possible limitations upon the freedom to choose an occupation with the provisions of the Convention.

We presume that the different assessment of the legal acts made by the European Court of Human Rights with regard to their compliance with the Convention should not be regarded as such an essential circumstance which could lead to possible repeated review of such legal act at the Constitutional Court. Thus, such intersection of the jurisprudences, which came into being due to different assessments of the legal regulation in cases where the legislature does not correct the legal regulation which is deficient with regard to the Convention, should be solved by ordinary courts while following the doctrine which was formulated by the Constitutional Court and which regards international treaties as a source of law: under this doctrine, in cases where legal acts contain the legal regulation which competes with that established in the international treaty, the international treaty should be applied.

References

- Birmontienė, T. Šiuolaikinės žmogaus teisių konstitucinės doktrinos tendencijos [Modern Trends in Constitutional Doctrine of Human Rights]. *Konstitucinė jurisprudencija. Lietuvos Respublikos Konstitucinio Teismo biuletenis*. 2007, 1(5): 202–240.
- Constitutional Court ruling of 27 May 1994. *Official Gazette*. 1994, No. 50-948.
- Constitutional Court Ruling of 18 November 1994. *Official Gazette*. 1994, No. 91-1789.
- Constitutional Court conclusion of 24 January 1995. *Official Gazette*. 1995, No. 9-199.
- Constitutional Court Ruling of 20 April 1995. *Official Gazette*. 1995, No. 34-847.
- Constitutional Court ruling of 21 December 1999. *Official Gazette*. 1999, No. 109-3192.
- Constitutional Court ruling of 8 May 2000. *Official Gazette*. 2000, No. 39-1105.
- Constitutional Court ruling of 19 September 2000. *Official Gazette*. 2000, No. 80-2423.
- Constitutional Court ruling of 12 February 2001. *Official Gazette*. 2001, No. 14-445.
- Constitutional Court decision of 25 April 2002. *Official Gazette*. 2002, No. 44-1679.

- Constitutional Court ruling of 23 October 2002. *Official Gazette*. 2002, No. 104-4675.
- Constitutional Court decision of 7 April 2004. *Official Gazette*. 2004, No. 53-1816.
- Constitutional Court ruling of 29 December 2004. *Official Gazette*. 2005, No. 1-7.
- Constitutional Court ruling of 14 March 2006. *Official Gazette*. 2006, No. 30-1050.
- Constitutional Court ruling of 21 December 2006. *Official Gazette*. 2006, No. 141-5431.
- Constitutional Court ruling of 16 January 2007. *Official Gazette*. 2007, No. 7-287.
- Constitutional Court ruling of 15 May 2007. *Official Gazette*. 2007, No. 54-2097.
- Constitutional Court ruling of 20 December 2007. *Official Gazette*. 2007, No. 136-5529.
- Constitutional Court ruling of 28 May 2008. *Official Gazette*. 2008, No. 62-2353.
- Convention for the Protection of Human Rights and Fundamental Freedoms. *Official Gazette*. 1995, No. 40-987.
- Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, with protocols Nos. 1, 4, 6, and 7. *Official Gazette*. 2001, No. 96-3016.
- Dworkin, R. Rimtas požiūris į teises [Serious Approach to the Rights]. Translated from English by Klimka, K. Vilnius: Lietuvos rašytojų sąjungos leidykla, 2004.
- Frowein, J. A. The Transformation of Constitutional Law through the European Convention on Human Rights. In *Dialogue Between Judges*. Strasbourg, 2007.
- Jarašiūnas, E. Jurisprudencinė konstitucija [Jurisprudential constitution]. *Jurisprudencija*. 2006, 12(90): 24–33.
- Kūris, E. The Impact of the Decisions of the European Court of Human Rights on the National Legal System viewed from the Standpoint of the Constitutional Court of Lithuania. In *Dialogue Between Judges*. Strasbourg, 2006.
- L v. Lithuania*, application No. 27527/03.
- Lane, J. E. *Konstitucija ir politikos teorija* [Constitution and Theory of Policy]. Translated by Kūris, E. Kaunas, 2003.
- Lorz, R. A. *The Emergence of European Constitutional Law/Recent Trends in German and European Constitutional Law*. Berlin: Springer, 2006.
- Papier, H.-J. Execution and effects of the judgments of the European Court of Human Rights in the German judicial system. In *Dialogue between judges*. Strasbourg, 2006.
- Rainys and Gasparavičius v. Lithuania*, application Nos. 70665/01 and 74345/01.
- Republic of Lithuania Law ‘On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Fourth, Seventh and Eleventh Protocols Thereof’. *Official Gazette*. 1995, No. 37-913.
- Rodriguez-Zapata Perez, J. *The Dynamic Effect of the Case-Law of the European Court of Human Rights and the Role of the Constitutional Courts*. 2007.
- Sidabras and Džiautas v. Lithuania*, application Nos. 55480/00 and 59330/00.
- Sinkevičius, V. Teisės į teisingą teisinį procesą samprata Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje [Conception of the Right to a Fair Legal Process in the Jurisprudence of the Constitutional Court of the Republic of Lithuania]. *Konstitucinė jurisprudencija*. 2006, 2.
- Tulkens, F. The European Convention on Human Rights between International Law and Constitutional Law. In *Dialogue Between Judges*. Strasbourg, 2007.
- Wildhaber, L. *The European Court of Human Rights 1998-2006, History, Achievements, Reform*. N. P. Engel, Publisher, 2006.

JURISPRUDENCIJŲ SANDŪRA. EUROPOS ŽMOGAUS TEISIŲ KONVENCIJOS ĮTAKA LIETUVOS RESPUBLIKOS KONSTITUCINIO TEISMO FORMUOJAMAI DOKTRINAI

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Santrauka. Šiame straipsnyje nagrinėjami kai kurie konstitucinės žmogaus teisių doktrinos bruožai, kuriems poveikį padarė Europos Žmogaus Teisių Teismo jurisprudencija. Europos Žmogaus Teisių Teismo jurisprudencija, kuri su pačia Konvencija sudaro vadinamąją Europos žmogaus teisių konvencijos teisę, yra svarbus teisės šaltinis. Tam tikrais atvejais, kai tas pats teisės aktas Europos Žmogaus Teisių Teismo ir Lietuvos Respublikos Konstitucinio Teismo (toliau – Konstitucinis Teismas) jurisprudencijoje yra vertinamas skirtingai, susiduriama su vadinamąja jurisprudencijų sandūra, dėl kurios kyla ne tik teorinių, bet ir praktinių problemų. Jurisprudencijų sandūros atveju galėtume vadovautis Konstitucinio Teismo suformuluota tarptautinių sutarčių kaip teisės šaltinio doktrina, pagal kurią tais atvejais, kai nacionaliniuose teisės aktuose, inter alia įstatymuose nustatomas toks teisinis reguliavimas, kuris konkuruoja su nustatytu tarptautinėje sutartyje, turi būti taikoma tarptautinė sutartis. Konstitucinio Teismo jurisprudencija gali būti vertinama ir kaip Konstituciją bei teisę aiškinanti, ir kaip lemianti teisminės praktikos kryptis, taigi priimant sprendimą byloje dėl tokios jurisprudencijų sandūros, atsiradusios dėl skirtingo teisinio reguliavimo, įtvirtinto inter alia įstatyme, vertinimo Konstitucijos bei Konvencijos atžvilgiu, ordinariniai teismai turėtų vadovautis konstitucine doktrina.

Reikšminiai žodžiai: konstitucinė teisė, konstitucinės teisės šaltiniai, Lietuvos Respublikos Konstitucinio Teismo jurisprudencija, jurisprudencijų sandūra, Europos Žmogaus Teisių Konvencija, Europos Žmogaus Teisių Teismo jurisprudencija.

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