Case No. 22/94

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA

C O N C L U S I O N

On the compliance of Articles 4, 5, 9, 14 as well as Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania

24 January 1995, Vilnius

The Constitutional Court of the Republic of Lithuania, composed from the Justices of the Constitutional Court: Algirdas Gailiūnas, Kęstutis Lapinskas, Zigmas Levickis, Vladas Pavilonis, Pranas Vytautas Rasimavičius, Stasys Stačiokas, Teodora Staugaitienė, Stasys Šedbaras, and Juozas Žilys

The court reporter—Rolanda Stimbirytė

Seimas deputy Speaker Juozas Bernatonis, acting as the representative of the President of the Republic of Lithuania, the petitioner

The Constitutional Court of the Republic of Lithuania, pursuant to Paragraph 3 of Article 105 of the Constitution of the Republic of Lithuania and Paragraph 1 of Article 1 of the Law on the Constitutional Court of the Republic of Lithuania, in its public hearing, on 5 January 1995, considered case No. 22/94 subsequent to the inquiry submitted by the President of the Republic of Lithuania concerning the conclusion if Articles 4, 5, 9, 14 as well as Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms is in compliance with the Constitution of the Republic of Lithuania.

The Constitutional Court

has established:

The petitioner requests the Constitutional Court to submit a conclusion whether Articles 4, 5, 9, 14 as well as Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights

and Fundamental Freedoms is in conformity with the Constitution of the Republic of Lithuania. The request is based on the following arguments.

Article 1 of the Convention provides that the duty of every state is to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Due to such an obligation of the Republic of Lithuania, national legislation with respect to human rights must be co-ordinated with the requirements of said Convention.

On 11 February 1994, by his Decree No. 233, the President of the Republic formed the working group for the preparation of a comparative analysis of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, and the Constitution of the Republic of Lithuania. In the petitioner's opinion, such comparative analysis of the Convention and the Constitution shows that some articles of the Convention and its Protocols may contradict the provisions of the Constitution (or fail to comply with them according to the scope). In such a case, the Republic of Lithuania, having ratified the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, would not be able to comply with the international obligations, as Article 7 of the Constitution prescribes that "any law or other statute which contradicts the Constitution shall be invalid".

Conforming to these arguments, the petitioner requests the Constitutional Court to present the conclusion:

(1) whether Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms is in compliance with Article 48 of the Constitution of the Republic of Lithuania;

(2) whether Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with Article 20 of the Constitution of the Republic of Lithuania;

(3) whether Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms is consistent with Article 26 of the Constitution of the Republic of Lithuania;

(4) whether Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms conforms to Article 29 of the Constitution of the Republic of Lithuania;

(5) whether Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not contradict Article 32 of the Constitution of the Republic of Lithuania.

The Constitutional Court

holds that:

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) was concluded in Rome on 4 November 1950 and entered into force on 3 September 1953. According to the first paragraph of Article 66 of the Convention, it must be ratified. Protocol 4 of the Convention was concluded in Strasbourg on 16 September 1963 and came into force on 2 May 1968. On 14 May 1993, the Minister of Foreign Affairs of the Republic of Lithuania signed the Convention and its Protocols Nos. 1, 4 and 7. These Protocols must also be ratified.

Section 1 of the Convention defines human rights and freedoms that, according to Articles 1 and 57 thereof, shall be secured by every state which has ratified the Convention to everyone within its jurisdiction. Article 1 of the Convention provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Thus, every state which has ratified the Convention must effectively implement the provisions of the Convention (or its Protocols that have been signed by this state) in order to fully carry out all the obligations under it.

This general requirement is directly connected with the relation between the international law and domestic (national) laws of the states in general and with respect to separate problems, specifically—to the problem of human rights and freedoms. Nowadays, the system of the so-called parallel adjustment of international and domestic law is perhaps the most widely spread in Europe; it is based on the rule that international treaties are transformed in the legal system of a state (i.e. are incorporated in it). Such a way of the realisation of international treaties, the Convention among them, is established in the Constitution of the Republic of Lithuania.

The Convention for the Protection of Human Rights and Fundamental Freedoms is a peculiar source of international law, the purpose of which is different from that of many other acts of international law. 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. That is why it is very significant to evaluate and establish the relation between the Convention and the Constitution.

Chapter II of the Constitution ("The Human Being and the State"), also the preamble, Chapters III, IV, and XII of the Constitution define the rights and freedoms to be guaranteed for persons within the jurisdiction of the Republic of Lithuania.

The legal system of the Republic of Lithuania is based on the fact that no law or other legal act as well as international treaties (in this case the Convention) may contradict the Constitution. Otherwise, the Republic of Lithuania would not be able to ensure the legal protection of the rights and freedoms recognised by the Convention, which is prescribed in Article 13 of the Convention containing the basis for the implementation of the provisions of the Convention in the internal legal system of every state. This Article declares: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Consequently, national authority, while implementing legal protection, must directly apply constitutional norms and realise the provisions of the Convention. The provisions must become the constituent part of the domestic law of a state and must meet no obstacles in their application in courts and other authorities providing legal protection.

It should also be emphasised that the requirement that the norms of the domestic law must literally comply with the contents of the norms of the Convention is not directly formulated in the Convention as the realisation of this requirement would not be possible. Neither it is strictly specified in the Convention which ways should be employed for the realisation of human rights established in the Convention. Every state itself establishes the ways it will use to ensure the application of the provisions of the Convention. At this point it is important to define the so-called limits of compliance, i.e. to determine a sufficiently effective protection of the rights, specified in the Convention, by means of laws of a state. Such "limits of compliance" are provided by the national authority of a state on the basis of the powers prescribed to them by the Constitution. The Court of Human Rights in its judgement of 6 February 1976 in the Swedish Engine Drivers' Union Case argued that neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention.

However, the provisions of Sections 2, 3, 4 and 5 of the Convention concerning the international protection of human rights and freedoms established therein doubtlessly imply that the norms of the Convention must be really implemented and the violation of these rights and freedoms may not be explained by saying that national laws prescribe otherwise. Such validity of the Convention may be explained by the fact that a State Party to the Convention must secure the application of the norms of the Convention in the domestic legal system. Nevertheless, international

treaties, the Convention among them, is differently applied in separate spheres of legal activity. Concrete ways and forms of their application are established by means of laws of the Republic of Lithuania. In civil proceedings direct application of international treaties is established as a way of solving the competition between such agreements and the norms of laws of the Republic of Lithuania: in case that international treaties of the Republic of Lithuania set forth other rules than it is provided by means of laws of the Republic of Lithuania, the rules of international treaties shall prevail (Article 606 of the Civil Code and Article 482 of the Code of Civil Procedure). Said way of deciding the competition of norms shall not be applied in criminal proceedings. In such cases criminal laws and laws of criminal procedure of the Republic of Lithuania shall be directly applied, whereas international treaties shall be applicable only in special cases prescribed by law (Article 71 of the Criminal Code, and Articles 20, 21, 211, 212, 22, 221 and 222 of the Code of Criminal Procedure). If, in the process of the application of a criminal law, doubts arose as to the guarantees for the realisation of human rights established in the Convention, the issue of the constitutionality of the applied law should be settled in the procedure of constitutional review. On the other hand, human rights determined in the Convention cannot be realised without direct application of domestic law acts. Putting it otherwise, if only direct application of the Convention is recognised, said rights cannot be secured because the Convention itself does not provide for any ways of realisation of these rights in the states that have ratified the Convention, or legal responsibility of offenders, or appropriate procedures and special jurisdiction for judicial institutions of the states. The rule *ubi jus ibi remedium,* i.e. when the law provides the right it also provides the remedy, is obviously valid here. Such remedy in the legal system of a state is established by means of laws of this state. The Convention sets forth the remedy only for the cases when litigation concerning the protection of human rights established in it becomes the subject-matter of international jurisdiction.

In the third paragraph of Article 138 it is determined: "International treaties which are ratified by the Seimas of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania." With respect to the Convention, this constitutional provision implies that, upon its ratification and enforcement, the Convention will become a constituent part of the legal system of the Republic of Lithuania and will be applied in the same way as laws of the Republic of Lithuania. The provisions of the Convention in the system of legal sources of the Republic of Lithuania are equalled to laws, because in Article 12 of the 21 May 1991 Law "On International Treaties of the Republic of Lithuania" (Official Gazette *Valstybės žinios,* 1991, No. 16-415; 1992, No. 30-915) it is established that "International treaties of the Republic of Lithuania shall have the power of a law on the territory of the Republic of Lithuania."

The equal with laws application of the Convention in the domestic law of the Republic of Lithuania and the legal power of its provisions *ipso facto* does not ensure yet that the provisions of the Convention shall in all cases be effectively applied, because the first paragraph of Article 7 of the Constitution prescribes: "Any law or other statute which contradicts the Constitution shall be invalid." Although this constitutional provision by itself may not make an international treaty, the Convention in this case, invalid, however it requires the compliance of the provisions of an international treaty with the constitutional provisions, because, otherwise, it would be problematic to implement the Convention in the domestic law of the Republic of Lithuania.

While evaluating the contents of human rights established in the Constitution and in the Convention, it is necessary to take into consideration methodological basis for co-ordination of comparative constitutional law and international law. The provisions of the Convention might be ruled to be in conflict with the Constitution if:

(1) the Constitution established a complete and final list of rights and freedoms and the Convention set forth some other rights and freedoms;

(2) the Constitution prohibited some actions and the Convention defined them as one or another right or freedom;

(3) some provision of the Convention could not be applied in the legal system of the Republic of Lithuania because it was not consistent with some provision of the Constitution.

(1) Pursuant to the general analysis of the Constitution and the Convention it can be stated that neither the Constitution nor the Convention contain a complete and final list of human rights and freedoms. This is also confirmed in Article 18 of the Constitution which establishes that "human rights and freedoms shall be innate". No legal act may establish an exhaustive list of innate rights and freedoms.

The interpretation of the compatibility (relation) of the norms of the Constitution and the Convention must be semantic, logical and not only literal. Literal interpretation of human rights alone is not acceptable for the nature of the protection of human rights. For example, in the second paragraph of Article 5 of the International Covenant on Civil and Political Rights it is set forth that: "There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent."

The literal interpretation of legal norms when applied as the only way of interpretation is not acceptable because while interpreting the contents of a legal norm not the particular wording of a

certain rule is most significant, but the fact that the text should provide understanding beyond doubt that the instruction is given to certain subjects under certain conditions to act in an appropriate way.

The formalistic literal interpretation of the provisions of the Convention is not recognised in the practice of the European Court of Human Rights, either. This Court on 27 June 1968 in the judgement in Wemhoff Case and on 17 June 1970 in the judgement in Delcourt Case repeated the same conclusion that, given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties.

The fact that the fundamental rights, freedoms and the guarantees in one or another verbal form are formulated in the Constitution does not yet allow the assertion that these wordings are in all cases absolute in the sense of their application. A law may provide a more extensive formulation of human rights, freedoms and their guarantees than their literal expression in concrete article or its part in the Constitution. Therefore, their broader application is possible only if it is provided by another legal act which has the power of a law (in this case, by the Convention and its Protocols. In this case, the third paragraph of Article 138 of the Constitution shall have determining significance, as it establishes the principle of incorporation of international treaties which are ratified by the Seimas, consequently also of their equal application with laws, in the legal system of the Republic of Lithuania.

Therefore, the provisions of the Convention, which define human rights and freedoms, may be applied along with the constitutional provisions provided they do not contradict the latter.

(2) The Constitutional Court after a general analysis of the texts observes that no provision of the Constitution and no provision establishing human rights and freedoms in the Convention allows the assertion that the Constitution forbids some actions whereas the Convention defines them as one or another right or freedom.

While evaluating the interaction of the norms of the Constitution and the Convention and interpretation limits for mutual interaction, the provision of Paragraph 1 of Article 6 of the Constitution “the Constitution shall be an integral and directly applicable statute” should not be disregarded. The Constitutional Court emphasises that the integrity of the Constitution, first of all, implies that constitutional provisions are related not only formally, i.e. according to the structure of their arrangement, but also according to their contents. This unanimity of norms implies that the preamble to the Constitution, its chapters and articles comprise the significant whole of the Constitution. The significance of the Constitution as integral and directly applicable act is exceptional only when evaluating constitutional provisions pertaining to human rights and

freedoms. It is obvious that, while interpreting the contents of concrete constitutional provision, in many cases it is impossible to interpret it separately from other provisions of the Constitution. It is especially important to take this into account with regard to such Chapters of the Constitution as "The Human Being and the State", "Society and the State", "National Economy and Labour" and others which contain the guarantees for the implementation and means of the legal protection of constitutional rights and freedoms.

(3) The Constitutional Court notes that it is possible to answer the question concerning compatibility of concrete provisions of the Convention with concrete articles of the Constitution only after analysing these concrete norms. Further in this conclusion it is presented the analysis of the norms of the Convention and the Constitution the compatibility of which has been questioned in the inquiry.

1. On the compliance of Article 4 of the Convention for the Protection of Human Rights and Freedoms with the Constitution of the Republic of Lithuania.

In the inquiry of the President of the Republic it is indicated that the second paragraph of Article 4 of the Convention declares that "no one shall be required to perform forced or compulsory labour", and the third paragraph of this Article contains explanation what kind of work is not considered forced or compulsory. Paragraph 3 (a) of the said Article provides that this is "any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention." Whereas, according to the provision of the fifth paragraph of Article 48 of the Constitution, "labour which is performed by convicts in places of confinement and which is regulated by law shall not be deemed as forced labour either". Every criminal penalty provided in the Criminal Code may comprise the duty of a convict to work. This principle is realised by correctional labour penalty without imprisonment (Article 29 of Criminal Code). The rule formulated in the Convention provides the duty to work only for a person who has been imprisoned or conditionally released from detention. In the inquiry it is stated that the rule prescribed by the Convention is of somewhat narrower scope, therefore, the conclusion can be drawn that paragraph 3 (a), Article 4 of the Convention contradicts paragraph 5, Article 48 of the Constitution.

The Constitutional Court emphasises that such interpretation of the interaction of norms of the Constitution and the Convention is inaccurate first of all because the Constitution does not provide for correctional labour as criminal penalty, in fact such labour is not even mentioned. The rule of the fifth paragraph of Article 48 of the Constitution that labour which is performed by convicts and which is regulated by law shall not be deemed as forced labour either, does not imply,

however, that laws must establish correctional labour penalty without imprisonment. It should also be noted that the Criminal Code does not provide for the forced employment of a convict as penalty.

On the other hand, forced labour in Paragraph 3 (a), Article 4 of the Convention related to the application of Article 5 of the Convention, i.e. to lawful detention (or to conditional release from detention.) Such standpoint has in essence been confirmed in the practice of the European Court of Human Rights and other courts of the states of Europe. For instance, Van Droogenbroeck case the essence of which was forced work done by the recidivist executing a sentence including deprivation of liberty, because the work was required in order to save 12 000 Belgian francs. The European Court of Human Rights in its judgement of 24 June 1982 argued that in this case it was important to evaluate whether conditions of the plaintiff's detention complied with Article 5 of the Convention. The Court also pointed out that the work which Mr. Van Droogenbroeck was asked to do did not go beyond what is "ordinary" in this context since it was calculated to assist him in reintegrating himself into society and had as its legal basis provisions which find an equivalent in certain other member States of the Council of Europe.

The comparative analysis of Article 48 of the Constitution, Article 4 of the Convention and the practice of the application of this Article allows one to draw the conclusion that Paragraph 3 (a), Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not contradict the Constitution of the Republic of Lithuania.

2. On the compliance of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania.

In the inquiry of the President of the Republic it is specified that, first, the third paragraph of Article 5 of the Convention prescribes that "everyone arrested or detained <...> shall be brought promptly before a judge". Meanwhile, in the third paragraph of Article 20 it is established that "a person detained *in flagrante delicto* must, within 48 hours, be brought to court." The comparison of these two rules allows the presumption that the Convention provides for a more extensive guarantee as, under it, everyone detained in accordance with the criminal procedure shall be brought to court, whereas under the Constitution, only a person detained *in flagrante delicto* must be brought to court. In the inquiry it is emphasised that in this case it may be stated that this constitutional rule is a special norm, whereas Paragraph 2 of Article 20 of the Constitution provides for a general norm which declares that "no person may be deprived of freedom except on the bases, and according to the procedures, which have been established in laws", however such conclusion may be presented only by the Constitutional Court.

Second, in the inquiry it is requested to establish whether the term "promptly" used in the Convention complies with the rule of 48 hours determined in the Constitution.

Finally, the third paragraph 4 of Article 5 of the Convention contains the requirement that a judge should decide the lawfulness of detention, whereas under the Constitution the court must decide only the validity of the detention. The petitioner maintains that this difference is essential because a lawful detention is at the same time valid, whereas valid detention can be unlawful.

The Constitutional Court emphasises that such doubts is not a significant basis for maintaining that the Convention contradicts the Constitution. In the introductory part of the argumentation of this conclusion it has already been stated that the fact that the Constitution does not establish any human rights, freedoms or their guarantees or provides somewhat different wording for them, does not imply, however, that such rights, freedoms or means of their realisation may not be guaranteed in the legal system of the Republic of Lithuania. They may be, and normally are, stipulated in other legal acts and are realised while applying these acts. Taking separately, this also may be ensured by applying the Convention on the basis of Paragraph 3 of Article 138 of the Constitution. It would not be possible to apply the provisions of the Convention only in the case that they contradict according to their contents to the Constitution.

First of all, the Constitutional Court, having compared the concepts "shall be brought promptly before a judge" (Paragraph 3 of Article 5 of the Convention) and "must, within 48 hours, be brought to court", emphasises that they in essence do not contradict each other. In the practice of the application of the Convention the period of 48 hours conforms to the provision "promptly brought". In order to found this, there is no need to make an independent analysis of the application of the Convention, because it is universally recognised that the period of 4 days in cases of usual criminal offences and a 5-day-period in exceptional cases are considered as conforming to the requirement of promptness. On the other hand, having compared the Constitutions of other Member-States of the Council of Europe, we can find analogous constitutional norms. For example, the same term of 48 hours is established in the Constitutions of Portugal and Italy (Articles 28 and 13, respectively), of 72 hours in the Constitution of Spain (Article 17). Thus, even the comparative analysis of the constitutions of Member-States of the Council of Europe confirms the above-mentioned evaluation with respect to this issue.

Secondly, in the inquiry, while comparing Paragraph 3 of Article 20 of the Constitution and Paragraph 3 of Article 5 of the Convention, the conclusion is made that "the Convention provides for a broader procedural guarantee, because under it everyone detained in accordance with the criminal procedure shall be brought to court, whereas under the Constitution only a person detained *in flagrante delicto* must be brought to court". The Constitutional Court observes that the main purpose of the provisions of Paragraph 3 of Article 20 of the Constitution is to guarantee that such a person be brought to court. Even in the case that the conclusion made in the inquiry were true, it

would be possible to co-ordinate both provisions. When applied together, they would only complement each other making one legal guarantee.

Thirdly, although in the fourth paragraph of Article 5 of the Convention it is required that a judge should decide the lawfulness of detention, whereas according to Paragraph 3 of Article 20 of the Constitution the court must determine the validity of the detention, which, in the petitioner's opinion, is the essential difference, these provisions, however, when evaluated not literally but notionally, do not contradict each other. According to the Constitution as well as conforming to the Convention, the Constitutional Court must evaluate the lawfulness and the validity of detention. However, Paragraph 3 of Article 20 of the Constitution may not be evaluated separately from the text of all this Article and other constitutional provisions concerning the guarantees of lawfulness. The second paragraph of said Article provides: "No person may be arbitrarily arrested or detained. No person may be deprived of freedom except on the basis, and according to the procedures, which have been established in laws." These provisions actually establish the principle of lawfulness of detention as a universal rule. The term "validity" used in Article 20 of the Constitution has a more extensive meaning than causative factual relation, i.e. it includes "lawfulness" as well.

Taking all this into consideration, the conclusion may be drawn that Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with the Constitution of the Republic of Lithuania.

3. On the compliance of Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania.

In the inquiry of the President of the Republic it is specified that the second paragraph of Article 9 of the Convention provides for the possibility of limiting a person's "freedom to manifest one's religion or beliefs", whereas Paragraph 4 of Article 26 of the Constitution declares that "a person's freedom to profess and propagate his or her religion or faith" may be subject to limitations. In the inquiry it is stated that, in the Convention as well as the Constitution, freedom to profess and propagate one's religion or beliefs is discerned into two independent freedoms, therefore, it may be maintained that the Convention does not prescribe any possibility of limiting a person's freedom to profess his or her religion or beliefs.

The Constitutional Court states that neither Article 9 nor any other article of the Convention contains two independent freedoms, i.e. a person's freedom to profess religion or beliefs and freedom to manifest religion or beliefs. The freedom to profess religion or beliefs is simply not mentioned in the Convention. The first paragraph of Article 9 of the Convention prescribes: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom

to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."

Thereby this text of the Convention differs not only from Article 26 of the Constitution but also from the texts of the first paragraph of Article 18 of the International Covenant on Civil and Political Rights containing the word "to have". Consequently, international legal acts and the Constitution while securing to everyone freedom of religion, employ different terms to define this freedom.

Taking this into consideration, there is absolutely no basis for maintaining that Article 26 of the Constitution provides for the possibility of limiting a person's freedom to profess religion or beliefs. On the contrary, the first paragraph of Article 26 of the Constitution establishes a general principle: "Freedom of thought, conscience, and religion shall not be restricted", whereas the second paragraph provides: "Every person shall have the right to freely choose any religion or faith and, either individually or with others, in public or in private, to manifest his or her religion or faith in worship, observance, practice or teaching."

The profession of religion or beliefs, when taken apart from manifestation and propagation, is a spiritual category implying the possession of religious and faith beliefs. It is not accidental that the Lithuanian words "laisvė išpažinti" ("freedom to profess") in the French and English texts of the first paragraph of Article 18 of the Covenant on Civil and Political Rights correspond to "la liberté d'avoir" and "freedom to have", respectively, the word-for-word translation of which would be "'laisvė turėti' (religiją ar tikėjimą)" ("'freedom to have' (a religion or belief)"). In the translations the word "to profess" was used instead of "to have" because the latter does not entirely reflect the spiritual nature of religion or faith and also the inner state of human spirit. This state may not be limited in any way if only by persecuting a person for his religion or faith, and even in such a case the persecution cannot deprive him of his religious beliefs or faith. In this case a general legal principle is valid: *lex non cogit ad impossiblia*—the law does not require impossible things.

The Constitutional Court states that the word "to profess" in the phrase "a person's freedom to profess and propagate his or her religion or faith may be subject only to those limitations prescribed by law" in Paragraph 4 of Article 26 of the Constitution may be interpreted as corresponding in its sense to the words "one's religion" in the Convention. If Paragraph 4 of Article 26 of the Constitution had provided separate limitations on the freedom to profess religion or faith, the phrase would be joined by the conjunction "or" instead of "and". The joining of the words "to profess" and "to propagate" by the conjunction "and" means nothing else but "one's religion or beliefs". That is why this constitutional provision did not have any negative legal consequences in

the legal system of the Republic of Lithuania with respect to freedom of faith or religion, there is no law limiting the right to profess religion or faith.

Taking all this into account the conclusion can be drawn that Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms is in compliance with the Constitution of the Republic of Lithuania.

4. On the compliance of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania.

In the inquiry of the President of the Republic it is pointed out that the Convention prohibits only the so-called negative discrimination, whereas the Constitution forbids "negative" as well as "positive" discrimination (the granting of privileges). Furthermore, in the inquiry it is stated that the Convention establishes a longer list of the grounds for prohibiting discrimination: in the Constitution no mention is made of the colour of the skin, belonging to a national minority.

The Constitutional Court states that the so-called positive discrimination mentioned in the inquiry may not be considered as the granting of privileges. The Constitution only establishes certain universally recognised special rights peculiar for a certain group of people, namely the rights of the members of national minorities, which are determined in Articles 37 and 45 of the Constitution. The Constitution also prescribes that the State shall take care of families bringing up children at home, and shall render them support, shall provide privileges for working mothers (Article 39), etc.

Such a standpoint with regard to special human rights is peculiar also to the practice of the application of the Convention. The European Court of Human Rights in its judgement of 8 July 1986 in the Case of Lithgow and Others made the conclusion that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.

All this, along with the general non-discrimination rule, ensure the underlying principle of all persons' equality. This is confirmed by the general rule established in the first paragraph of Article 29 of the Constitution: "All persons shall be equal before the law, the court, and other State institutions and officers."

The second paragraph of this Article derives from the first one as it forbids any violation of the equality of rights by determining that "A person may not have his right restricted in any way, or be granted any privileges, on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions, or opinions." Here the phrase "a person may not have his rights restricted in any way, or be granted any privileges" is adequate to the phrase "the enjoyment of the rights and freedom set forth in this Convention shall be secured without discrimination on any

ground.” The restriction of human rights on the basis of his or her sex, race, nationality, etc., is nothing else but discrimination which is prohibited by both, the Convention and the Constitution.

The Constitutional Court argues that the word-for-word comparison of the texts of the second paragraph of Article 29 of the Constitution and Article 14 of the Convention allows the assertion that the Convention provides for more extensive non-discrimination guarantees, because it prohibits discrimination also on the basis of colour, association with a national minority, property, birth or other status. However, it is necessary to take into consideration the essential identity of the constitutional norms and the norms of the Convention concerning non-discrimination of people on any ground, and not the differences in verbal expression of separate non-discrimination indications. Besides, it should be noted that some different words used in the Constitution and in the Convention actually imply the same non-discrimination indication or embraces some of them. For example, it may be presumed that the word “faith” used in the Constitution embraces the word “religion” employed in the Convention. If it were evaluated otherwise, it might cause doubts where the Convention recognises faith as a basis for non-discrimination. The notion “social status” used in the Constitution comprises the concepts “social origin” and “property” of the Convention. On the other hand, the fact that the phrase “social status” is not used in the Convention, and the phrase “social origin” is mentioned instead, does not imply the possibility of establishing unequal rights for persons of separate social groups. The words “races”, “nationalities”, “national minorities” that are actually used to define the same non-discrimination basis, should be evaluated in the same way.

Consequently, a complex and not formalistic word-for-word comparison of the provisions of the Constitution and the Convention allows one to make the conclusion that Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not contradict the Constitution of the Republic of Lithuania.

5. On the compliance of Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania.

In the inquiry of the President of the Republic it is specified that Paragraph 1 of Article 2 of Protocol No. 4 prescribes that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” Meanwhile, in the first paragraph of Article 32 of the Constitution it is declared that “citizens may move and choose their place of residence in Lithuania freely, and may leave Lithuania at their own will.” The petitioner argues that systematic analysis of articles of the Constitution shows that the legislature uses the concepts “person”, “human being” and “citizen”. The analysis of the texts in which these notions are used allows the assertion that they are not synonyms and have certain legal meaning. For

instance, the concepts “human being” and “person” used in Articles 22, 24, 25 and 26 of the Constitution which provide for universal human rights and freedoms (for a citizen of a state, a foreigner and a person without citizenship). Meanwhile, the concept “citizen” is employed only in those articles of the Constitution which establish specific rights concerning relation between a person and the Lithuanian State, i.e. concerning citizenship (e.g., Paragraphs 1, 2, and 3 of Article 32 and Article 33 of the Constitution). Therefore, the petitioner has doubts whether Article 2 of Protocol No. 4 of the Convention according to its scope is in conformity with the first paragraph, Article 32 of the Constitution.

The Constitutional Court states that the norm of Article 2 of Protocol No. 4 of the Convention that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence” consists of two parts that are interdependent. One of them implies freedom of movement and freedom to choose one’s residence, whereas another means that only persons that are lawfully within a State shall be entitled to such right. Such persons may be citizens, foreigners and persons without citizenship. A citizen’s being in his or her state is always lawful. Paragraph 3 of Article 32 of the Constitution prescribes: “A person may not be prohibited from returning to Lithuania.” Meanwhile, the conditions for the lawfulness of arrival, departure and being in a state of a foreigner or a person without citizenship are prescribed in the domestic law. Such conditions have been established in the Republic of Lithuania’s Law “On the Legal Status of Foreigners in the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 1991, No. 27-729).

Foreigners and persons without citizenship that in accordance with said Law are lawfully within the Republic of Lithuania have the same rights and freedoms as citizens of the Republic of Lithuania unless the Constitution, this Law and other laws as well as international treaties prescribe otherwise. Thus, the provisions in question of Protocol No. 4, when applied in the legal system of Lithuania along with the provisions of the Law “On the Legal Status of Foreigners in the Republic of Lithuania” and other laws of the Republic of Lithuania would include each other. There would be only one question to solve—whether in a concrete case a foreigner or a person without citizenship is lawfully within territory of the Republic of Lithuania, so that he might fully exercise the right to movement and free choice of his place of residence.

The evaluation of all this results in the conclusion that Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms is in compliance with the Constitution of the Republic of Lithuania.

Taking into consideration all the arguments presented in the reasoning of this conclusion and interpretation of some concepts of the Constitution and the Convention, and conforming to

Paragraph 3 of Article 105 of the Constitution, as well as Item 3 of Article 73 and Article 83 of the Law on the Constitutional Court of the Republic of Lithuania, the Constitutional Court of the Republic of Lithuania adopts the following

conclusion:

Articles 4, 5, 9, 14 and Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms are in compliance with the Constitution of the Republic of Lithuania.

This conclusion of the Constitutional Court is final and not subject to appeal.

Justices of the Constitutional Court:

Algirdas Gailiūnas	Kęstutis Lapinskas	Zigmas Levickis
Vladas Pavilonis	Pranas Vytautas Rasimavičius	Stasys Stačiokas
Teodora Staugaitienė	Stasys Šedbaras	Juozas Žilys