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HOW TO EXECUTE THE JUDGEMENT OF THE STRASBOURG COURT IN THE CASE *PAKSAS V. LITHUANIA*?

INTRODUCTION

Article 74 of the Constitution of Lithuania states:

> The President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal as well as the Members of the Seimas who have grossly violated the Constitution or breached their oath, or if it transpires that a crime has been committed, may by a 3/5 majority vote of all the Members of the Seimas be removed from office or their mandate of a Member of the Seimas may be revoked. This shall be performed according to the procedure for impeachment proceedings which shall be established by the Statute of the Seimas.

On 6 April 2004, the Seimas acting according to the procedure for impeachment proceedings removed R. Paksas from the office of the President of the Republic for gross violation of the Constitution. On 13 June 2004 elections to the office of the President of the Republic were to be held and R. Paksas stated his wish to run for the office. On 4 May 2004 the Seimas amended the Law of the Republic of Lithuania on Presidential Elections[1] and added the following provision:

> A person who was removed from office by the Seimas according to the procedure for impeachment proceedings or his mandate of a Member of the Seimas was revoked by the Seimas cannot be elected President of the Republic if less than 5 years have lapsed from his removal from office or revocation of his mandate of a Member of the Seimas.

Thus, a ban of five years was imposed. A group of Members of the Seimas addressed the Constitutional Court with a request to examine whether the said ban of five years was not in conflict with the Constitution. On 25 May 2004 the Constitutional Court passed a ruling,[2] in which it stated that a ban on election of a person

[1] Official gazette *Valstybės Žinios*, 2004, No. 75-2568.
[2] Official gazette *Valstybės Žinios*, 2004, No. 85-3094.

removed from office according to the procedure for impeachment proceedings as President of the Republic was not in conflict with the Constitution, but setting of the term of such a ban was. The Constitutional Court stated that the removal of the President of the Republic — as of any other person specified in Article 74 of the Constitution, who breached his oath, grossly violated the Constitution — from office according to the procedure for impeachment proceedings was not an end in itself, that the constitutional purpose of the impeachment institution was not only a one-off removal of such persons from office, it was much wider — to prevent such persons from holding such offices provided for in the Constitution, taking of which is related to giving of an oath specified in the Constitution, at any time in the future. Thus, a person removed from office for gross violation of the Constitution, breach of oath, will never in the future be able to be elected President of the Republic, Member of the Seimas, may never hold an office of a justice of the Constitutional Court, a justice of the Supreme Court, a judge of the Court of Appeal, a judge of another court, a member of the Government, the office of the Auditor General, as taking of these offices is related to giving of an oath specified in the Constitution.

In implementation of the ruling of the Constitutional Court, on 15 July 2004 the Seimas amended the Law on Elections to the Seimas[3] and established that a person who was removed from office by the Seimas according to the procedure for impeachment proceedings cannot be elected a Member of the Seimas. On 27 September 2004 R. Paksas addressed the European Court of Human Rights (hereinafter: the ECHR). He stated that Lithuania infringed his right to be elected President of the Republic and Member of the Seimas. On 6 January 2011 the ECHR passed a judgement,[4] in which it stated that the permanent ban for R. Paksas to stand for election to the parliament was a disproportionate restriction and that by imposing such a ban Lithuania acted in violation of Article 3 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention).

According to Article 46 § 1 of the Convention, the High Contracting Parties to the Convention undertake to abide by the final judgement of the ECHR in any case to which they are parties. Supervised by the Committee of Ministers, the respondent state may choose freely what measures it will use to fulfil its legal duty according to Article 46 of the Convention to execute final judgement of the ECHR.[5] It is namely how the judgement of the ECHR of 6 January 2011 can be

[3] Official gazette *Valstybės Žinios*, 2004, No. 120-4430.

[4] *Case of Paksas v. Lithuania.* No. 34932/04, Grand Chamber judgement, Strasbourg, 6 January 2011. http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Paksas%20%7C%20v.%20%7C%20Lithuania&sessionid=66682800&skin=hudoc-en. (accessed: march 2013).

[5] *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*. No. 32772/02. Grand Chamber judgement of the European Court of Human Rights, Strasbourg, 30 June 2009.

executed that is the subject of the research. The research has not only scientific theoretical, but also practical significance, as specific actions to be taken by the Seimas in order to execute the judgement of the ECHR will depend on finding an answer to this question.

ATTEMPT OF THE SEIMAS TO OVERCOME THE RULING OF THE CONSTITUTIONAL COURT

After the announcement of the ECHR judgement in the case *Paksas v. Lithuania*, the Constitutional Court, in response to the discussion held in the society whether the Constitution will have to be amended, made a special pronouncement on 10 January 2010 that the judgement of the ECHR can be executed only by amending the Constitution. But in spite of the pronouncement of the Constitutional Court, lawyers held different opinions as to how the ECHR judgement can be executed. Some ignored the pronouncement of the Constitutional Court solely by the reason that, in their opinion, only rulings and other acts adopted by the Constitutional Court after hearing of a case have legal consequences, but not pronouncements of the Court made in response to an event. On 13 December 2011, the draft Law on Amending Article 2 of the Law on Elections to the Seimas was registered with the office of the Seimas sessions, where it was established that a person who was removed from office by the Seimas according to the procedure for impeachment proceedings, can again be elected a Member of the Seimas if e i g h t y e a r s have lapsed from his removal from office. It was indicated in the explanatory letter accompanying the draft that after the adoption of the proposed draft Law, it will not be necessary to amend the Constitution, as the judgement of the ECHR can be executed by amending the Law on Elections to the Seimas. Thus, drafters of the Law absolutely ignored the official constitutional doctrine formed by the Constitutional Court that, according to the Constitution, a person who was removed from office by the Seimas according to the procedure for impeachment proceedings, can never in the future be elected a Member of the Seimas. Their main arguments were as follows: "the Constitution does not contain a prohibition to elect a person who was removed from office by the Seimas according to the procedure for impeachment proceedings for gross violation of the Constitution, breach of his oath as Member of the Seimas," "the Constitutional Court created a totally new independent rule of the Constitution referring only to the spirit of the Constitution that only the Constitutional Court is aware of," "the ban set in the constitutional doctrine is disproportionate and is contrary to Article 3 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms."

On 22 March 2012 the Seimas amended paragraph 5 of Article 2 of the Law on Elections to the Seimas and established that

A person who was removed from office by the Seimas according to the procedure for impeachment proceedings or his mandate of a Member of the Seimas was revoked by the Seimas cannot be elected Member of the Seimas if less than four years have lapsed from the effective date of the decision to remove him from office or to revoke his mandate of a Member of the Seimas[6] (emphasis mine).

Let us discuss arguments referred to by the Seimas, deciding not to amend the Constitution but to amend the Law on Elections to the Seimas and set a ban of four years therein.

It is true that we will not find words in the Constitution stating *expressis verbis* that it is prohibited at any time in the future to elect a person who was removed from office by the Seimas according to the procedure for impeachment proceedings for gross violation of the Constitution, breach of his oath as a Member of the Seimas. But the Constitution is not only its text. It was said in the case law that the Constitution does not consist of its text only, that it cannot be interpreted only literally, that constitutional rules may also originate from the essence and purpose of a relevant constitutional institution, from the entirety of the constitutional regulation, as far back as in 1803, when the Supreme Court of the USA passed the famous judgment in the case *Marbury v. Madison.*[7] During the time that has passed from the settlement of that case, the constitutional justice has spread all over the world. One of the fundamental grounds of the constitutional justice is that a constitution is not only its text, a constitution is a certain system of values, which is not always established only in the literal form, that a constitution implies not only explicit but also implicit legal regulation, that in the interpretation of the text of the constitution, the law lying beyond it, those fundamental values on which the constitution is based, must be revealed. According to H.G. Gadamer, speech includes not only the external but also the internal

[6] Official gazette *Valstybės Žinios*, 2012, No. 42-2042.

[7] The Supreme Court of the USA pronounced in the case *Marbury v. Madison* that it had the right to investigate whether a federal law adopted by the Congress was not contrary to the Constitution of the USA, though nothing is said about such a right of the Supreme Court in the Constitution, such powers of the Supreme Court are not established therein *expressis verbis*. The fact that the Constitution did not have a word about the right of the Supreme Court to investigate the conformity of the federal laws to the Constitution did not prevent this Court from stating that such authorities of the Court originated from the Constitution by way of its interpretation. It has been already a long time that the authority of the Supreme Court to investigate the conformity of the federal laws to the Constitution is no longer questioned. Let us remember the words of Ch.E. Hughes, one of the most famous Chief Justices of the United States Supreme Court: "The Constitution of the USA is what has been said about it by the United States Supreme Court." Sometimes, when the United States Supreme Court adopts some controversial judgement, voices are heard that the Court should be made "to interpret the Constitution of the USA as it is and not to create what is absent from it," still the Supreme Court continues interpreting the Constitution the way it understands it, often finding in it what its Founding Fathers could not even think about. It can also be added that the true Constitution of the USA is not its written text, which is very short and often very abstract, but over 500 volumes of judgements of the United States Supreme Court interpreting the provisions of the Constitution.

word. The so-called originalist interpretation of the constitution has long been superseded by interpretivism. As even if one agrees that the constitution must be interpreted as it is, the question what it really is, what its true content is still must always be answered. Only the literal (verbal) interpretation of the provisions of the constitution is not sufficient for this, as even clear words of the constitution may be and often are understood differently by different people.[8] In the Constitution we will find more than one word, term, concept, formulation, provision, the text of which can be interpreted differently. Therefore, it is not easy to reveal the law that lies beyond the text of the Constitution. The Constitutional Court has stated that

> the Constitution cannot be interpreted solely literally, only by application of the linguistic (verbal) method by the reason that the Constitution is an integral act, that it consists of various provisions — both constitutional rules and constitutional principles, among which there may be no and there is no opposition and which together form a harmonious system, that the constitutional principles are derived also from the entirety of the constitutional legal regulation that signifies the spirit of the Constitution, from the meaning of the Constitution, as an act establishing and defending the system of the most important values of the community of the state — the civil Nation, setting the guidelines for the entire legal system, also that the letter of the Constitution cannot be interpreted or applied in negation of the spirit of the Constitution.

The Constitutional Court emphasized that only by application of various methods of interpretation of the law: systemic method, method of the general principles of law, logical, teleological methods, method of the legislator's intentions, precedents, historical, comparative methods, etc., can one form prerequisites for the implementation of the purpose of the Constitution, as a public contract and an act of the supreme legal power, for ensuring that the meaning of the Constitution is not deviated from, that the spirit of the Constitution is not negated and that those values on which the Nation bases the Constitution adopted by it are consolidated in life.[9] It

[8] Let us say, Article 19 of the Constitution establishes that "The right to life of a human being shall be protected by law." The scientific law literature presents totally different views whether this provision permits euthanasia. For example, it is written that "euthanasia is not a morally objectionable phenomenon, on the contrary, it is an expression of mercy and human understanding," that "the understanding of the morality by the society is gradually developing towards rationality and probably that will eventually encourage renouncing a negative attitude to those who for objective reasons are forced to choose an easier demise of physical and related psychological suffering" (see, for example, J. Gumbis, Eutanazija žmogaus teisių ir autonomijos kontekstu [Euthanasia in the context of human rights and autonomy], *Teisė*, 2003, No. 47, p. 49). There are also objections to this opinion — it is stated that "euthanasia, no matter voluntary or not, is an intentional killing of a person by another person;" "Both passive and active euthanasia are essentially the same killing of a patient, only through choice of other measures. Suicide with the doctor's assistance is an act of suicide" (see, for example, A. Narbekovas, Eutanazijos terminų vartojimo bioetikoje bei teisėje problematika Lietuvoje [Problems of using terms of euthanasia in bioethics and in law in Lithuania], *Jurisprudencija*, 2008, No. 12 (114), pp. 33, 34).

[9] Ruling of the Constitutional Court of 25 May 2004. Official gazette *Valstybės Žinios*, 2004, No. 85-3094.

is the only way — by comprehensive interpretation of the Constitution — in which the true meaning of the provisions of the Constitution can be disclosed.

A couple more words about the argument that the Constitutional Court ostensibly created a totally new independent rule of the Constitution referring only to "the spirit of the Constitution" that only the Constitutional Court is aware of. There is no reason for mocking the concept of "the spirit of the Constitution." That a certain text has its own spirit was written almost two thousand years ago (for example, when investigation and interpretation of the Gospel texts started). It should only be said that the spirit of the Constitution is reflected and is made a juridical notion not only in the rules of the Constitution, but also in the principles, also in such a concept of the provisions of the Constitution which is presented by the Constitutional Court. The spirit of the Constitution is expressed by the entirety of the constitutional regulation, which is revealed by the Constitutional Court in its jurisprudence.[10]

Is the Constitutional Court of the Republic of Lithuania, interpreting the provisions of the Constitution, "creating" it at the same time? Yes, it is. That is done by constitutional courts of all the states, including that of Lithuania. That is unavoidable. But we can speak about a "new" Constitution being created by the Constitutional Court only in the sense that in the course of the interpretation of the Constitution, constitutional provisions that are not absolutely clear (in the case at hand, provisions in connection with impeachment) are provided with real and specific content, eliminating the uncertainty in perceiving the constitutional provisions. When we talk about the new law being created by the Constitutional Court, we should essentially say that the Constitutional Court does not replace the Nation as the creator of the Constitution or the legislator, but that it reveals the will of the Nation as the creator of the Constitution, also of the legislator, determines the true content of the constitutional provisions, relates the constitutional provisions to the public practice. It is admitted in the scientific legal literature

[10] That the constitution is not only its text, not only its rules and principles, that the constitution has not only letter, but also spirit, has been known according to the tradition of the European law for a very long time. The concept of "the spirit of the constitution" is not a novelty discovered by the Constitutional Court of the Republic of Lithuania. Probably, it is impossible to determine exactly when this concept was first put into the legal circulation and who was the first to do that, but it is well known that there is a book *Spirit of Laws* issued by Ch. Montesquieu in 1748, that the concept of "the spirit of the constitution" was used in the Constitution of the Kingdom of Poland and the Grand Duchy of Lithuania of 3 May 1791 (in Chapter VI), that the United States Supreme Court used the concept of "the spirit of the constitution" in the cases settled by it as far back as several hundred years ago. The scientific legal literature quotes works of the investigators of the Islamic law, where it is stated that there is a position in the Islamic law that "as time goes, the rules of the Islamic law may change, but the spirit of the Islamic law is eternal." Please note that the ECHR in its judgements has specified for a number of times that the rights and freedoms guaranteed by the Convention must always be interpreted so that they would be in line with the spirit of the Convention. Finally, let us remember the famous saying by Ch. de Gaulle that "the constitution encompasses its spirit, institution and practice."

that the text of the Constitution becomes only a starting point for revealing the true meaning and content of the constitutional regulation, that the true "centre of gravity" in understanding the Constitution as the normative reality is moved from the Constitution, i.e. the principal act, to constitutional jurisprudence with the help of constitutional justice.[11] In the scientific legal literature it is also reasonably indicated that "interpretative meaning should not be perceived as the finite metaphysical meaning. It means that there is always a possibility that the currently found meaning will be newly (re)interpreted in the future."[12]

Going back to the argument that ostensibly "the Constitution does not contain a prohibition to elect a person who was removed from office by the Seimas according to the procedure for impeachment proceedings as a Member of the Seimas," it needs to be repeated that such a prohibition is not really set *expressis verbis* in such words in the Constitution, that the Constitutional Court derived it from the purpose of the impeachment institution directly provided for in the Constitution, from the deep meaning of the established sanction — removal from office.[13]

Thus, an interesting legal situation appeared: in its ruling of 25 May 2004 the Constitutional Court stated that the Constitution sets a prohibition at any time in the future to elect a person who was removed from office by the Seimas according to the procedure for impeachment proceedings for gross violation of the Constitution, breach of his oath as a Member of the Seimas, and on 22 March 2012 the Seimas passed the law, pursuant to which such a person may be elected Member of the Seimas if four years have lapsed after the decision to remove him from office according to the procedure for impeachment proceedings. Such a legal situation appeared because the Seimas completely ignored the official constitutional doctrine formed in the rulings of the Constitutional Court, that the concept of the provisions of the Constitution presented by the Constitutional Court is binding on the Seimas, the Government, the President of the Republic, as well as on courts,[14] that they may not interpret the Constitution otherwise than it was interpreted by the Constitutional Court.[15] Such a doctrine does not mean that no one else, other than

[11] E. Jarašiūnas, Jurisprudencinė Konstitucija (Jurisprudential Constitution), *Jurisprudencija*, 2006, No. 12 (90), p. 24.

[12] V. Vaičaitis, *Hermeneutinė teisės samprata ir konstitucija* (Hermeneutical concept of law and the constitution), Vilnius: Justitia, 2009, p. 39.

[13] The way it is done in the Constitution of the United States, which establishes *expressis verbis* that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States" (paragraph 7 of Section 3 of Article I). (About the impeachment process in the United States of America, see, e.g. M.J. Gerhardt, *The Federal Impeachment Process. A Constitutional and Historical Analysis*, Princeton: Princeton University Press, 1996).

[14] Ruling of the Constitutional Court of 28 March 2006. Official gazette *Valstybės Žinios*, 2006, No. 36-1292.

[15] Ruling of the Constitutional Court of 22 December 2011. Official gazette *Valstybės Žinios*, 2011, No. 160-7591.

the Constitutional Court, may interpret the Constitution. The Constitution may be interpreted by anyone, it may be interpreted differently; there may be as many concepts of the provisions of the Constitution as the number of interpreters of the Constitution. Just any interpretation of the Constitution does not bring any legal consequences to anyone, it is only an opinion of its interpreters. Legal consequences are brought only by the concept of the provisions of the Constitution presented by the Constitutional Court, which may not be deviated from either by the legislative or the law enforcement authorities. The Constitutional Court derived the prohibition established in the Constitution to elect a person who was removed from office by the Seimas according to the procedure for impeachment proceedings as Member of the Seimas, as well as President of the Republic, from the Constitution by investigating whether the amendments to the Law on Elections to the Seimas were not contrary to the Constitution. According to paragraph 2 of Article 107 of the Constitution: "The decisions of the Constitutional Court on issues ascribed to its competence by the Constitution shall be final and not subject to appeal." After the announcement of the ruling of the Constitutional Court, such a prohibition acquired the status of the official constitutional doctrine, became an immanent part of the Constitution. The concept of the provisions of the Constitution presented by the Constitutional Court (thus, including the above-discussed prohibition) became, as mentioned above, binding on the Seimas, the President of the Republic, the Government, and the courts. This prohibition is an immanent part of the Constitution in all cases, i.e. also in the case where, as it is sometimes stated, the Constitutional Court "has made a mistake." The binding nature of the decisions of the Constitutional Court and the duty of all the entities to submit to all the decisions of the Constitutional Court (without exceptions) is the basis of the constitutional control. If any state authority or an official of the Republic of Lithuania could decide whether the decision of the Constitutional Court is right or wrong, and having decided that, in its/his/her opinion, the Constitutional Court "has made a mistake," could refuse to implement the decision of the Constitutional Court or refuse to submit to the concept of the provisions of the Constitution presented in the ruling of the Constitutional Court, there would be no sense even talking about any real constitutional control. According to the Constitution, only the Constitutional Court has powers to interpret the Constitution officially — it does that by forming the official constitutional doctrine; only the Constitutional Court has powers to reinterpret an earlier constitutional doctrine.[16] Please note that no other state authorities, no other officials or other entities have powers to change the constitutional doctrine formed by the Constitutional Court, consequently, they do not have powers to change the concept of the relevant provision of the Constitution presented by the Constitutional Court. These are axioms of the constitutional control, they are not subject to discussion.

[16] Rulings of the Constitutional Court of 13 May 2004, 16 January 2006, 24 January 2006, 14 March 2006.

On the other hand, even if we agree with the opinion that the Constitutional Court "has made a mistake," that it "discovered" in the Constitution what is ostensibly absent from it and "created" a new constitutional rule, which is contrary to the Constitution, the legal situation does not change. It is so because no one may change the concept of the provisions of the Constitution presented by it; according to the Law on the Constitutional Court, it can be done only by the Constitutional Court itself and only on its own initiative. The concept of the provisions of the Constitution presented by the Constitutional Court could also be changed if, inter alia, any of those provisions of Constitution on the basis of which (i.e. by interpretation of which) an earlier official constitutional doctrine was formed (on a certain issue of constitutional legal regulation), were changed. In such a case, according to the Constitution, only the Constitutional Court has powers to state whether, in interpretation of the Constitution, the official constitutional doctrine formed by the Constitutional Court on the basis of earlier provisions of the Constitution can still be referred to (and to what extent), or whether it is no longer possible to refer to it (and to what extent).

So, as long as the Constitution has not been amended or the Constitutional Court has not formed a new, different, official constitutional doctrine, the concept of the provisions of the Constitution presented by it remains binding on all state authorities, including the Seimas. According to the Constitution, the legal power of the final legal acts, inter alia, rulings of the Constitutional Court, may not be overcome by the adoption of relevant ordinary laws and/or constitutional laws by the legislator.[17] The Constitutional Court stated:

> the legislator, when adopting new, amending and supplementing the existing laws, may not disregard the concept of the provisions of the Constitution and other legal arguments set forth in a Constitutional Court ruling, which was officially published and became effective. Otherwise, preconditions would be created to recognise the laws, provided the Constitutional Court was addressed regarding their constitutionality, as contradicting the Constitution.[18]

The final acts of the Constitutional Court are obligatory to the Constitutional Court itself: "[…] they restrict the Constitutional Court in the aspect that it may not change them or review them if there are no constitutional grounds for that."[19]

The Seimas, amending the Law on Elections to the Seimas and setting the above-mentioned ban of four years therein, totally failed to analyse the interaction of the Constitution and the constitutional doctrines presented by the Constitutional Court, which gives their official interpretation, and the so-called supranational legal systems. In the case at hand, it is important to reveal the relationship

[17] Ruling of the Constitutional Court of 30 May 2003. Official gazette *Valstybės Žinios*, 2003, No. 53-2361.

[18] Ruling of the Constitutional Court of 19 January 2005. Official gazette *Valstybės Žinios*, 2005, No. 9-289.

[19] Ruling of the Constitutional Court of 28 March 2006. Official gazette *Valstybės Žinios*, 2006, No. 36-1292.

between the Constitution of the Republic of Lithuania and the Convention for the Protection of Human Rights and Fundamental Freedoms.

Paragraph 1 of Article 7 of the Constitution establishes that "any law or other act, which is contrary to the Constitution, shall be invalid." Pursuant to paragraph 3 of Article 138 of the Constitution, "international treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania." When interpreting this provision of the Constitution, the Constitutional Court has stated that it means that the international treaties ratified by the Seimas acquire the power of law. Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols have the power of law in the Lithuanian legal system.[20] In Lithuania, the parallel system of harmonisation of the international and domestic law is applicable, which is based on the rule that international treaties are transformed in the national legal system (are incorporated into it). In its rulings, the Constitutional Court has stated more than once that international treaties, thus including the Convention for the Protection of Human Rights and Fundamental Freedoms, do not have supremacy over the Constitution.[21] Currently, in Europe there are three levels of establishment of human rights and freedoms: the national level (national constitutions), the level of the Council of Europe (including the Convention) and the level of the European Union. The relationship of the Constitution of the Republic of Lithuania and the Convention for the Protection of Human Rights and Fundamental Freedoms has many various aspects. These legal systems are closely related as they must guarantee human rights and fundamental freedoms. But no matter how complicated the interaction between these two systems is, they are two independent legal systems. Though they are based on the same values (democracy, natural justice, respect to human rights and freedoms, their real protection, etc.), each of them has not only its own independent content but also its own interpreter: the Convention for the Protection of Human Rights and Fundamental Freedoms is officially interpreted only by the European Court of Human Rights, the Constitution of the Republic of Lithuania — only by the Constitutional Court of the Republic of Lithuania, whereas the content of the European Union law is interpreted by the European Union Court of Justice. Solely the fact that there are three levels of establishment of human rights and freedoms, that there are three independent interpreters of provisions of legal acts belonging to each of the above-specified levels (that is done by relevant courts), that in case of giving priority to any element of a certain provision, a different result of the interpretation of such a provision may be obtained, creates objective preconditions for a certain competition among the concepts of human rights and freedoms provided for in the national constitutions, the Conven-

[20] Ruling of the Constitutional Court of 5 September 2012. Official gazette *Valstybės Žinios*, 2012, No. 108-5472.

[21] Ruling of the Constitutional Court of 14 March 2006. Official gazette *Valstybės Žinios*, 2006, No. 30-1050.

tion and the legal acts of the European Union to arise. There have been a number of cases when national constitutional courts, the ECHR or the European Union Court of Justice differently interpret the same human rights and freedoms, which are provided for in the national constitution, the Convention and the legal acts of the European Union. That happened many times, for example, in the practice of the constitutional courts of Germany, Hungary and other states.[22] But competition in interpretation of human rights and freedoms is a rare exception rather than a rule because, as it has been mentioned, the national and international (supranational) systems of protection of human rights and freedoms are (must be) based on the same fundamental values, therefore, the general rule is their compatibility but not differences.

The Convention for the Protection of Human Rights and Fundamental Freedoms is not a typical international treaty, it does not establish mutual obligations of the parties. The states, members of the Convention, assume international obligations in the field of human rights and freedoms in that aspect that they undertake to establish such human rights and freedoms, which would conform to the minimal standard set in the Convention, in their national legal acts. In other words, the aim of the Convention is that a certain part of the main human rights and freedoms, on which the states have agreed, would become part of the national legal system of each state, which is a member of the Convention. All democratic states following the principle of the rule of law establish such human rights and freedoms in their constitutions, other legal acts, which are provided for in the Convention, though their textual (legal) expression may be different. It has been mentioned that solely the fact that there are three levels of establishing human rights and freedoms and three entities interpreting human rights and freedoms established on a relevant level, creates objective preconditions for arising of certain competition among the concepts of human rights and freedoms established in the national constitutions, the Convention and the European Union legal acts. There is a presumption made in the very Convention that certain differences are possible, as the purpose of the Convention is not only to establish certain human rights and freedoms, but also to ensure their real protection. The ECHR is established for this purpose, which decides whether the states are not violating human rights and freedoms provided for in the Convention. When examining cases against states, the ECHR not only applies the Convention, but also officially interprets its provisions and such interpretation may be different from that legal regulation of human rights and freedoms, which is provided for in national legal systems, national constitutions. Thus, the fact that a state ratified the Convention does not mean by itself that its national legal system is fully harmonised with the provisions of the Convention in the aspect of establishment

[22] See, e.g. *Case of Alajos Kiss v. Hungary*. No. 38832/06, judgement of 20 May 2010. http://www.unhcr.org/refworld/pdfid/4bf665f58.pdf. (accessed: march 2013).

of human rights and freedoms and their protection, that there can be no conflicts with the Convention.

Upon stating a violation of the Constitution, the state has the duty to eliminate it. The Convention does not provide that the ECHR could by its judgements revoke, cancel any national legal rule (including any constitutional rule), judgements of national courts or could declare which national legal rule (including any constitutional rule) continues to be in effect and which does not. Judgements of the ECHR and the interpretation of human rights and freedoms provided for in the Convention given in such judgements do not automatically become an integral part of national constitutions. Of course, when interpreting the content of human rights and freedoms provided for in their constitutions, the states seek to take into account how such rights and freedoms are interpreted by the ECHR. The Constitutional Court of the Republic of Lithuania has stated that the jurisprudence of the ECHR, as a source of interpretation of the law, is also important for the interpretation and application of the Lithuanian law.[23] But it arises from the principle of the supremacy of the Constitution saying that the Constitution can be interpreted referring only to the Constitution as such, the logic of the Constitution, the relations and interactions among its rules and principles, the entirety of the constitutional regulation. It means that the Constitution cannot be interpreted based on the Convention, as that would negate the principle of the supremacy of the Constitution provided for in Article 7 of the Constitution. It has been mentioned that the Constitution of the Republic of Lithuania is officially interpreted only by the Constitutional Court of the Republic of Lithuania; it does that referring only to the Constitution as such (of course, it is also taken into account how certain provisions are interpreted by the ECHR or the European Union Court of Justice). It is important that there are no relations of subordination or supremacy between the ECHR and the Constitutional Court, that each of them is the supreme body in the field of the legal system (jurisdiction) ascribed to it. That is the main, universally recognised and until now unquestioned condition of a coexistence of national constitutional systems and the so-called supranational legal systems. The Constitutional Court has stated more than once that in case of incompatibility of the international treaty entered into by Lithuania and the national legal regulation, priority is given to the international treaty, except for the case when the incompatibility is between the international treaty and the Constitution.[24] Thus, the power of the constitutional legal regulation cannot be overcome by the legal regulation arising out of the international treaty to which Lithuania is a party (including the Convention). Until now, none of the European states has delegated (given) powers to interpret its constitution or take decisions which rule of the constitution

[23] Ruling of the Constitutional Court of 8 May 2000. Official gazette *Valstybės Žinios*, 2000, No. 39-1105.

[24] Ruling of the Constitutional Court of 14 March 2006. Official gazette *Valstybės Žinios*, 2006, No. 30-1050.

continues to be in effect and which does not and since when, to any international court, including the European Court of Human Rights. Lithuania has not done that, either. Becoming a member of the Council of Europe, Lithuania undertook to respect the Convention, not to violate it. Each state adopts its own constitution itself, interprets, amends it, supplements it with new rules or cancels them. So, no judgement of the ECHR as such amends or can amend that concept of the provisions of the Constitution of the Republic of Lithuania in connection with impeachment, which was presented by the Constitutional Court of the Republic of Lithuania. Though the jurisprudence of the European Court of Human Rights, as a source of the interpretation of law, is important for interpretation and application of the Lithuanian law, its jurisdiction does not change the powers of the Constitutional Court to officially interpret the Constitution.[25] This principle is established *expressis verbis* in the text of the Convention — it has been mentioned that, according to Article 46 § 1 of the Convention, the High Contracting Parties to the Convention undertake to abide by the final judgement of the ECHR in any case to which they are parties, and that supervised by the Committee of Ministers, the respondent state may choose freely what measures it will use to fulfil its legal duty according to Article 46 of the Convention to execute final judgement of the ECHR. So, according to the Convention, a state that violated a human right or freedom guaranteed by the Convention, must take actions and eliminate from its legal system those legal rules, the implementation of which resulted in the violation of a human right or freedom guaranteed by the Convention. The judgement of the ECHR to the effect that Lithuania violated the right of R. Paksas to be elected as a member of parliament, means that this court stated that the ban set in the legal system of the Republic of Lithuania, to be specific — in the Constitution and in the Law on Elections to the Seimas, is too strict, that such a ban is disproportionate, not conforming to that standard of restriction of the election rights which is provided for in the Convention. It is noteworthy that after the ECHR judgement was passed, the Constitution did not change, it remained the same as it had been previously, i.e. with the prohibition stated in it by the Constitutional Court to elect a person who was removed from office by the Seimas according to the procedure for impeachment proceedings for gross violation of the Constitution, breach of oath as Member of the Seimas and President of the Republic at any time in the future. Of course, one can lose his voice trying to prove that there is no such prohibition set in the Constitution, but that will be only an opinion which does not have any legal consequences for anybody — as long as the Constitutional Court does not decide otherwise, such a ban will remain and nobody can cancel this ban except for the Constitutional Court itself and only in case if the Constitution were amended, as it has been discussed above.

[25] Ruling of the Constitutional Court of 5 September 2012. Official gazette *Valstybės Žinios*, 2012, No. 108-5472.

The working group formed by the decree of the Prime Minister of the Republic of Lithuania, dated 17 January 2011, which was commissioned to present proposals on how the ECHR judgement can be executed, stated that in order to properly execute the Court judgement it is necessary to refuse the absolute constitutional restriction; such a restriction can be cancelled only by making relevant amendments to the Constitution, which would make it possible for persons, removed from office according to the procedure for impeachment proceedings for gross violation of the Constitution or breach of oath, again to be elected as Members of the Seimas upon a lapse of a certain period of time.

Unfortunately, the Seimas chose another way: the Seimas resolved that it was not necessary to amend the Constitution, it was enough to amend the Law on Elections to the Seimas. As it has been mentioned, on 22 March 2012 the Seimas amended the Law on Elections to the Seimas and determined that a person who was removed from office according to the procedure for impeachment proceedings for gross violation of the Constitution or breach of oath can again be elected Member of the Seimas if at least four years have lapsed from the effective date of his removal from office. So, the Seimas completely ignored the official constitutional doctrine formed in the ruling of the Constitutional Court of 25 May 2004, according to which such a person may never be elected as Member of the Seimas; the law passed by the Seimas can also be regarded as an attempt by the Seimas to overcome the ruling of the Constitutional Court. It is noteworthy that it arises from the Constitution that the power of the rulings of the Constitutional Court cannot be overcome by the Seimas repeatedly passing laws that were recognised by the Constitutional Court as being contrary to the Constitution.

A group of Members of the Seimas, disagreeing with such a law passed by the Seimas, applied to the Constitutional Court, asking to examine whether the said amendment to the Law on Elections to the Seimas was not contrary to the Constitution. On 5 September 2012, the Constitutional Court passed a ruling,[26] in which it stated that the provision of the Law on Elections to the Seimas, according to which a person, who was removed from office according to the procedure for impeachment proceedings for gross violation of the Constitution or breach of oath, can again be elected as Member of the Seimas if no less than four years have lapsed from his removal from office, was contrary to the Constitution. Thus, the Constitutional Court once again confirmed its earlier doctrine, that a person, who was removed from office according to the procedure for impeachment proceedings for gross violation of the Constitution, breach of oath, may never again be elected as Member of the Seimas, President of the Republic. The Constitutional Court emphasized that the judgement of the ECHR as such cannot be the constitutional grounds for reinterpreting (amending) the official constitutional doctrine, that it

[26] Ruling of the Constitutional Court of 5 September 2012. Official gazette *Valstybės Žinios*, 2012, No.108-5472.

arises from the principle of the supremacy of the Constitution, that the only way to eliminate the incompatibility of the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms is to make relevant amendments to the Constitution.

According to paragraph 1 of Article 147 of the Constitution, a motion to alter the Constitution may be submitted to the Seimas by a group of no less than 1/4 of all Members of the Seimas. On 13 November 2012, a group of Members of the Seimas (42 Members of the Seimas) registered a draft Law on Supplementing Article 56 of the Constitution, where it is provided that a person, who was removed from office according to the procedure for impeachment proceedings for gross violation of the Constitution, breach of oath, can again be elected as Member of the Seimas if four years have lapsed from his removal from office. A discussion again arises in the society whether the proposed period is not too short, whether it should not be longer. In our opinion, no specific period needs to be determined in the Constitution at all — it would be enough to supplement Article 74 of the Constitution, which provides for the impeachment institution, by adding a provision that the legal consequences for a person who was removed from office according to the procedure for impeachment proceedings for gross violation of the Constitution, breach of oath, shall be determined by law. After making such an amendment to the Constitution, the Seimas would acquire the constitutional grounds for setting the relevant prohibitions in laws. Prohibitions to hold certain offices must be proportionate, they may not be absolute — upon a lapse of a certain period of time set in the law, a person would again have the right to be elected Member of the Seimas.

CONCLUSIONS

1. The constitutional purpose of the impeachment institution is not only to ensure a one-off removal from office of persons who committed a gross violation of the Constitution, breached an oath, it is much wider — to prevent such persons from holding such offices provided for in the Constitution, taking of which is related to giving of an oath specified in the Constitution, at any time in the future.

2. The ECHR judgement as such does not change and cannot change the Constitution or such a concept of the provisions of the Constitution, which was presented by the Constitutional Court; the ECHR judgement as such cannot determine validity or invalidity of the rules of the Constitution.

3. Statements that in order to execute the ECHR judgement, it is not necessary to amend the Constitution, are not constitutionally grounded. The judgement of the ECHR of 6 January 2011 in the case *Paksas v. Lithuania* can be executed only by amending the Constitution, and subsequently, referring to such amendments to

the Constitution, by making the relevant amendments to the Law on Elections to the Seimas.

4. As long as the Constitution is not amended, the Seimas does not have the right to pass a law, according to which a person, who was removed from office according to the procedure for impeachment proceedings for gross violation of the Constitution, breach of oath, could again be elected as Member of the Seimas or could hold any other office, taking of which is related to giving of an oath specified in the Constitution.

JAK WYKONAĆ ORZECZENIE TRYBUNAŁU STRASBURSKIEGO W SPRAWIE *PAKSAS PRZECIWKO LITWIE*?

Streszczenie

Artykuł analizuje, w jaki sposób Litwa może i powinna wykonać orzeczenie Europejskiego Trybunału Praw Człowieka z dnia 6 stycznia 2011 r. w sprawie *R. Paksas przeciwko Litwie*. Dnia 6 kwietnia 2004 r. Sejm w trybie impeachmentu usunął R. Paksasa z urzędu Prezydenta Republiki za rażące naruszenie Konstytucji. Sąd Konstytucyjny w wyroku z dnia 25 maja 2004 r. konstatował, że osoba usunięta z urzędu za rażące naruszenie Konstytucji lub złamanie przysięgi nigdy w przyszłości nie może być wybrana na prezydenta Republiki, posła na Sejm. Europejski Trybunał Praw Człowieka w orzeczeniu z dnia 6 stycznia 2011 r. w sprawie *R. Paksas przeciwko Litwie* konstatował, że ustanowiony w litewskim systemie prawnym absolutny zakaz wobec R. Paksasa kiedykolwiek w przyszłości zostania wybranym do parlamentu jest nieproporcjonalny i że ustanawiając taki zakaz, Litwa naruszyła artykuł 3 Pierwszego Protokołu do Konwencji o ochronie praw człowieka i podstawowych wolności. Artykuł kończy się wnioskiem, że chcąc wykonać orzeczenie ETPCz, nie wystarczy zmienić ustawy o wyborach do Sejmu — w tym celu należy dokonać zmiany konstytucji, ponieważ absolutny zakaz kiedykolwiek w przyszłości wybierania na posła na Sejm lub prezydenta Republiki osoby, którą Sejm w trybie impeachmentu usunął z zajmowanego urzędu za rażące naruszenie konstytucji lub złamanie przysięgi, wynika z konstytucji.