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Regional Challenges in Implementation of European Convention on Human Rights: Lithuanian Perspective[1]

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The European region encompasses countries with a different historical past, consequently, entailing a variety of political, legal, and cultural traditions. Despite the general commitment to the same principles, human rights and fundamental freedoms under the European Convention on Human Rights, the actual situation is marked by disputes and different approaches towards the assumed obligations occurring on both the political and constitutional level. The article addresses two main types of challenges concerning the implementation of the Convention on the level covering both the *inter partes* and *erga omnes* effects of the judgments adopted in Strasbourg. The first is the rise of political populism that is usually directed against the European standards of human rights. The second is the insufficient observance of the principle of subsidiarity by the European Court of Human Rights in some cases sensitive to the core elements of national identity of certain states, in particular those from the Central Europe. The lack of understanding of particularities of those states who share the legacy of double totalitarianism can reduce the legitimacy of the ECtHR judgments within those societies and, by the same token, strengthen the anti-European populist ideas. The article deals with the issue how constitutional courts can respond to those challenges and contribute to the implementation of the ECtHR judgments. It provides the example of the Lithuanian Constitutional Court in deciding the landmark cases relevant to the Convention law. From that example one can see that openness and determination to follow the European standards, even though the Constitution provides for its superiority over the Convention law, are the best means to harmonise two legal orders from the national perspective. The article also argues that the application of the European consensus criterion by the ECtHR should be based on a clear methodology and the subsidiary nature of the Convention mechanism should be retained. The proper respect to national, in particular constitutional, jurisdiction without compromising the Convention values is also required in increasing the legitimacy and implementation of the ECtHR judgments.

Keywords: European Convention on Human Rights, principle of subsidiarity, constitutional court, constitutional doctrine, European consensus.

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Introduction

The European region, covered by the European Convention on Human Rights (hereinafter, – the Convention), encompasses countries with a different historical past. This entails a variety of political, legal, and cultural traditions, existing under the umbrella of principles enshrined in the preamble to the Statute of the Council of Europe[2] – individual freedom, political liberty, and the rule of law – i.e. the principles that form the basis of all genuine democracy.[3] However, it is evident that, despite the general commitment to the same principles and to the maintenance and further realisation of human rights and fundamental freedoms,[4] the situation "on the ground" is marked by disputes and different approaches towards the particular assumed obligations. For example, it is observed that some founding states of the Council of Europe show certain resistance towards what they perceive as the aspirations of the European Court of Human Rights (thereinafter – the ECtHR) to become a pan-European constitutional court. Such resistance occurs both on the political level, including the ideas concerning the withdrawal from

[2] Council of Europe. (1949). *Statute of the Council of Europe: London, 5th May, 1949*. London: H.M.S.O. Available at http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052 [last viewed 02.01.2017].

[3] The corresponding intent of the preamble of the Statute of the Council of Europe reads, as follows: "Reaffirming their devotion to the spiritual and moral values, which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy".

[4] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Preamble. Available at http://www.refworld.org/docid/3ae6b3b04.html [last viewed 28.12.2016].

the Convention (e.g., in the United Kingdom),[5] and on the constitutional level (e.g., in Italy).[6]

The challenges concerning the implementation of the Convention may be analysed from different perspectives. The following two types of challenges are to be considered in this article. The first type is related to what may be described as the raise political populism, which is faced now by many of European states, in particular by the Central Europe. It is in this context that constitutional courts gain a particular relevance in responding, at least indirectly, to certain populist ideas by ensuring the openness of national legal systems towards the Convention, as interpreted in the case law of the ECtHR (or the Convention law). The second type of challenges is linked to the insufficient observance of the subsidiarity principle by the ECtHR in some sensitive cases related to the core elements of national identity of certain states. Those types of challenges are interrelated: one can note that sometimes the lack of understanding at the European level of sensitive particularities of certain states may provoke in those societies the ideas directed against the common human rights standards.

The article is focused on the challenges occurring in the Central Europe, in particular on the experience of the Lithuanian Constitutional Court in dealing with the implementation of the Convention law. For the purposes of this article, the notion of implementation covers both the *inter partes* and *erga omnes* effects of the judgments adopted in Strasbourg. As stated by the ECtHR, the Convention is a "constitutional instrument of European public order".[7] This implies the *erga omnes* effect – even if indirect – of the ECtHR jurisprudence.

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[5] The Conservative Party. Protecting Human Rights in the UK, 3 October 2014. Available at https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf [last viewed 07.01.2017]. The Conservative Party policy document sets out the proposal to repeal the Human Rights Act 1998 (HRA) and replace it with a British Bill of Rights. The policy document raises the prospect that the UK might withdraw from the European Convention on Human Rights. See also: *Lock, T., Dzehtsiarou, K.* The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights, 15 May 2015. Available at http://ohrh.law.ox.ac.uk/the-legal-implications-of-a-repeal-of-the-human-rights-act-1998-and-withdrawal-from-the-european-convention-on-human-rights [last viewed 29.12.2016]. See also: *Asthana, A., Mason, R.* UK must leave European convention on human rights, says Theresa May *in The Guardian*, 2016. Available at https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum [last viewed 29.12.2016]. From the perspective of national law, due to the doctrine of parliamentary sovereignty, the Parliament is entitled to ignore any decision issued by national courts, including the Supreme Court. Available at https://publiclawforeveryone.com/2013/12/05/the-three-dimensions-of-the-relationship-between-uk-law-and-the-echr [last viewed 29.12.2016].

[6] According to the rulings of the Italian Constitutional Court adopted in 2007, the Convention ranks between the Constitution and ordinary statutes. The Italian Constitutional Court acknowledged that the Convention is a fundamental charter, as it protects and fosters fundamental human rights and freedoms. However, as a treaty law, it binds the State without having a direct effect in the domestic order: thus, national judges cannot apply the Convention in trials before them, by displaying the internal norms in potential conflict with it (Italy adheres to the dualistic concept of the relationship between international and national law). In this way the Italian Constitutional Court reacted towards the evolving practice of ordinary courts to display statutory law in conflict with the Convention. See *Biondi Dal Monte, F., Fontanelli, F.* Decisions No. 348 and No. 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System. pp. 912–913. Available at https://core.ac.uk/download/pdf/8767376.pdf [last viewed 27.12.2016].

[7] *Loizidou v. Turkey* (preliminary objections), 23 March 1995, para. 75. Available at http://hudoc.echr.coe.int/eng?i=001-57920 [last viewed 08.01.2017].

1. Response to Challenges Posed by Political Populism

One can briefly describe political populism as the conduct of policy based on popular emotions rather than rational arguments, which includes giving irresponsible, unrealistic and controversial promises for the attainment of short-term political benefit. One can see at least three common features that characterise political populism as such.

Firstly, populist political movements give strong preference to the rule of the people over the rule of law. They often advocate the use of referendums (direct democracy), because, in this way, allegedly the voice of the people is directly heard. They also implicitly claim that constituent power has absolute primacy vis-à-vis the constitution (as well as the Convention law) and the rules and powers derived from it.[8] They insist on the alleged higher degree of legitimacy of the legislator and, by the same token, intend to question the legitimacy of other branches of the state power, in particular, the judiciary.

Secondly, according to political populists, the people (or the nation of the state) have to be perceived as a uniform monolithic or homogenous structure, which leads to the idea that democracy is simply a rule of the majority without taking into account any needs of minorities (that leads to the inevitable conflict with the constitutional principles of equal rights and protection of minorities[9]). Naturally, such a perception implies the rejection of pluralism and results in hostility towards minorities. Thus, political populism, especially the right-wing populist movements, promotes discriminative ideas. They include the proposals to discriminate the LGBT people and minorities in general, to dictate the moral perceptions of private life by adopting a specific legislation on the definition of family, absolute prohibition of abortion, strict restriction or prohibition of artificial insemination, etc.

Thirdly, in Europe, including Lithuania, political populism generally entails a negative attitude towards the international obligations of a state, in particular in the area of human rights protection (first of all, those under the Convention law). These obligations are claimed to be unfounded restrictions of the sovereign powers of the people, or even considered to be threatening to the national identity of the people.[10]

One can observe that the hostility of political populists towards the European Union and international obligations in general is highly beneficial to the aims of the Russian policy to destroy the European unity. These ideas also resonate with the concept of the Russian World and the propagated idea of the protection of Russian "traditional" values against the "rotten West". Thus, it is no coincidence that the rhetoric of the majority of populist political movements shows clear sympathies towards Russia and its domestic and foreign policies, including its aggression against neighbouring countries (e.g., the annexation of Crimea). It is also

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[8] See: *Corrias, L.* Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity. In: *European Constitutional Law Review,* Vol. 12, No. 1, May 2016, pp. 6–26.

[9] *Lane, J.-E.* Konstitucija ir politikos teorija. Kaunas: Naujasis lankas, 2003, p. 238.

[10] For example, according to the Lithuanian politician Rolandas Paksas, "The people have had enough of listening to unserious directives of bureaucrats in Brussels and, I am sorry to say this, their nonsense – they want to determine their own fates by themselves". He also speaks about the alleged value crisis in Europe and asserts that the Christian and national values are being thrown out of Europe. See: Buvęs Lietuvos prezidentas, Europos parlamento narys R. Paksas: Europa jau nebėra ta, norima sumaišyti tautas, lytis, tikėjimus, religijas, 2 October 2016. Available at http://www.respublika.lt/lt/naujienos/lietuva/lietuvos_politika/buves_lietuvos_prezidentas_europos_parlamento_narys_rpaksas_europa_jau_nebera_ta_norima_sumaisyti_tautas_lytis_tikejimus_religijas/,print.1 [last viewed 25.01.2017].

no surprise that sometimes those political movements are even openly backed by Russia.

1.1. Constitutional Approaches Towards Convention Law in Central and Eastern Europe

Within the limits of their competence, constitutional courts may perform a significant role in responding to at least some of the challenges posed by populist initiatives aimed at curtailing human rights and, by the same token, in increasing the efficiency of the implementation of the Convention law. One of the most important concepts in this respect is the openness of national constitutions to international law. In this context, one can see that the Central and Eastern European states that have chosen the path of Western geopolitical orientation tend to be cooperative with the European Court of Human Rights, in particular on the constitutional level. The openness of these states towards international law and, in particular, towards human rights law, can be explained on account of their experience under the Soviet totalitarian regime, where international human rights standards were rejected. Thus, a friendly approach on the constitutional level towards international commitments in the field of human rights is closely interrelated with the aspirations to protect democracy and the rule of law as the core elements of the constitutional identity of those states.

For example, the Constitutional Court of Moldova stated that the elements essential in defining the constitutional identity of the Republic of Moldova encompass the democratisation, rule of law, norms of international law, European geopolitical orientation, the ensuring of social, economic, and cultural rights and political freedoms for all the citizens of the Republic of Moldova.[11] The Constitutional Court of Moldova has specifically acknowledged the binding nature of the judgments of the European Court of Human Rights;[12] in cases of divergence between a judgment of the Constitutional Court and that of the European Court of Human Rights, the judgment of the Strasbourg Court is considered as a circumstance constituting a basis for the review of the constitutional judgment.[13]

Another example of a particularly friendly approach towards Convention law is witnessed in Slovenia. The Constitution of Slovenia (Article 15) consolidates the principle that the highest level of protection of human rights must always be observed; this principle ensures a constitutional ranking to a treaty that provides

[11] The 5 December 2013 Judgment of the Constitutional Court of Moldova No. 36 of on the Interpretation of Article 13, Par. (1) of the Constitution in Correlation with the Preamble of the Constitution and the Declaration of Independence of the Republic of Moldova, No. 8b/2013; 41b/2013). Available at http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=476&l=en [last viewed 03.01.2017].

[12] The 16 April 2010 Judgment of the Constitutional Court of Moldova No. 10 on the Revision of the Judgment of the Constitutional Court No. 16 of 28.05.1998 on Interpretation of Article 20 of the Constitution of the Republic of Moldova as amended by Judgment no. 39 of 09.07.2001. Available at http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=55&l=en [last viewed 03.01.2017].

[13] Following the judgment of the ECtHR in the case of *Tănase v. Moldova* (in which the ECtHR found that the law prohibiting the members of the Parliament with multiple citizenship from holding the position of a Deputy in the Parliament was disproportionate and, thus, violated Article 3 of Protocol No. 1 to the Convention), the Constitutional Court of Moldova considered it necessary to revise its own case-law, namely its judgment No. 9 of 26 May 2009, and declared unconstitutional the legal provisions that prohibited persons in public positions from holding multiple citizenship (The of 11 December 2014 Judgment of the Constitutional Court of Moldova No. 31 on the review of Judgment of the Constitutional Court of Moldova No. 9 of 26 May 2009. Available at http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=568&l=ru [last viewed 03.01.2017]).

a higher level of protection of a certain human right compared to the Constitution.[14] Consequently, the Constitutional Court of Slovenia has held that the judgments of the European Court of Human Rights are binding even if they were not adopted in a case against Slovenia.[15]

On the opposite side, there is the position of the Russian Federation and its Constitutional Court. In its judgment of 14 July 2015,[16] the Constitutional Court of the Russian Federation assumed the power to declare the judgments rendered by the ECtHR against Russia as "unenforceable". This position was codified in the statutory provisions, and the first judgment concerning the impossibility to execute the judgment of the European Court of Human Rights (in the case of *Anchugov and Gladkov v. Russia*[17] concerning the disenfranchisement of prisoners) was adopted on 19 April 2016.[18] The Russian Constitutional Court found that a contradiction with the Russian Constitution existed not in respect of the Convention as such, but only in respect of the interpretation given by the ECtHR in the light of the Convention with regard to the issue of disenfranchisement of prisoners. According to the Russian Constitutional Court, the interpretation by the ECtHR "was an evolutive […] rather than a well-established one". In this manner, the Russian Constitutional Court continued the line of the judgment of 14 July 2015, whereby it questioned the authority of the ECtHR to interpret the Convention.

Such a hostile approach adopted by the most authoritative court of the state towards the European mechanism for the protection of human rights is unique in the European context. Moreover, as acknowledged by the Venice Commission, a declaration of unenforceability of the ECtHR judgment constitutes a violation of the obligation of state, party to the Convention, to abide by the final judgment

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[14] *The Constitutional Court of the Republic of Slovenia*, Selected Decisions 1991–2015, p. 23. Available: http://www.us-rs.si/media/zbirka.an.25.-.let.pdf [last viewed 11.01.2017].

[15] Ibid., p. 37.

[16] The 14 July 2015 Judgment of the Constitutional Court of the Russian Federation No. 21-П/2015 on the case concerning the review of constitutionality of the provisions of Article 1 of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto", Items 1 and 2 of Article 32 of the Federal Law "On International Treaties of the Russian Federation", Sections 1 and 4 of Article 11, Item 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation, Sections 1 and 4 of Article 13, Item 4 of Section 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation, Sections 1 and 4 of Article 15, Item 4 of Section 1 of Article 350 of the Administrative Judicial Proceedings Code of the Russian Federation and Item 2 of Section 4 of Article 413 of the Criminal Procedure Code of the Russian Federation in connection with the request of a group of deputies of the State Duma. Available at https://rg.ru/2015/07/27/ks-dok.html [last viewed 06.01.2017].

[17] *Anchugov and Gladkov v. Russia*, Nos. 11157/04 and 15162/05, 4 July 2013. Available: *http://hudoc.echr.coe.int/eng?i=001-122260* [last viewed 12.01.2017].

[18] The Constitutional Court of the Russian Federation ruled that it was impossible to execute the judgment of the ECtHR in the case of *Anchugov and Gladkov* in the sense of amending the legislation of the Russian Federation to exclude from disenfranchisement some categories of convicted persons serving a sentence in places of deprivation of liberty. See: the 19 April 2016 Judgment of the Constitutional Court of the Russian Federation No. 12-П/2016 on the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4th July, 2013 in the case of *Anchugov and Gladkov v. Russia* in connection with the request of the Ministry of Justice of the Russian Federation. Available at http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf [last viewed 12.01.2017].

of this Court in any case to which it is a party.[19] This obligation includes the requirement for the state to abide by the interpretation and the application of the Convention made by the ECtHR in cases brought against it. However, taking into public statements by the President of the Russian Constitutional Court Mr Valery Zorkin,[20] it seems that this institution prioritizes the official narrative, directed against the "rotten Western values".[21] For example, in his speech delivered on 1 November 2016,[22] Mr Zorkin expressed concerns over trends in European legal developments, which allegedly contrast with traditional orthodox values. In particular, Mr Zorkin referred to legal norms concerning non-discrimination of sexual minorities and equality of men and women. Such a position, assumed by the head of the highest judicial institution, is a strong indication of challenges for the implementation of the Convention, posed by the so-called traditionalist approaches coupled with populist trends.

1.2. Convention Law from Perspective of Lithuanian Constitutional Law

Lithuania can be considered as a country with a particularly friendly approach towards the Convention law. From the perspective of the Lithuanian constitutional law, treaties ratified by the *Seimas*, including the Convention, formally acquire the force of a law.[23] Consequently, as regards the relationship between treaties and national laws, the Constitutional Court of the Republic of Lithuania has consolidated a monistic approach. In view of the constitutional tradition of respect for international law as reflected in Article 135(1) of the Constitution (that obliges the State to follow the universally recognised principles and norms of international law), the Constitutional Court held that, according to the Constitution, in cases where a national legal act (with the exception of the Constitution itself) establishes

[19] Final Opinion on the Amendment to the Federal Constitutional Law on the Constitutional Court adopted by the Venice Commission. Opinion No. 832/2015 of 13 June 2016, CDL-AD(2016)016-e. Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)016-e [last viewed 05.01.2016].

[20] *Coalson, R.* Top Russian Judge Wants Legal System to Embrace Gender "Differences", 2 November 2016. Available at http://www.rferl.org/a/russia-top-judge-calls-for-postsecular-legal-framework/28091305.html [last viewed 06.01.2017].

[21] In addition, one can note that it is namely the Russian Constitutional Court that, for the first time in history, was used for the commission of international crime – the annexation of Crimea.

[22] Glava KS predupredil o predskazannoj apostolom Pavlom ugroze bezzakonija, 1 November 2016. Available at http://www.rbc.ru/society/01/11/2016/581870649a7947865c3d8355?from=main [last viewed 25.01.2017].

[23] This conclusion is made on the basis of Article 138(3) of the Constitution of the Republic of Lithuania, which reads as follows: "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". *Constitution of the Republic of Lithuania* [Lithuania], 6 November 1992. Official Gazette *Valstybės* Žinios, 1992, No. 33-1014. Among others, see the 24 January 1995 Conclusion of the Constitutional Court of the Republic of Lithuania 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. Official Gazette *Valstybės* žinios, 1995, No. 9-199. Available at http://www.lrkt.lt/en/court-acts/search/170/ta990/content [last viewed 06.01.2017]. See also: the 17 October 1995 Ruling of the Constitutional Court of the Republic of Lithuania on the compliance of Paragraph 4 of Article 7 and Article 12 of the Republic of Lithuania's Law "On International Treaties of the Republic of Lithuania" with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės* žinios, 1995, No. 86-1949. Available at http://www.lrkt.lt/en/court-acts/search/170/ta983/content [last viewed 06.01.2017]; the 14 March 2006 Ruling of the Constitutional Court of the Republic of Lithuania on the Limitation on the Rights of Ownership in Areas of Particular Value and in Forest Land. Official Gazette *Valstybės* žinios, 2006, No. 30-1050. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1357/content [last viewed 06.01.2017].

a legal regulation that competes with the one established in an international treaty, the international treaty must be applied.[24] Thus, a collision between the provisions of a law (or any other national legal act) and the Convention is considered to be an issue of the application of law. National courts have to resolve such collisions by directly applying the Convention and taking into account the priority of the application of the Convention.[25]

In the absolute majority of cases, this constitutional framework enables the effective execution of ECtHR judgments in terms of individual measures. It also serves as a partial substitute for the general measures, when relevant political will to adopt necessary legal norms is lacking (usually due to the populist reasoning). For example, in the case of *L. v. Lithuania*[26], the ECtHR found a violation of the Convention on the account of the absence of a law regulating full gender reassignment surgery. This legislative gap led to the applicant being unable to undergo full gender reassignment surgery and change his gender identification in all official documents. Following the judgment in this case, the domestic courts developed a consistent practice allowing for changes in official documents without excessive formalism and within a reasonable time. Moreover, non-pecuniary compensation is granted for the inconveniences encountered due to the lack of the relevant legislation in this respect. In addition, it is possible for persons who undergo gender reassignment surgery abroad to claim reimbursement of medical expenses under certain conditions.[27] Taking into account the lack of the political will to adopt a necessary regulation (partly because of the strong influence of the Catholic Church), Lithuanian courts have ensured the implementation of the Convention at least on *ad hoc* basis.[28]

Nevertheless, the monist model may be applied inasmuch as it is related to domestic legal acts other than the Constitution of the Republic of Lithuania. Since Article 7(1) of the Constitution of the Republic of Lithuania proclaims the principle of the superiority of the Constitution,[29] in cases where a provision of the Convention competes with a legal regulation established in the Constitution, the provisions of the Convention take no precedence in terms of application.[30] However, as it is clear from the jurisprudence of the Lithuanian Constitutional

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[24] Among others, see the 14 March 2006 Ruling of the Constitutional Court of the Republic of Lithuania on the Limitation on the Rights of Ownership in Areas of Particular Value and in Forest Land. Official Gazette *Valstybės* žinios, 2006, No. 30-1050. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1357/content [last viewed 06.01.2017].

[25] The 9 May 2016 Decision of the Constitutional Court of the Republic of Lithuania on refusing to consider a petition. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1639/content [last viewed 06.01.2017].

[26] *L. v. Lithuania*, No. 27527/03, 11 September 2007. Available at http://hudoc.echr.coe.int/eng?i=001-82243 [last viewed 08.01.2017].

[27] *Council of Europe*. Information on pending cases: current state of execution. Available at http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=LIT&SectionCode=ENHANCED+SUPERVISION [last viewed 08.01.2017].

[28] Ibid.

[29] Article 7(1) of the Constitution reads as follows: "Any law or other act that contradicts the Constitution shall be invalid". Constitution of the Republic of Lithuania [Lithuania], 6 November 1992. Official Gazette *Valstybės* Žinios, 1992, No. 33-1014.

[30] The 5 September 2012 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of Paragraph 5 (Wording of 22 March 2012) of Article 2 of the Republic of Lithuania Law on Elections to the *Seimas* with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės* žinios, 2012, No. 105-5330. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1055/content [last viewed 18.01.2017].

Court, the Convention is perceived as the treaty with exceptional legal significance for Lithuanian constitutional law. That is due to the intrinsically interrelated constitutional principles that imply the compatibility between the Constitution and the Convention and consequently lead to the openness of the Constitution to the Convention law. These constitutional principles comprise the principle of respect for international law, the principle of an open civil society, and the principle of the geopolitical orientation of the State. The principle of *pacta sunt servanda* (that is expressed in the above-mentioned Article 135(1) of the Constitution) is strengthened by two other principles. The principle of an open civil society (expressed in the preamble of the Constitution) precludes self-isolation and implies the openness of Lithuania to international community and its legal standards, while the principle of geopolitical orientation of the State (expressed in the constitutional acts on non-alignment with the post-Soviet unions and on the membership in the European Union) is grounded on the value-based commonness of Lithuania with Western democratic states and therefore directs towards integration of the European human rights standards into national legal system.

The openness of the Constitution to the Convention law in its turn gives rise to a few major constitutional implications. Firstly, the Convention law is perceived as the minimum necessary constitutional standard for national law. Secondly, under the Constitution the Constitutional Court has the duty of consistent interpretation – the duty to pay due regard to the Convention law, when interpreting the provisions of the Constitution.

1.2.1. Landmark Constitutional Cases on Openness to Convention Law

These implications can be illustrated by several landmark cases considered by the Constitutional Court of the Republic of Lithuania. They demonstrate how the constitutional jurisprudence can respond to the challenges posed by populist initiatives.

Firstly, two cases in which the doctrine of constitutionality of constitutional amendments are the most important in this regard. These are rulings of 24 January 2014 and 11 July 2014.[31] There the Constitutional Court identified the substantive (material) restrictions on the amendments to the Constitution.

One can see two types of those restrictions. The first is absolute prohibition to adopt, even by the referendum, any such amendments to the Constitution that would deny the eternal constitutional values, including the innate nature of human rights. While formulating this doctrine in its ruling of 11 July 2014, the Constitutional Court referred to the Guidelines for Constitutional Referendums at National Level (adopted by the Venice Commission), according to which constitutional amendments must not be contrary to international law or the statutory principles of the Council of Europe (democracy, the protection of human rights and the rule of law). The second type is relative (or conditional) material restrictions. They include the prohibition on denying, by means of constitutional

[31] The 24 January 2014 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of the Republic of Lithuania's Law amending Article 125 of the Constitution and Article 170 (Wording of 15 March 2012) of the Statute of the *Seimas* of the Republic of Lithuania with the Constitution of the Republic of Lithuania. TAR, 2014, No. 478. Available at http://www.lrkt.lt/en/court-acts/search/170/ta850/content [last viewed 14.01.2017]; the 11 July 2014 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of the Provisions of the Republic of Lithuania's Law on Referendums with the Constitution of the Republic of Lithuania. TAR, 2014, No. 10117. Available at http://www.lrkt.lt/en/court-acts/search/170/ta859/content [last viewed 14.01.2017].

amendments, the international obligations of the Republic of Lithuania and, at the same time, the constitutional principle of *pacta sunt servanda,* as long as these international obligations are not renounced according to international legal rules.

Thus, the doctrine of constitutionality of constitutional amendments totally excludes such constitutional amendments that could reintroduce the death penalty or legalise torture, as well as precludes any other amendments to the Constitution that would be in conflict with the Convention. In this way, the doctrine of constitutionality of constitutional amendments plays a key preventive role against various possible populist initiatives that would be contrary to the Convention law. Evidently, among other assumptions, this doctrine is based on the principle that the constitutional standards for human rights protection cannot be lower than those provided by the Convention law.

Secondly, the case on the constitutionality of the death penalty (the ruling of 9 December 1998)[32] can be mentioned where the latter principle was formulated for the first time. In this case, the Constitutional Court was requested to adopt the decision on the abolition of the death penalty, i.e. to decide the issue that was avoided by the politicians due to wide support for the death penalty in society. In response to this question, the Constitutional Court confirmed that the Constitution cannot provide for lower level of protection, but can establish higher standards than those existing under international human rights law. In determining the constitutional standard, the Constitutional Court has also to take into account the trends of progressive development of human rights law.

That is why the Constitutional Court highlighted that the Convention and its Article 2 guided the members of the Council of Europe towards the rejection of the death penalty, despite of the fact that in the then ECtHR case law of the (namely, in the case of *Soering v. the United Kingdom*[33]), the Convention was interpreted as not consolidating the general prohibition of the death penalty. Also it was taken into account that, at that time, Lithuania was one of only five states of the Council of Europe that had not yet signed Protocol No. 6 of the Convention concerning the abolition of the death penalty. Thus, the formation of the European standard regarding the inadmissibility of the death penalty, had a strong reinforcing, if not decisive, role leading to the conclusion on the unconstitutionality of the penalty that, in the words of the Council of Europe, serves "no purpose in a civilised society governed by the rule of law and respect for human rights".[34]

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[32] The 9 December 1998 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of the Death Penalty Provided for by the Sanction of Article 105 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės* žinios, 1998, No. 109-3004. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1135/content [last viewed 11.01.2017].

[33] *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989. Available: *http://hudoc.echr.coe.int/eng?i=001-57619* [last viewed 16.01.2016]. The Court clarified that, even though *de facto* the death penalty no longer existed in any of the Contracting States to the Convention, the evolutive interpretation of the Convention could not be used as a basis for the conclusion that, under Article 3, the Convention prohibits the death penalty, as: first of all, such a conclusion would deny the possibility of executing the death penalty, which is explicitly consolidated in Paragraph 1 of Article 2 of the Convention by the Contracting Parties; and secondly, the adoption of Protocol No. 6 shows that member states chose the normal method of the amendment of the Convention preventing from reference to subsequent national practice in the application of the treaty as endorsing the rejection of the death penalty.

[34] *Council of Europe*. Abolition of the Death Penalty, 2014. Available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/Death_Penalty/default_en.asp [last viewed 14.01.2017].

Thirdly, the case concerning the constitutionality of the State Family Policy Concept (the ruling of 28 September 2011)[35] can be referred as the striking example of the duty of consistent interpretation carried out by the Constitutional Court. According to this Concept, which embodied the view of "the majority", a family was defined as a relationship founded exclusively on the basis of marriage. Consequently, families based exclusively on marriage were to be entitled to more favourable conditions for gaining access to housing, social assistance, or other support.

In its ruling, the Constitutional Court held that the constitutional concept of the family must be interpreted in view of the international obligations of under the Convention. Therefore the ECtHR case-law (*Marckx v. Belgium*[36], *Kroon and Others v. the Netherlands*[37], *Keegan v. Ireland*[38], and *El Boujaidi v. France*[39]) had a decisive impact on the interpretation of the constitutional concept of family and inspired the Constitutional Court to give priority to the content of family relationship rather than its form.[40] By declaring the State Family Policy Concept unconstitutional, the Constitutional Court precluded discriminatory regulation in respect of families emerged on other basis than marriage.

1.2.2. Duty to Remove Incompatibilities

The supremacy of the Constitution and, notably, the system of constitutional values entrenched draw the limits of its openness to the Convention law. The Constitutional Court explicitly addressed this question after the incompatibility between the provisions of the Constitution and the Convention became apparent following the ECtHR judgment in the case of *Paksas v. Lithuania*[41] (namely, in terms of the right to free elections, consolidated in Article 3 of the First Protocol to the Convention). This incompatibility has emerged as a result of the difference in the jurisprudence of the Constitutional Court and the ECtHR in balancing colliding legal values and perceiving the permissible limitations on the passive electoral right. Formulating the doctrine on the consequences of impeachment in its ruling of 25 May 2004,[42] the Constitutional Court placed more weight on such constitutional values as the security of the state and the related loyalty of members

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[35] The 28 September 2011 Ruling of the Constitutional Court of the Republic of Lithuania on the State Family Policy Concept. Official Gazette *Valstybės* žinios, 2011, No. 118-5564. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1112/content [last viewed 18.01.2017].

[36] *Marckx v. Belgium*, No. 6833/74, 13 June 1979. Available at http://hudoc.echr.coe.int/eng?i=001-57534 [last viewed 16.01.2017].

[37] *Kroon and Others v. the Netherlands*, No. 18535/91, 27 October 1994. Available at http://hudoc.echr.coe.int/eng?i=001-57904 [last viewed 16.01.2017].

[38] *Keegan v. Ireland*, No. 28867/03, 18 July 2006. Available at http://hudoc.echr.coe.int/eng?i=001-76453 [last viewed 16.01.2017].

[39] *El Boujaidi v. France*, No. 123/1996/742/941, 26 September 1997. Available at http://hudoc.echr.coe.int/eng?i=001-58099 [last viewed 16.01.2017].

[40] The 28 September 2011 Ruling of the Constitutional Court of the Republic of Lithuania on the State Family Policy Concept, para. 15.1 of Chapter II of the reasoning part of the Ruling. Official Gazette *Valstybės* žinios, 2011, No. 118-5564. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1112/content [last viewed 18.01.2017].

[41] *Paksas v. Lithuania*, No. 34932/04, 6 January 2011. Available at http://hudoc.echr.coe.int/eng?i=001-102617 [last viewed 17.01.2017].

[42] The 25 May 2004 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of Article 1(1) (Wording of 4 May 2004) and Paragraph 2 (Wording of 4 May 2004) of Article 2 of the Republic of Lithuania's Law on Presidential Elections with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės* žinios, 2004, No. 85-3094. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1269/content [last viewed 18.01.2017].

of the Parliament and other highest officials to the state and its constitutional order, whereas, in the case *Paksas v. Lithuania* the ECtHR gave priority to the free expression of the opinion of the people in the choice of the legislature, even though this would entail the possibility of electing candidates with doubtful loyalty to the state and its constitutional order.

Facing this incompatibility, the Constitutional Court held that the ECtHR judgment may not serve in itself as a constitutional ground for the reinterpretation (correction) of the official constitutional doctrine.[43] Reinterpretation is not permitted if, in the absence of the appropriate amendments to the Constitution, it would substantially change the overall constitutional regulation (in this case, the integrity of the constitutional institutes of impeachment, oath and electoral rights), would distort the system of constitutional values, or would compromise the guarantees of the protection of the supremacy of the Constitution in the legal system.[44]

However, the refusal to reinterpret the Constitution in that case does not mean the possibility not to implement the ECtHR judgment. On the contrary, the Constitutional Court underlined that the constitutional principle of respect for international law determines the duty of the Republic of Lithuania to remove the incompatibility between the provisions of the Convention and the Constitution by to adopting the appropriate amendments to the Constitution. Although in general the state enjoys the broader discretion to choose a means of removing incompatibilities between a treaty and the Constitution, this discretion in the area of human rights is limited. In view of the perception of human rights as fundamental constitutional values and the constitutional principles of an open civil society and the geopolitical orientation of the state, renouncing international obligations in the area of human rights would not be a constitutionally justified option.

Thus, on the one hand, the constitutional duty to remove incompatibilities between the Constitution and the Convention law by making appropriate amendments to the former preserves the superiority of the Constitution. On the other hand, this duty demonstrates the especially friendly constitutional attitude towards the Convention law, as the incompatibility between the Constitution and the Convention law is perceived as a constitutional anomaly that has to be removed by the appropriate constitutional amendments.

2. Observance of Subsidiarity Principle

The challenges to the implementation of the Convention law of the first type (those related with political populism) can be regarded as the challenges of internal character, as they mostly occur due to internal factors within the states, parties to the Convention. While the challenges of the second type (those related with the observance of the principle of subsidiarity) can be considered as external challenges from the perspective of national law, as they occur due to the certain ECtHR judgments where the reasonable doubt can be raised as to whether the Strasbourg

[43] The 5 September 2012 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of Paragraph 5 (Wording of 22 March 2012) of Article 2 of the Republic of Lithuania Law on Elections to the *Seimas* with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės* žinios, 2012, No. 105-5330. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1055/content [last viewed 18.01.2017].

[44] Ibid.

Court, in determining the violation of the Convention, has duly taken into account the particularities of the situation in a concrete state. Indeed, one can mention a number of cases when national institutions seemed to be in a better position to assess the situation and it can be argued that, by rejecting their assessment, the ECtHR has disregarded the subsidiarity principle that underlies the Convention mechanism. In these situations, the ECtHR judgment is unlikely to be perceived as possessing a sufficient degree of legitimacy in the state concerned; therefore, their implementation can meet a strong resistance from the political institutions or society in general.

One can mention a few Lithuanian cases, most importantly with regard to the principle of subsidiarity. For example, the abovementioned case of *Paksas v. Lithuania* can be referred where, by rejecting the position of the Lithuanian Constitutional Court concerning the importance and the role of a constitutional oath,[45] the ECtHR has actually undermined the significance of the constitutional institute of an oath. In addition, the ECtHR examined only the right to stand in elections to the *Seimas*; whereas under the Lithuanian Constitution, this right is directly linked with the capacity of standing as a candidate in presidential elections, while the institute of a constitutional oath is also related to the capacity to occupy some other highest offices, including in the judiciary. Thus, actually the Strasbourg Court judgment has broader implication than only on a passive electoral right in the parliamentary elections. Therefore, the question may be raised as to whether the ECtHR has not interfered too deeply within the jurisdiction of the Lithuanian Constitutional Court. In view of these circumstances, although the Constitutional Court ruled on the necessity to adopt the appropriate amendments to the Constitution, so far all the attempts to implement this ruling have failed.

Similar questions arise out of the case of *Vasiliauskas v. Lithuania*.[46] In this case the ECtHR in principle questioned the assessment by the domestic courts that the Lithuanian freedom fighters were a significant part of a national group for the purposes of a definition of genocide. In this way, the ECtHR has actually diminished the prominent role of those who, among other things, fought and lost their lives for the values declared in the Convention (the testimony to this is the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949,[47] whereby the adherence of the Lithuanian State to the Universal Declaration of Human Rights was declared).

Another example illustrating the sensitivity of subsidiarity could be the assessment of totalitarian symbols. It is relevant to Lithuania, as it has introduced the ban on public demonstration of both Nazi and Communist regime symbols.

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[45] That this oath cannot be perceived as a pure formality; therefore, the duly established breach of the oath will result in a constant reasonable doubt regarding the trustworthiness of the person concerned and his loyalty to the state and its constitutional order, and, for this reason, the oath cannot be taken again by the same person. See: the 25 May 2004 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of Article 1(1) (Wording of 4 May 2004) and Paragraph 2 (Wording of 4 May 2004) of Article 2 of the Republic of Lithuania's Law on Presidential Elections with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės* žinios, 2004, No. 85-3094. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1269/content [last viewed 18.01.2017].

[46] *Vasiliauskas v. Lithuania*, No 35343/05, 20 October 2015. Available at http://hudoc.echr.coe.int/eng?i=001-158290 [last viewed 15.01.2017].

[47] Declaration of the Council of the Lithuanian Freedom Fight Movement. Available at http://www.lrkt.lt/en/legal-information/lithuanias-independence-acts/declaration-of-the-council-of-the-lithuanian-freedom-fight-movement/364 [last viewed 15.01.2017].

In this regard one can refer to the case of *Vajnai v. Hungary*,[48] where the persecution for the public demonstration of a five-pointed red star was recognised as contrary to the Convention due to the alleged multi-meaningful character of that symbol. By denying the conclusion of the Constitutional Court of Hungary, the ECtHR maintained that this symbol, as well, can be perceived as a symbol of "international workers' movement struggling for a fairer society". However, it is evident that, irrespective of their multiple theoretical attributes, the symbols like a five-pointed red star have a clear dominant meaning in the states that had experienced the Communist totalitarian regime. For example, in popular understanding in Lithuania it has never been associated with any peaceful democratic workers' movement; unambiguously, it is perceived only as the symbol of the Soviet occupation totalitarian regime and its repressive structures, including the Soviet armed forces. Nevertheless, the ECtHR seems to ignore the double legacy of totalitarianism in the Central Europe: it ruled that, although "the display of a symbol which was ubiquitous during the reign of [Soviet] regimes may create uneasiness among the victims of systematic terror and their relatives, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment".[49] Following this line of logic, one can put a rhetorical question whether the same reasoning could be applicable to the assessment of a swastika.

On the other hand, the reasoning in *Vajnai v. Hungary* case may be compared with arguments employed in the case of *S.A.S. v. France,*[50] which concerned the prohibition on wearing a full-face veil. The state was granted a wide margin of appreciation, by holding that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society. The ECtHR found a general ban, guaranteed by means of criminal sanctions, to be necessary in a democratic society in order to protect a rather vague notion of "living together" as an element of the "protection of the rights and freedoms of others". The principle of unhindered interaction between individuals (or, in other words, the possibility to see the face of a person you are talking to) was accorded priority over the rights of certain Muslim women. This conclusion was made in spite of the fact that many international and national institutions, working in the field of fundamental rights protection, had found the blanket ban to be disproportionate.[51]

Although the cases of *Vajnai* and *S.A.S.* concerned different rights, generally implying different breadth of the margin of appreciation (accordingly, freedom of expression and freedom to manifest religion), it seems that criticism concerning the selective liberalism, which underlies certain judgments of the Strasbourg Court, is not so unreasonable. To sum it up, one can argue that, as long as the domestic courts are not found to have failed to comply with the standards of fair court proceedings under the Convention law (primarily, Article 6 of the Convention), the ECtHR should not "substitute" its assessment of the facts for that given by the domestic courts of the factual, historical, political, or other circumstances specific to a particular state. For the purposes of the effective implementation

[48] *Vajnai v. Hungary,* No. 33629/06, 8 July 2008. Available at http://hudoc.echr.coe.int/eng?i=001-87404 [last viewed 14.01.2017].

[49] Ibid.

[50] *S.A.S. v. France* [GC], No. 43835/11, 1 July 2014. Available at http://hudoc.echr.coe.int/eng?i=001-145466 [last viewed 14.01.2017].

[51] Ibid.

of the Convention law, the balanced and consistent application of the principle of subsidiarity and the margin of appreciation doctrine stemming from this principle are very important in sensitive cases related to the historical experience and other specific features of a particular society and its constitutional values.

3. Establishment of European Consensus

This leads to another topic, which raises similar discussions, namely, the relevance of the European consensus in the interpretation of the Convention guarantees. The significance of the concept of the European consensus is twofold.

Firstly, the convergence of national standards in the field of human rights protection constitutes an important basis for applying the "living instrument" approach and expanding the scope of the rights guaranteed by the Convention. In the recent judgment of *Magyar Helsinki v. Hungary*,[52] a broad consensus (existing among thirty states) of recognising the right of access to information held by public authorities, together with consensus on the international level, led the Strasbourg Court to interpret the scope of Article 10 (guaranteeing freedom of expression) as encompassing the right of access to information. Though reliance on European consensus, as one of the main sources of inspiration for applying the evolutive interpretation of the Convention gains certain criticisms, the approach based on both European and international consensus is an important guarantee of the vitality of Convention standards, including the effectiveness of their implementation.

Secondly, the existence (or non-existence) of a common European standard in a particular field is employed by the ECtHR in deciding whether national institutions remained within their margin of appreciation when striking a balance between the competing interests. A common practice of the majority of European states, revealing the generally higher standard of protection than in a state concerned, is a strong argument in favour of "codification" of this standard on the supranational level. However, the methodology of establishing the existence or non-existence of the European consensus in a particular field is not always transparent.

At the same time, the precision with which the object of comparative analysis is defined may have a decisive impact upon the conclusion as to the existence of the European consensus. To clarify, it would be useful to refer to the case of *Animal Defenders International v. the United Kingdom,*[53] concerning a ban on broadly defined political advertising. The scope of this ban included social interest advertising, even to the extent of preventing the airing of an advertisement calling attention to the genocide in Rwanda and Burundi. In this case, the ECtHR (the majority of 9 judges in the Grand Chamber) found that there was no European consensus between the Contracting States on how to regulate paid political advertising in broadcasting. However, dissenting judges emphasised that comparative law material, which dealt primarily with political party advertising, could not serve as an appropriate basis to justify restrictions imposed on public interest groups that wished to draw attention to an issue of public interest (such as

[52] *Magyar Helsinki Bizottság v. Hungary* [GC], No. 18030/11, 8 November 2016. Available at http://hudoc.echr.coe.int/eng?i=001-167828 [last viewed 16.01.2017].

[53] *Animal Defenders International v. the United Kingdom* [GC], No. 48876/08, 22 April 2013. Available at http://hudoc.echr.coe.int/eng?i=001-119244 [last viewed 18.01.2017].

commercial exploitation of animals in circuses).[54] Dissenting judges also observed that the respondent State was one of a few in Europe that still applied such a comprehensive ban on "political" advertising.[55] Thus, the finding of the majority rested on a rather broadly understood object of comparison.

Similar conclusion can be drawn from the abovementioned case *Paksas v. Lithuania*, which concerned the right of the impeached President to stand in parliamentary elections. The ECtHR held that impeachment proceedings in most of European republics had no direct effects on the electoral and other political rights of a head of state who was removed from office. This conclusion was made despite the non-existent practice of actual presidential impeachments in Europe (only Lithuania has successfully impeached the head of a state and faced the challenge to establish the consequences thereof).

In this context, an interesting note by the ECtHR, made in the case of *Grosaru v. Romania*,[56] concerning electoral matters may be mentioned. After observing that Belgium, Italy, and Luxembourg stood out in the European context as the states where the only post-election remedy available was validation by the parliament, the Strasbourg Court was quick to note that those three countries had enjoyed a long tradition of democracy, which would tend to dissipate any doubts as to the legitimacy of such a practice.[57] Again, one can raise a rhetorical question as to the application of double standards to the so-called old and new democracies.

To sum it up, taking into account that the criterion European consensus is a strong presumption in favour of the solution adopted by the majority of the Contracting Parties,[58] the application of this criterion should be based on a clear methodology.

Conclusions

Constitutional courts can certainly play a decisive role within their states in ensuring the implementation of the Convention law. This role is particularly important in responding to the first type of the challenges to implementation of the Convention law, i.e. the challenges posed by the populist initiatives aiming to undermine the European human rights standards. However, this role can be successfully carried out, provided that the Constitutional Court is consolidating the openness of the Constitution to the Convention law, even if the text of the Constitution does not seem friendly to the Convention by establishing unconditional superiority of the Constitution, and is firmly determined to follow the European standards.

This conclusion is confirmed by good practice of the Lithuanian Constitutional Court. It can be compared with the practice in Germany, whose legal system is also based on the supremacy of the Constitution. However, at the same time the Convention enjoys special constitutional significance. The German Federal

[54] *Animal Defenders International v. the United Kingdom* [GC], No. 48876/08, 22 April 2013 (dissenting opinion of Judges Ziemele, Sajo, Kalaydjiyeva, Vučininć and De Gaetano; dissenting opinion of Judge Tulkens, joined by Judges Spielmann and Laffranque). Available at http://hudoc.echr.coe.int/eng?i=001-119244 [last viewed 18.01.2017].

[55] Ibid.

[56] *Grosaru v. Romania*, No. 78039/01, 2 March 2010. Available at http://hudoc.echr.coe.int/eng?i=001-97617 [last viewed 18.01.2017].

[57] Ibid., para. 28.

[58] *Brems, E.*, Human Rights: Universality and Diversity. The Hague: Kluwer Law International, 2001, p. 420.

Constitutional Court is guided by the principle of friendliness of the Constitution towards international law and interprets the content of fundamental constitutional rights consistently with the interpretation provided by the ECtHR.[59]

Similarly, in Lithuania the interpretation by the Constitutional Court of the relevant constitutional principles, in particular, the principles of *pacta sunt servanda,* an open civil society and geopolitical orientation of the state, lead to the openness of the Constitution to the Convention law. That has a few major constitutional implications. Firstly, the Convention law is a source for the interpretation of the Constitution as supreme law within the State. Secondly, Convention law is perceived as the minimum necessary constitutional standard for Lithuanian national law. Thirdly, under the Constitution, the Constitutional Court has the duty of consistent interpretation, i.e., the duty to interpret the relevant constitutional provisions in line with the Convention law. Derogations from this duty are possible only in two cases: where the Constitution provides for a higher standard of protection than the Convention, or where the interpretation in line with the Convention would substantially affect the system of constitutional values. Fourthly, the latter case of the incompatibility between the Constitution and the Convention law is perceived as a constitutional anomaly that has to be removed by the appropriate constitutional amendments.

On the other hand, solely the efforts of national courts to ensure the implementation of the Convention law are insufficient. The second type of challenges in this field can be considered as external from the perspective of national law, as they occur due to the lack of subsidiarity in certain ECtHR judgments. The principle that, due to their direct and continuous contact with the vital forces in the society, national courts are better placed to evaluate the local needs and conditions should be equally applicable to all states, parties to the Convention (including the Central Europe). While the application of the European consensus criterion that is relevant to the observance of subsidiarity should be based on a clear methodology.

The denial of different experience and specific features of particular states and societies would imply not a dialogue between national courts and the ECtHR, but a monologue of the latter. This may adversely affect the legitimacy of its judgments (in terms of reception by the relevant societies) and complicate their execution on the spot. Therefore, apart from the openness of national constitutions to the Convention law, the need of the real judicial dialogue and the respect to national, in particular, constitutional jurisdiction without compromising the Convention values is no less important for the efficient implementation of the Convention law.

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[59] *Die Völkerrechtsfreundlichkeit* des *Grundgesetzes*. The German Federal Constitutional Court held that the provisions of the ECHR serve, on the level of constitutional law, as interpretation aids to determine the contents and the scope of fundamental rights and of rule-of-law principles of the German constitution. *See* the 14 October 2004 Order of the Federal Constitutional Court of the Federal Republic of Germany, 2 BvR 1481/04, BVerfGE 111, 307 (315 f.). Available at *http*://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html [last viewed 17.01.2017]; the 26 February 2008 Decision of the Federal Constitutional Court, 1 BvR 1602, 1606, 1626/07, para. 52. Available at http://www.bverfg.de/e/rs20080226_1bvr160207.html [last viewed 17.01.2017].

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