THE ROLE OF CONSTITUTIONAL COURTS OF EUROPEAN UNION MEMBER STATES, 
*INTER ALIA* THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA, IN THE 
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE EU CITIZENS

Introduction

Although the protection of human rights in the Community has been an issue since the very 
creation of the European Economic Community, after the development of the Community from 
economic Member State union to a wider political union, whose activities more and more often 
influence directly fundamental rights and freedoms of the EU citizens, the protection of 
fundamental rights issue became particularly relevant. For many years, the development of 
fundamental rights as general principles of Community law was characterized by dialogue between 
the European Court of Justice (hereinafter also referred to as the ECJ) and certain national 
constitutional courts, subsequently joined by the European Court of Human Rights (hereinafter also 
referred to as the ECHR).

European Union Member States are not only parties of this international organization with 
all the consequent obligations, but also parties to the Convention for the Protection of Human 
Rights and Fundamental Freedoms (hereinafter also referred to as the Convention) and they have 
recognized the jurisdiction of the ECHR. Therefore national courts of the European countries 
consider three different legal sources defining the content of human rights: national legal sources, 
*inter alia* (and first of all) the national constitutions; international legal sources, entrenching 
compulsory and directly effective norms, such as the Convention; and European Union legal 
sources, *inter alia* the jurisprudence of the European Court of Justice, which filled the vacuum of 
human rights protection in the EC Treaty, and the European Union Charter of Fundamental Rights 
(hereinafter also referred to as the Charter), which is not legally binding yet. It also needs to be 
noted that those different legal sources are not compartmentalized in the sense that each of them 
would apply only to its own legal system. Rather, in practice several sources of fundamental rights 
may have to be applied in parallel, therefore national courts, aiming for effective protection of 
fundamental rights, often face the unenviable choice between proper implementation of the 
obligations under Community law and the obligations under the Convention.

Constitutional courts, constantly interpreting rights and freedoms entrenched in the national 
constitutions and considering international obligations of the state in human rights protection field, 
define the final limits of fundamental rights.

This paper is an attempt to reveal the role of constitutional courts of the European Union 
Member States in the protection of fundamental rights and freedoms of the EU citizens in the 
variety of sources and jurisdictions of fundamental rights.

The Convention for the Protection of Human Rights and Fundamental Freedoms is the document for protection of human rights which presently makes the strongest influence on the constitutional doctrine of human rights in European countries. This Convention is described as "minimum standard for protection of human rights" which must be followed by all the states – Convention participants; however the states may determine wider ambit for protection of human rights in their national law.

Also it was emphasized by the European Commission of Human Rights that the Convention is “the constitutional instrument of public order in the area for protection of human rights”; that the purpose of the states – Convention participants is “to establish common public order of the new European democracies”. The ECHR pointed out that the preamble of the Convention refers to “the heritage of political traditions, ideals, freedoms and supremacy of law” which is mostly consolidated in national constitutions; that the Convention “creates the net of common and bilateral obligations and objective duties”, which under the preamble of the Convention must be collectively implemented.

The Convention in the international level has the superior legal power than national law of the states which have joined the Convention; none of the states can stand on its national law for the purpose to avoid the pursuance of its international obligations, taken under the provisions of the Convention. The Convention demands (as other international contracts also do) a particular result which could ensure the conformity of the national law and practice with the obligations arising from the Convention, however it still leaves the discretion for the states to choose the ways and methods for implementation.

Despite the difference of constitutional norms of the states which have ratified the Convention, on the interpretation of the relations between international law and national law, all the states – Convention participants (except Ireland) have already transferred provisions of the Convention to their domestic law, therefore national courts may (and even must) apply the

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2 Communist Party v. Turkey, 30.1.1999, para. 28.
3 Cyprus v. Turkey, 10.05.2001, para 76.
Convention directly in the domestic law. In some contracting countries (in Austria, Netherlands, San Marino) the Convention was given the constitutional status, whereas in the bigger part of other countries the Convention takes a medium part between the Constitution and ordinary laws in the hierarchy of norms. The Convention itself does not provide any special conditions or requirements concerning its place in domestic law, however the state must guarantee the rights consolidated in the Convention for all the persons which fall under its jurisdiction and power and for which the state is responsible, despite the fact whether this state implements its authority in its territory or outside it. Thus the applicability of the Convention provided in its Article 1 “for all the persons which fall under its jurisdiction” does not mean only the territory of the state.  

By the law adopted on 27 of April 1995 the Seimas of the Republic of Lithuania has ratified the Convention for Protection of Human Rights and Fundamental Freedoms and its IV, VII and XI protocols. Under Paragraph 3 of Article 138 of the Constitution of the Republic of Lithuania international treaties ratified by the Seimas of the Republic of Lithuania shall be constituent part of the legal system of the Republic of Lithuania. Constitutional Court has held that the international treaties ratified by the Seimas acquire the power of the law; this doctrinal provision cannot be construed as meaning that, purportedly, the Republic of Lithuania may disregard its international treaties, if a different legal regulation is established in its laws or constitutional laws than that established by international treaties. Quite to the contrary, the principle entrenched in the Constitution that the Republic of Lithuania observes international obligations undertaken on its own free will and respects universally recognised principles of international law implies that in cases when national legal acts (inter alia laws or constitutional laws) establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied.

The analysis of texts of the Constitution of the Republic of Lithuania and the Convention allows drawing a conclusion that these documents are related by their content. Only the

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6 Cyprus v. Turkey, supra n. 3.
7 On 14 May 1993 European Convention for Human rights and Fundamental Freedoms and its I, IV and VII protocols were signed. On 11 May 1994 the IX Protocol of the Convention was signed.
particularity and degree of concretizing differ. Sometimes the scope of the treatment differs, but nevertheless one should find if not direct than at least indirect equivalents in both legal texts\(^9\).

The Constitutional Court in its Conclusion of 24 January 1995\(^{10}\) has emphasized that the interpretation of the compatibility (relation) of the norms of the Constitution and the Convention must be semantic, logical and not only literal. Literal interpretation of human rights alone is not acceptable for the nature of the protection of human rights. The fact that the fundamental rights, freedoms and the guarantees in one or another verbal form are formulated in the Constitution does not allow yet to maintain that these wordings are in all cases absolute in the sense of their application. A law may provide a more extensive formulation of human rights, freedoms and their guarantees than their literal expression in concrete article or its part in the Constitution. Therefore, their broader application is possible only if it is provided by another legal act which has the power of law (in this case, by the Convention and its Protocols). The Constitutional Court observed that no provision of the Constitution and no provision establishing human rights and freedoms in the Convention allow maintaining that the Constitution forbids some actions whereas the Convention defines them as one or another right or freedom.

The Constitutional Court of the Republic of Lithuania started to refer to the provisions of the Convention even earlier than this international treaty was ratified by the Seimas\(^{11}\); provisions of the Convention and the jurisprudence of the ECHR could be found in many acts of the Constitutional Court after the ratification of the Convention. The jurisprudence of the ECHR as a source of construction of law is important to construction and applicability of Lithuanian law\(^{12}\).

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One should note that the Constitutional Court in its Ruling of 16 January 2007\textsuperscript{13} for the first time has adjudicated on the compliance of a national substatutory legal act – a Decree of the President of the Republic – with the Convention – its Paragraph 2 of Article 6. Considering that the concept of the principle of presumption of innocence which is consolidated in Paragraph 2 of Article 6 of the Convention is virtually the same as the concept of the principle of presumption of innocence which is entrenched in Paragraph 1 of Article 31 of the Constitution, the Constitutional Court has held that the Decree of the President of the Republic to the extent that it is disputed is not in conflict either with the principle of presumption of innocence entrenched in the Constitution, or the principle of presumption of innocence consolidated in the Convention.

Thus the fact that the Constitutional Court interpreting the provisions of the Constitution refers to the provisions of the Convention is related to the legal similarity of the content of the Constitution and the Convention\textsuperscript{14}; the backgrounds of restriction of exercising human rights in general are similar to the backgrounds consolidated by the European Court of Human Rights.

2. Relationships between the Jurisprudence of European Constitutional Courts and the European Court of Human Rights

The jurisprudence of the ECHR includes all the questions of interpretation and applicability of the Convention and its protocols. In the opinion of the former President of the ECHR L. Wildhaber\textsuperscript{15}, we can always \textit{sui generis} call this court quasi-constitutional court. A mere fact that the questions of protection of fundamental human rights of the European citizens are adjudicated here leaves no doubts about the constitutional character of the questions solved. The system of protection of fundamental rights set in the Convention and based on the subsidiarity principle allows national courts to solve these questions more properly. Determining the influence of the jurisprudence of the ECHR, the Constitutional Court of the Republic of Lithuania has held that it


takes this jurisprudence as a source of construction of law as important to construction and applicability of Lithuanian law\textsuperscript{16}.

The decisions of the ECHR do not have the \textit{res judicata} meaning\textsuperscript{17}. Under Article 46 the states – Convention participants are obliged to exercise the final decision in every case they are parties to. It should be also emphasized that the decision in a case against another country can give no right to the third state or to its domestic courts to ignore the decisions of the ECHR and not pay attention to them without any motivation.

It goes without saying, the coordinated applicability of the Convention in the domestic law of the states – Convention participants does not mean uniform applicability, because there is always certain discretion for national institutions, however such applicability of the Convention helps if not to avoid so at least to decrease the applicability of double standards in the protection of fundamental rights. As it was mentioned before, common minimal standards for protection of all European human rights and freedoms are set by the decisions of the ECHR, without preventing the states – Convention participants to ensure a higher level of protections of fundamental rights.

The President of the ECHR Jean-Paul Costa following Article 19 of the Convention, witch provides that “the European Court of Human Rights being established to achieve guarantees that obligations taken by High states – Convention participants will be followed”, states that the ECHR is not bound by the decisions of national constitutional courts on the protection of fundamental rights issue\textsuperscript{18}. The jurisprudence of ECHR definitely confirms his words by illustrating that the ECHR has repeatedly adopted decisions, which were different in comparison with those of national constitutional courts of the states – Convention participants (\textit{inter alia} in the cases \textit{Sramek vs. Austria}\textsuperscript{19}, \textit{Open Door vs. Ireland}\textsuperscript{20}, \textit{Zielinski, Pradal, Gonzales and the others vs. France}\textsuperscript{21}, \textit{Von Hannover vs. Germany}\textsuperscript{22}). In one of these cases – \textit{Zielinski, Pradal, Gonzales and the others vs. France} – the claimant complained that the doubts about equity of court proceedings arose because the state interfered into the proceedings. The Constitutional Council of France held in this case that disputed provision is not in conflict with the Constitution. Disregarding this decision of the Constitutional Council of France, the ECHR held Article 6 of the Convention has been violated. The ECHR noted that the fact that the disputed law was not in conflict with the Constitution does not necessarily mean that this law is in compliance with the Convention.

\textsuperscript{16} Ruling 8 May 2000 of Constitutional Court of Republic of Lithuania, supra n. 12.
\textsuperscript{19} Decision 22 October 1984 of European Court of Human Rights in the Case Sramek vs. Austria (No 8790/79);
\textsuperscript{20} Decision 29 October 1992 of European Court of Human Rights in the Case Open Door vs. Ireland (No 14234/88; 14235/88).
\textsuperscript{21} Decision 28 October 1999 of European Court of Human Rights in the Case Zielinski, Pradal, Gonzales and the Others vs. France (No 24846/94, 34165/96, 34173/96).
\textsuperscript{22} Decision 24 June 2004 of European Court of Human Rights in the Case Von Hannover vs. Germany (No 59320/00).
However, in certain cases the ECHR has referred to the decisions of national constitutional courts (inter alia in the cases Leyla Şahin vs. Turkey\textsuperscript{23}, Von Maltzan and the others vs. Germany\textsuperscript{24}). In Leyla Şahin vs. Turkey case, in which the question of restriction to wear headscarves in the university was decided, the ECHR has held that disputed circular letter, under which restrictions of the ways and places of wearing headscarves in universities were established, has confined the claimant’s right to profess her religion. However the ECHR has held that this interference was prescribed by law, pursued a legitimate aim and it was not disproportionate to this aim. Taking the decision the ECHR has directly referred to the decision of the Constitutional Court of Turkey to the extent that the Constitutional Court of Turkey indicated secularism being necessary trying to reach and ensure freedom and equality.\textsuperscript{25}

It should be noted that the real confrontation between the protection of fundamental rights ensured by the Convention and applicability of constitutional norms is very rare, because constitutional courts aim to interpret the Constitution according to the provisions of the Convention. Besides, constitutional provisions of the states very often establish more requirements than provisions of the Convention, which aim to establish the minimum level of protection.

It should be also noted that despite the fact that national courts definitely play the main role in ensuring the protection of fundamental rights and freedoms, nevertheless only theoretical possibilities of ensuring protection of fundamental rights and freedoms, established in the jurisprudence of constitutional courts, in opinion of the European Court of Human Rights, could not be held sufficient and effective in every case. The Constitutional Court of Republic of the Lithuania in its Ruling of 19 August 2006 held that, under the Constitution, the person has the right to claim for compensation for damage inflicted by unlawful actions of state institutions and officials, also when the case of the corresponding compensation for damage is not specified in any law, while the courts, deciding such cases according to their competence, have constitutional powers, by applying the Constitution directly, as well as general principles of law, pursuing inter alia the principle of reasonableness, to adjudge corresponding compensation for damage.\textsuperscript{26}

\textsuperscript{23} Decision 10 November 2005 of European Court of Human Rights in the Case Leyla Şahin vs. Turkey (N 44774/98).
\textsuperscript{24} Decision of European Court of Human Rights in the Case Von Maltzan and the others vs. Germany (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 77 and 111-12, ECHR 2005).
\textsuperscript{25} Decision 10 November 2005 of European Court of Human Rights in the Case Leyla Şahin vs. Turkey (No 44774/98), para. 39, 115 – 116.
\textsuperscript{26} Ruling 19 August 2006 of Constitutional Court of Republic of Lithuania “On the compliance of Paragraph 3 of Article 3 (wording of 13 March 2001) and Paragraph 7 of Article 7 (wording of 13 March 2001) of the Republic of Lithuania Law on Compensation for Damage Inflicted by Unlawful Actions of Interrogatory and Investigatory Bodies, the Prosecutor's Office and Court, with the Constitution of the Republic of Lithuania”// Valstybės žinios (Official Gazette), 2006, Nr. 90-3529, No 137.
of the Convention before appealing to the ECHR must be sufficiently certain not only in theory but also in practice.  

Constitutional Courts: obedient or independent?

The IXth Conference of European constitutional courts was intended for the constitutional and international protection of human rights, as well as determination of the relationship between these systems for protection of human rights. In this conference inter alia one tried to establish whether national constitutional courts in the interaction of these systems for protection of human rights remain independent or whether they obey the jurisdiction of international courts (in this case – the ECHR).

In the Conference it was undisputedly agreed that national constitutional courts are absolutely independent. For the European Court of Human Rights the Convention is the only constitutional “instrument” it is called to apply and ensure. While for the national constitutional courts it is the national constitutions that are the norms in whose regard the compliance of the legal acts is investigated. Constitutional courts interpret the constitutions while the ECHR interprets the Convention. Even where the two texts are broadly in agreement, they can be interpreted differently, notably in that the domestic protection of human rights can go beyond that guaranteed by the Convention. Such situation can doubtlessly arise frequently, since the national guarantees of protection of human rights have their own history, significance and dynamics. Conversely, it is possible that in some cases European human rights protection can appear stronger than the protection guaranteed by constitutional law. In fact, there can be no real conflict between the jurisprudence of constitutional courts and the ECHR, except where the same text is given differing interpretations.

3. Consolidation and Development of the Protection of Fundamental Rights of the EU Citizens in the European Union

The institute for human rights protection was not mentioned in the Treaties establishing the Communities. The scholars indicate more than one reason for such decision of the drafters of the Treaties establishing the Communities: that in the initial stage of Member States integration the

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27 Decision 19 July 2007 of European Court of Human Rights in the Case Gečas vs. Lithuania (No 418/04), para. 43.
28 The Conference took place on 10-13 May 1993.
main attention was given namely to the economic integration; that the drafters of the Treaties feared the incorporation of the institute for human rights would highly expand the fields of the Communities and could therefore interfere with autonomy or sovereignty of the states; and finally that this was done on purpose hoping for national courts of the states to be the main institutions to protect rights of the citizens from the unlawful interference of the Community into protected freedoms.

Initially the ECJ was also silent on the fundamental rights protection issue, stating that the High Authority is only required to apply Community law and its decisions have to be adopted in accordance with Community law, without regard for their validity under national law. However, after subsequently confronting unexpectedly active resistance from constitutional courts of the Member States (first of all Germany in Solange cases and Italy in Granital and Frontini cases) to the ECJ aiming to entrench the supremacy of Community law over the national constitutions when there was no protection of human rights within Communities, the ECJ reconsidered its position.

One of the first cases indicating the change in the ECJ position towards human rights protection – Stauder case, in which it was stated that human rights are protected as general principles of law in the Communities, but unfortunately it did not indicate the origin and the content of those principles. Whereas in the subsequent cases the ECJ already stated that it deduces the general principles of law from the constitutional traditions common to the Member States; that deducing those general principles of law it draws inspiration from the international documents for protection of fundamental rights, which were drafted or were joined by Member States. Thus gradually the doctrine was developed, under which the ECJ draws inspiration from three sources: the Convention for the Protection of Human Rights, the constitutions of the EU Member States, general principles of EU law, entrenching and protecting human rights. Talking about the Convention one should also underline that every right and freedom entrenched in the Convention is considered to be a general principle of Community law, therefore not the Convention itself but

30 Anciuvienė, M. Bendrieji teisės principai ir žmogaus teisių apsauga Europos Sąjungoje // Europos Sąjungos teisė ir Lietuva. Vilnius, Justitia, 2002, P.89.
33 ECJ case 1/58 Stork & Cie. v. ECSC High Authority [1959] ECR 43
the rights entrenched in it are referred to as general principles of Community law and at the same time – as sources of the European Union law.  

Currently the Community position on the protection of human rights issue is entrenched not only in the jurisprudence of the ECJ, but also formally entrenched in the Article F of the Treaty on European Union: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”. In the Treaty of Amsterdam of 1997 respect of fundamental rights is named as one of the principles the Union rests on and the political liability of states for breach of this principle is provided for. Paragraph 2 of Article 6 establishes that the Council may take actions if there is obvious threat that one of the Member States may seriously breach the principles entrenched in the Article F1, which include “respect of fundamental rights and freedoms”; the Council responding to the breach of those principles even may “decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council”.

The European Union Charter of Fundamental Rights was adopted in the European Council summit in Nice on 7th December 2000 and became a declarative political document. The need for such human rights protection document the drafters grounded on the fact that fundamental rights as general principles of Community law deduced by the ECJ lacked sufficient legal certainty of what rights precisely are protected in the Community; that after codification of the rights deduced by the ECJ, supplemented by other rights, entrenched in the international human rights documents and common to the Member States constitutional traditions, fundamental rights respected in the European Union shall be far more visible to the people in its jurisdiction, therefore it was expected that this shall improve the protection of those rights. The decision to adopt separate human rights protection document for the European Union was definitely inspired by the Opinion 2/94 of the ECJ, in which it was stated that the Community has no competence to join the Convention.

At the time the Charter was adopted it was clear that remaining non-legally-binding document it will not achieve the objectives sought. Therefore the Charter was incorporated into the Treaty establishing the Constitution for Europe, signed on the 29th October 2004 in Rome, which due to the failed referendums still has not come into force. At present, another important step has been taken – the Constitution for Europe entrenched the norm enabling the EU to join the Convention.

The European Council summit in June 2007 assigned the Intergovernmental Conference to draft the Treaty reforming the Treaty establishing the European Community, which will replace controversially valued Constitution for Europe.

Considering the development of fundamental rights of EU citizens in the European Union, one should note that the rulings of the constitutional courts of EU Member States not only impelled the Community to entrench the principle of protection of fundamental rights (since the protection of fundamental rights in the Community is first of all seen as the response to the supremacy of Community law, questioned by the constitutional courts), but also ensured the better human rights guarantees. Otherwise, i.e. if the human rights protection standard ensured by the Community were insufficient, the constitutional courts would retain for themselves the right to review the conformity of the Community legal acts with human rights, entrenched in the national constitutions. In this context one should recall the rulings of the German Federal Constitutional Court in Solange cases. Solange I, in 1974, the German Federal Constitutional Court noted retaining the right to review the conformity of the Community law with the Basic Law until the Community has a catalogue of fundamental rights, which shall amount to the catalogue of fundamental rights entrenched in the Basic Law. But in Solange II, in 1986, the German Federal Constitutional Court, having regard to the ECJ decisions on fundamental rights, changed its position and noted that the standard of human rights protection, ensured by the Community, had advanced and according to the substance, content and effect should be considered substantially equal to the one entrenched in the Basic Law. Therefore the German Federal Constitutional Court stated that it would no longer carry out a review of secondary Community legislation according to the fundamental rights entrenched in the Basic Law as long as the European Community, and particularly the ECJ, shall ensure the effective protection of fundamental rights, which shall amount to the standard of fundamental rights entrenched in the Basic Law. Comparable position of the constitutional courts was repeated in the Italian Frontini decision and the Danish so-called Maastricht decision.

Some authors interpreting the German Federal Constitutional Court decision in Maastricht case, in 1993, alleged that the Court had reconsidered its doctrine and had returned to position in Solange I. However the German Federal Constitutional Court denied this interpretation in the decision on banana market organization in 2000. The Court stated that doubled human rights protection was not necessary.

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43 BVerfGE 37, 271.
44 BVerfGE 73, 339.
45 Carlsen v. Rasmussen, Judgement of 06.04.1998 [1999]
46 BVerfGE 89, 155.
47 BVerfGE 102, 147.
In the context at issue the position of the constitutional courts of the newly acceded (on 1st May 2004) Member States is none the less important, since some authors believe\(^{48}\) that those courts – Hungarian Constitutional Court in sugar surplus case,\(^{49}\) Polish Constitutional Tribunal in European arrest warrant\(^ {50}\) and Accession Treaty cases,\(^ {51}\) Czech Constitutional Court in sugar quotas case\(^ {52}\) – repeat the *Solange* story, i.e. retain themselves the right to review the Community decisions on the grounds of democracy and human rights protection.

Due to the expansion of the competence of the European Union, the III pillar and decisions adopted therein became a more important sphere of human rights protection. Perhaps most discussions and assessments occurred as regards the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)\(^ {53}\). Three constitutional courts – the Polish Constitutional Tribunal\(^ {54}\), the German Federal Constitutional Court\(^ {55}\) and the Supreme Court of Cyprus\(^ {56}\) – found the national laws implementing the European arrest warrant unconstitutional; whereas the Czech Constitutional Court\(^ {57}\) did not see any contradiction with the national constitution. The Belgian Court of Arbitration decided not to take the decision itself and referred for the preliminary ruling to the ECJ\(^ {58}\). One should note that the rulings of courts mentioned above did not deny the institute of the European arrest warrant itself.

In the Republic of Lithuania the relationship between the European Union and national law is defined in the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”,\(^ {59}\) adopted by the Seimas on 13th July 2004, which states: “The norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania”. The Constitutional Court of the Republic of Lithuania has ascertained that this constitutional norm establishes *expressis verbis* the collision

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\(^{49}\) Decision 17/2004 (V. 25) AB.

\(^{50}\) Judgment of 27 April 2005 in Case P 1/05 [Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt. P 1/05].


\(^{52}\) Decision Pl. ÚS 50/04.

\(^{53}\) OJ L190/1, 18.07.2002.

\(^{54}\) Supra n. 50.


\(^{58}\) ECJ case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* [2007].

rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), save the Constitution itself. 60 Non-recognition of the superiority of the Constitution, differently from the constitutional courts mentioned above, was not related with any particular reasons or limitations.

One should also note that the jurisprudence of the European Court of Justice and the Court of First Instance, as well as the jurisprudence of the European Court of Human Rights, are considered to be sources of construction of law.61

4. Relationship and Interaction of the Fundamental Rights Sources of the European Union and the Council of Europe

For the definition of the relationship between the Charter and the Convention essential are the provisions of Paragraph 3 of Article 52 (Paragraph 3 of Article I-9 of the Constitution for Europe) in which it is provided that “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. With those provisions the priority is clearly given to the provisions of the Convention and their application extent in the ECHR, but nevertheless it is emphasized that the Convention is only the minimum standard of human rights protection.


Thus the question arises: why is the need to join the Convention still discussed, if the European Union already has a comprehensive catalogue of human rights, won't the double human rights protection standards be created in such a case? The answer to this question could be found in the national law. The Members of the Council of Europe, which ratified the Convention, ensure the protection at least the same rights, which are entrenched in this international document, or frequently even provide a better protection in their national legal acts. Notwithstanding that same or even better protection is provided by the national legal acts, they remain the Members of the Convention, because not the rights entrenched in the Convention are important, but the mechanism of their protection, i.e. external control of national acts and actions of state and its officials in regard of the human rights entrenched in the Convention. The same could be said about the need for European Union to join the Convention – not the possible duplication of the provisions of the European Union Charter of fundamental rights and the rights provided by the Convention is important, but that the minimum of fundamental rights ensured by the Convention shall acquire even better protection by applying external control of the ECHR. Therefore joining the Convention and incorporation of the Charter into the [Reformed Treaty] are complementary and not competing steps.  

5. Compatibility of the Jurisprudence of the European Court of Human Rights and the European Court of Justice

Although in the practice of the ECJ the questions of fundamental rights and freedoms of the EU citizens are analyzed more and more often, it does not mean that this court intends to replace the ECHR in regard to Member States. The question arises: who has the final word in relation to the protection of fundamental rights in Europe? What impact to the effectiveness of the protection of the fundamental rights does the pluralism of jurisdictions have? Can the ECJ be the subject of external ECHR control?

The efficiency of the Community’s system for the protection of fundamental rights

When one gives answers to these questions, first of all, it should be noted that the possibilities of a person to refer to the ECJ concerning the protection of the infringed rights are very limited, because the ECJ applies notably strict criteria of admissibility of complaint, which determine that the factual possibility to refer to the ECJ is much more narrow than the similarly

63 According to the Para 4 of the Article 230 of the EC Treaty the person must prove direct and individual concern with the act in question.
defined possibility to refer to national courts and even narrower than the possibility to refer to the ECHR\textsuperscript{64}. However, such position of the ECJ conforms with the previously mentioned statement that the main courts securing the respect for the human rights in the Community are national courts that have a right and in some cases the duty to refer to the ECJ for a preliminary ruling. In this context, it should be noted that the duty of the constitutional courts to refer to the ECJ for a preliminary ruling is not unambiguously implemented in all the EU Member States: the constitutional courts of Austria and Belgium have referred to the ECJ several times, whereas the institutions of constitutional justice of Germany, Italy, Spain and France have not referred at all\textsuperscript{65}. The fact that some constitutional courts do not refer to the ECJ does not mean that their positions as concerns the duty to refer are congruous: for example the Federal Constitutional Court of Germany is of the opinion that it is required to refer the matter to the ECJ for a preliminary ruling when it is necessary, whereas the Italian Constitutional Court at first acknowledged the right but not the duty to refer matters for preliminary rulings, though later stated that there is no such possibility, since the Italian Constitutional Court is not a national court as referred to in Article 234 of the EC Treaty\textsuperscript{66}.

It is to be noted that the Constitutional Court of the Republic of Lithuania acknowledges the duty to refer to the ECJ for a preliminary ruling and has already made use of this opportunity\textsuperscript{67}.

In assessing the possibility for a person to protect his rights in the ECJ in general, it should be acknowledged that the system, which exists in the European Union and which is comprised of a limited right to directly refer to the ECJ, and also of indirect protection of infringed rights by the right of national court to refer to the ECJ for a preliminary ruling, supplemented by the doctrine\textsuperscript{68} of state liability for the actions attributable for the court of the last instance, is an efficient one.

\textit{Compatibility of the ECJ and the ECHR decisions examining the same fundamental rights and freedoms}

Although the ECJ in his practice follows the jurisprudence of the ECHR, however it is not always possible to evade the different interpretation of fundamental rights and their extent.

\textsuperscript{64} Though the possibility to refer to ECHR is also restricted by the Protocol 14 of the Convention, forasmuch ECHR will have a right to declare inadmissible any individual application if the applicant has not suffered a significant disadvantage.


\textsuperscript{67} The decision of 8 May 2007 of the Constitutional Court of the Republic of Lithuania “On applying to the Court of Justice of the European Communities for preliminary ruling”.

\textsuperscript{68} This doctrine is stated in the \textit{Francovich} case, thought the expansion of her application to the national courts of the last instance (courts whose decisions in a specific case can not be appealed according to the national law) was expressis verbis stated in the \textit{Köbler} case.
In *Hoechst* case the question was raised whether the right to private life and inviolability of the home encompasses the right to the inviolability of dwelling of the legal person, i.e. whether it is possible to search the dwelling of a legal person. The ECJ held that the right to inviolability of the home “is concerned with the development of man’s personal freedom and may not therefore be extended to business premises”, the ECJ also noted that there is no interpretation of the ECHR in this respect\(^69\). Whereas in the *Niemietz* case\(^70\), where a similar question arose, the ECHR decided that professional and non-professional activities of a person are so intermingled that there is no means of distinguishing between them; that a narrow interpretation of the word “home” could therefore restrict the possibilities to use the rights guaranteed in the Convention.

Another example of divergence of the practice of these international courts was the *Orkem* case, where the ECJ decided that neither the wording of Article 6 of the Convention nor the previous decisions of the ECHR indicated that a person upholds the right not to give evidence against himself\(^71\). Whereas the ECHR in *Funke* case established that according to the Article 6 of the Convention a person has a right “to remain silent and not to contribute to incriminating himself”\(^72\).

These examples illustrate that ECJ tends to interpret the fundamental rights more strictly than the ECHR. Divergence of jurisprudence has a negative effect to the effectiveness of the mechanism of the protection of human rights, because the same rights in different systems are treated differently and to a person, for the protection of whose rights these instruments are developed, may be not clear how the specific right must be interpreted, what is its substance and extent.

Different interpretation of fundamental rights and freedoms is none the less problematic to the Member States, first of all – to their courts who must trim between the decisions of the ECJ and the ECHR.

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The possibility of cooperation between the ECJ and the ECHR

It was mentioned that the Communities have no competence to accede to the Convention, therefore according to the judgment of the ECHR in *Matthews*\(^73\) case the state, notwithstanding that it has transferred a part of the competence to the international organization in certain sphere, remains responsible even after the transfer of such powers. In this particular case the question of conformity of EU primary legislation with the Convention was decided, therefore to state the responsibility of Member States was much easier than it would be in the case of conformity of EU

\(^{69}\) Joined cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859

\(^{70}\) Case *Niemietz v. Germany*, No. 13710/88, Judgment of 16 December, 1992

\(^{71}\) Case 374/87 *Orkem v. Commission*, [1989], ECR 3283


\(^{73}\) Case of the ECHR *Matthews v. United Kingdom*, No. 24833/94, judgment of 18 February 1999
secondary legislation with the Convention, because it can be alleged that treaties after their ratification in the parliaments of Members States are the result of law making of Member States. We can question whether such decision of the ECHR is compatible with requirements of Article 220 of the EC Treaty that the ECJ must secure that in the interpretation and application of this Treaty the law should be observed. In such a manner above mentioned article fixes the autonomy of the ECJ to apply and interpret the EU law. Therefore a conclusion can be made that in the situation where EU/EC does not accede to the Convention, also in the absence of other contractual provisions as regards the relations between the two systems, any interpretation of EU primary legislation by the ECHR may be incompatible with the provisions of the Treaties establishing the European Communities.

It should be noted that in cases where liability of Member States was associated with EU secondary legislation, the ECHR always declared the Member States responsible only when the discretion in applying the Community legislation was accorded to them and when they assessed the conformity of national legal act which implements the Community law with the Convention\textsuperscript{74}. In cases where the Member States only implemented a Community legal act in their territory, petition to the ECHR used to be declared inadmissible \textit{ratione materiae}\textsuperscript{75}.

The \textit{Bosphorus} case became the so-called “peace treaty” between the ECJ and the ECHR\textsuperscript{76}. In this case the ECHR decided that “the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, “equivalent” \textlangle/>\textrangle to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC\textsuperscript{77}. In this case the ECHR did not confine oneself by the abstract statement that legal act was passed by an international organization carrying equivalent to the Convention protection of human rights, but applied a specific test, i.e. assessed the guarantees and procedural rules accorded by the Community from the point of view of the criterion “manifestly deficient”.

However the judgment in \textit{Bosphorus} case raised some questions which remained open: the ECHR has not revealed the meaning of the concept “manifestly deficient”; it did not indicate whether the principles applied in this case may be applied in regard to other international organizations; it has raised the question of supremacy of international norms (i.e. whether preference should be accorded to the obligations of the United Nations notwithstanding the fact whether the “equivalent protection” is afforded), also the risk of emerging of double standards (the

\textsuperscript{74} For example the Case of the ECHR \textit{Pafitis and others v. Greece}, No. 163/1996/782/983, judgment of 26 February 1998.

\textsuperscript{75} Case of the ECHR \textit{M. & Co. V. Germany} No. 13258/87, Commission decision of 9 February 1990.

\textsuperscript{76} Case of the ECHR \textit{Bosphorus havai yollari turizm ve ticaret anonym sirketi v. Ireland} No. 45036/98, judgment of 30 June, 2005.

\textsuperscript{77} \textit{Ibid.} Para 165.
presumption of “equivalent protection” is problematic taking into account the procedural differences between ECHR and ECJ, this problem is emphasized even in 6 concurring opinions of the judges).

6. Possibilities of the EU Citizens to Protect Their Rights in the Courts of the Republic of Lithuania

Under Paragraph 1 of Article 30, the person whose constitutional rights or freedoms are violated shall have the right to apply to court. The Constitutional Court has held in its acts more than once that: an imperative arises from the constitutional principle of a state under the rule of law that a person who thinks that his rights or freedoms have been violated has an absolute right to an independent and impartial court; this right cannot be artificially restricted or it is not permitted that implementation of such a right would be artificially burdened; it is not permitted to deny such a right; the person is guaranteed the defence of his violated rights in court regardless of the status of the said person; under the Constitution, the legislator has a duty to establish the legal regulation whereby all disputes regarding the violation of the rights or freedoms of a person might be possible to be settled in court; the violated rights of the person, inter alia his acquired rights, as well as legitimate interests must be defended irrespective of whether they are directly entrenched in the Constitution; the rights of the person must be protected not formally, but in reality and efficiently, from unlawful actions of private persons, as well as those of state institutions or officials; the legal regulation entrenching the procedure of implementation of the right of a person to judicial defence must conform to the constitutional requirement of legal clarity; the legislator must clearly establish in laws in what manner and to which court a person can apply, so that he would implement his right in reality to apply to court regarding violation of his rights and freedoms.

At the moment individuals do not have the right to apply directly to the Constitutional Court of the Republic of Lithuania. However on the 4 of July 2007 Seimas approved the conception of the establishment of the institute of individual constitutional complaint. According to this conception it is planned to accord to a person (natural or legal), whose constitutional rights and freedoms are violated, the right to apply to the Constitutional Court in cases concerning the constitutionality of a law or other act adopted by the Seimas, an act of the President or the Government whereby a decision violating constitutional rights and freedoms of the person was based. Before the appeal

such person will have to exhaust all the other available legal remedies. It is planned to implement the conception before the end of the year 2009.

Lithuanian courts have little experience in the sphere of application of the EU law, therefore in deciding the matters of the protection of fundamental rights and freedoms of EU citizens, consultations of the European Court of Justice are often needed. The mechanism of cooperation between member states courts and judicial institutions of European Union, embedded in Article 234 of the EC treaty, is established in Article 40\(^1\) of the Law on Courts of the Republic of Lithuania\(^80\): a court which, in the application of the norms of European Union law faces an issue involving the interpretation or validity of legal acts of the European Union that has to be examined before passing a judgment in the case, shall have the right to refer to a competent judicial institution of the European Union with a request to provide a preliminary ruling on the issue; the Supreme Court and the Supreme Administrative Court as well as the court which is the last instance in the adjudicated case (where the judgment may no longer be appealed against), must refer to a competent judicial institution of the European Union for a preliminary ruling on the issue of the interpretation or application of the legal acts of the European Union.

**Conclusions**

Summarizing the role of the constitutional courts in the protection of fundamental rights and freedoms of the EU citizens one should draw a conclusion that despite the existing plurality of fundamental rights sources and jurisdictions, the national courts remain the main ones ensuring that human rights in the Community are respected, and the national constitutions remain the basis of cooperation of the states in protecting fundamental rights.

The jurisprudence of the national constitutional courts confirms an extensive application of the provisions of the Convention in the domestic law and the recognition of the jurisprudence of the European Court of Human Rights as an important source of the interpretation of human rights.

The jurisprudence of the European Court of Justice is also gradually gaining in importance. The cooperation of the national constitutional courts with this Court on the basis of the preliminary rulings, as well as the warning expressed in the national jurisprudence that in case the standard of human rights protection would become inadequate to the one entrenched in the national constitutions, the national constitutional courts retain themselves the right to review the conformity of the Community legal acts with human rights, entrenched in the national constitutions, certainly contribute to the effective protection of the fundamental rights and freedoms of the EU citizens.

One should also notice that the confrontation between the international fundamental rights arbiters themselves vanishes – the decision of the European Court of Human Rights in *Bosphorus* case lets hope for a closer cooperation between the Court of Justice and the European Court of Human Rights.