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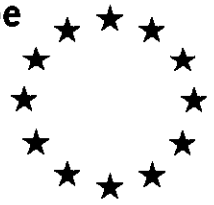

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Compatibility of Lithuanian law

with the requirements of the European Convention on Human Rights

February 1997

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FOREWORD

Upon joining the Council of Europe, new member States confirm their commitment to democratic values and respect for human rights. This is reflected in the requirement to sign the European Convention on Human Rights and, within a reasonable time-limit, to ratify the Convention and make themselves subject to the supervisory machinery of the Convention. This entails recognition of the right of individual petition and the acceptance of the compulsory jurisdiction of the European Court of Human Rights.

In the various domestic legal systems there are unquestionably many points on which law and judicial practice diverge from the Strasbourg case-law. This has made preparation for ratification an important stage for new member States. This preparation involves compatibility exercises to review the legal provisions and judicial practices of the member State, and to make recommendations to ensure compliance with the requirements of the European Convention on Human Rights.

The Lithuanian compatibility exercise was conducted as a national study and, like a range of other similar studies, was carried out within the framework of the cooperation and assistance programmes of the Council of Europe for Central and Eastern European countries. These include legislative expertises as well as material and technical assistance. The present document therefore presents the results of the compatibility study conducted by the Lithuanian expert legal working group and the views presented in it are those of the Lithuanian experts.

During the study, the working group examined Articles 1 to 16 of the Convention, the First Protocol to the Convention and Protocols 4, 6 and 7 to the Convention. The analysis of Protocol Four occurs within the sections on Articles 3 and 5 of the Convention, that for Protocol 6 within the section on Article 2 of the Convention, and the treatment of Article 1 of the Seventh Protocol occurs within the section on Article 3 of the Convention.

The working group outlined proposals for laws to be enacted, laws to be drafted and laws to be amended, in order to achieve compliance with the requirements of the Convention, its Protocols and relevant case-law. The working group also made proposals for reservations under Articles 5 and 6 of the Convention.

This study also contains the Decision of the Constitutional Court of Lithuania regarding conformity of the Constitution of Lithuania with Articles 4, 5, 9 and 14 of the European Convention on Human Rights and Article 2 of the Fourth Protocol to the Convention.

INTRODUCTION

On 14 May 1993, the Republic of Lithuania became a member State of the Council of Europe and signed the European Convention for the Protection of Human Rights and Fundamental Freedoms. Two years later, the Convention was ratified by the Seimas of the Republic of Lithuania and came into effect on 20 June 1995. This was a significant political and legal act - Lithuania has undertaken to respect and abide by both the requirements contained in the Convention and the decisions of the European Commission of Human Rights, the Committee of Ministers and the European Court of Human Rights.

Prior to ratification, a working group analysed the laws and legal system of the Republic of Lithuania. The working group, under the leadership of Mr J Bernatonis, deputy chairman of the Seimas, was formed under Presidential Decree No. 233 of 11 February 1994. The group studied the most significant decisions passed by the European Commission and Court of Human Rights, 102 laws in force in the Republic of Lithuania and 24 draft laws, and submitted its conclusions to the Seimas.

The principal aim of the working group was to identify areas of the Lithuanian legal system which were not in compliance with or contradicted the provisions of the Convention.

The members of the working group who contributed to the study were:

Mr J Bernatonis, Chairman; Mr G Švedas for Articles 1 - 3, 7, 8, 10, 11, and Protocol 6, and in collaboration with Mr V Vegelis for Article 4, Mr G Goda for Article 5, Mr A Dapšys for Article 12, Ms D Foigt for Articles 13 and 15, Mr V Sinkevičius for Article 16 and Protocol 4; and also Mr G Goda for Article 6, Mr A Dapšys Article 2 of Protocol 1, Mr V Sinkevičius for Article 9 and with Mr A Dapšys Article 3 of Protocol 1, Mr A Taminskas Article 1 of Protocol 1, Ms D Foigt Article 14.

This study presents the conclusions and proposals made as a result of the preparatory work for the ratification of the Convention. The working group accepts responsibility for any incorrect assessments or interpretations.

The working group is grateful to the following officials for their constructive remarks and proposals which have contributed to the successful completion of this study: Mr A Drzemczewski, formerly with the Directorate of Human Rights of the Council of Europe; Mr B Hall and Mr M Pellonpää, former member and member of the European Commission of Human Rights respectively; Mr R Pekkanen, Judge at the European Court of Human Rights; Mr J A Frowein, former First Vice-President of the European Commission of Human Rights; Mr T Ban, official of the Ministry of Justice of Hungary and Mr A Kosonen and Mr F Shurman, Government Agents from Finland and Switzerland respectively.

ARTICLE 1 OF THE CONVENTION[1]

"The high Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

The present Article of the Convention provides for the basic duties to be fulfilled by the member States of the Council of Europe after their ratification of the Convention. An analysis of the Article allows the following three aspects to be distinguished:

1. the rights defined in the Convention must be secured by the States which have ratified the Convention;

2. the rights defined in the Convention must be guaranteed to everyone;

3. the rights defined in the Convention must be secured to everyone within the State's jurisdiction.

Bearing in mind that aspects 2 and 3 may be said to complement aspect 1, we will begin by analysing the latter. The term "everyone" means that all the persons residing both temporarily and permanently within the territory of a certain State must have the possibility of exercising the rights and freedoms specified in the Convention. It must be emphasised that given this interpretation, the scope embraces not only citizens of the State, stateless persons and foreign nationals permanently or temporarily residing in the territory of the State, but also persons in transit as well as persons who are not physically present in a particular State can initiate proceedings before a court or other institution of that State.

On the other hand, not all persons may exercise to the same extent 24 different forms of human rights (The Convention provides for the securing of eleven human rights, the First Protocol three, the Fourth Protocol four, the Sixth Protocol one, and the Seventh Protocol five). This conclusion is based on an analysis of the rights and freedoms specified in the Convention. Here the following groups of rights and freedoms may be distinguished:

- universal, i.e., not subject to any restrictions. This category includes the right to life (Article 2 of the Convention), prohibition of torture (Article 3 of the Convention), prohibition of slavery (Article 4 paragraph 1 of the Convention) and the prohibition of the retroactive validity of criminal laws (Article 7 of the Convention);

- certain groups of people do not have the possibility to exercise some rights. For instance, persons in transit through any of the states have no right to take part in free elections or the right to education in that state (Articles 2 and 3 of the First Protocol);

- the Convention itself provides for the possibility to restrict certain rights (Articles 8 to 11) which under certain conditions may be applied to stateless persons, foreigners, and persons having no permanent residence in a state. However, this restriction shall not violate the prohibition against discrimination;

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[1] The discussion of this Article was prepared prior to the decision of the Constitutional Court, which denied any possible conflict between the Convention and the Constitution. It should therefore be subjected to a critical analysis. "The decision of the Constitutional Court of the Republic of Lithuania regarding the conformity with the Constitution of the Republic of Lithuania of Articles 4, 5, 9 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of the Fourth Protocol to the Convention" is attached to this study.

- a number of measures restricting the rights of certain persons may be applied in time of war or other emergency situation threatening the existence of the nation (Article 15 of the Convention). In our opinion, the extent of the restrictions acceptable in such circumstances may vary substantially with respect to citizens of the State and foreign nationals;

- taking into account Articles 10, 11 and 14 of the Convention, the restriction of the political activities of foreign nationals is permitted (this possibility is provided for by Article 16 of the Convention).

With regard to the term "everyone within the State's jurisdiction", the presence of a person within the jurisdiction of a certain State usually means that certain legal relations develop between that person and the state (citizenship, ownership, etc.). Most commonly, the state which is obliged to secure to a person the rights specified in the Convention is the state in which the person resides. However, it is merely a general rule the application of which, according to the data compiled by Hungary (up to 1992) and the author (1992-1993), has not been generally analysed by the Commission and the Court of Human Rights. In analysing cases of violations of certain rights enshrined in the Convention, the Commission has declared that the physical presence of a certain person in the territory of the state is not always a necessary condition for the state to be obliged to ensure his or her rights. The States which have ratified, for example, the First Protocol must secure the right of ownership (Article 1) even though the owner of the property is residing abroad.

In our opinion, the aspects analysed above do not pose any serious obstacles to Lithuania ratifying the Convention.

The first aspect is much more problematic. It must be emphasised that the feature characterising the majority of human rights and freedoms defined in the Convention is the possibility that they may also be violated by private individuals (particularly, the right to life, personal freedom, etc.). Irrespective of this, the Convention deals with the relations between the State and private citizens whose rights have been actually or allegedly violated. If the violation is not committed by the State but a private individual, the Convention's mechanism of protection between the violator and the person who suffered from the violation does not apply. This conclusion is based on an analysis of certain articles of the Convention. For example, Article 1 declares that the State must secure the execution of the obligations assumed by the Contracting Parties; Articles 24 and 25 provide for the possibility of bringing a case before the Commission in case one of the Contracting Parties actually or allegedly violates the provisions of the Convention, and under Article 50 the Court may afford just satisfaction to the injured party. The same attitude is supported by the Commission, which in the *Appl. No. 6956/75, X v. the United Kingdom* rejected the application because it had been made against a private individual and not the State.

Nevertheless, in certain cases provisions of the Convention may be indirectly applied not only to violations committed by the Contracting Parties but also to violations of the rights enshrined in the Convention which have been committed by private individuals. This opinion is based on the assumption that a State may not:

a. itself restrict human rights and freedoms, and

b. tolerate or permit that this be done by private individuals or institutions.

This means that the State must provide for the prohibitions (sanctions) to be imposed on private individuals who violate the rights of other individuals. On the other hand, the State must create administrative, legal and procedural conditions which help prevent the commission of such violations or to institute legal proceedings against a person guilty of such violations.

Thus, it is necessary first of all to analyse the Criminal Code of the Republic of Lithuania with respect to prohibiting violations of the rights and freedoms defined in the Convention:

Article of the Convention	**Article of the Criminal Code**
Article 2	- intentional homicide (Art. 104); - intentional killing of a new-born baby by the mother (Art. 106); - intentional homicide in a fit of passion (Art. 107); - denying medical assistance to a patient (Art. 129); - manslaughter committed by exceeding the limits of justifiable defence (Art. 108); - manslaughter through negligence (Art. 109); - promoting suicide (Art. 110); - illegal performance of abortion (Art. 124);
Article 3	- intentional homicide under aggravating circumstances (extreme use of violence) (Art. 105); - wilful infliction of serious bodily harm, performed by the use of torture (Art. 111)); - wilful infliction of less serious bodily harm, performed by the use of torture (Art. 112); - delivery of blows to the body and use of torture (Art. 131); - illegal deprivation of liberty resulting in suffering (Art. 131); - slander (Art. 132); - insult (Art. 133); - abuse of official position by use of torture (Art. 178); - extorting testimony by use of mockery (Art. 187); - denying a patient medical assistance (Art. 129);
Articles 4 and 5	- illegal deprivation of liberty (Art. 131); - taking of hostages (Art. 131); - unlawful placement of a person in a mental hospital (Art. 131); - unlawful arrest (Art. 185); - unlawful detention or bringing to court or police station (Art. 186);
Article 6	- instituting criminal proceedings against an innocent person (Art. 183); - passing of an unlawful sentence (Art. 184) - false notification (Art. 188); - exertion of pressure on the parties to proceedings (Arts. 191 and 192);
Article 8	- infringement of inviolability of the home

		(Art. 136);
	-	infringement of confidentiality of telephone conversations and telegraphic messages (Art. 137);
	-	persecution for criticism (Art. $140^{(1)}$);
	-	divulgence of the secret of adoption (Art. $217^{(1)}$);
	-	defamation (Art. 132);
	-	insult (Art. 133);
	-	desecration of a grave (Art. 243);
Article 9	-	obstructing the performance of religious rites (Art. 145);
	-	persecution for criticism (Art. $140^{(1)}$);
Article 10	-	infringement of trade union rights (Art. 138);

Appropriate prohibitions and sanctions are also contained in the Code of Administrative Offenses. Certain human rights specified in the Convention and its Protocols are protected by the civil law, and civil sanctions for their violations are provided for by the Civil Code:

- protection of civil rights (Art. 6);
- protection of honour and dignity (Art. 7 and $7^{(1)}$);
- compensation for damage (Arts. 483-510);
- responsibility for breach of obligations (Art. 225-237).

It would seem at first sight that the required system of prohibitions is established in the laws of the Republic of Lithuania (this system must be supplemented by prohibitions on violations of freedom of assembly and association).

Secondly, it is necessary to answer the question of whether a person whose rights have been violated by another person may avail himself or herself of proper procedural measures in order to bring an action. The author considers that Article 30 of the Constitution of the Republic of Lithuania partly gives a positive answer to this question: "Any person whose constitutional rights or freedoms are violated shall have the right to appeal to a court. The law shall establish the procedure for paying compensation for pecuniary and non-pecuniary damage inflicted on a person". The major problem is posed by the term "constitutional rights and freedoms". In this respect an analysis of the following two issues is necessary:

- the relationship between Lithuanian domestic laws and the Convention after its ratification;

- the influence of case-law on the obligation of the Republic of Lithuania to ensure the protection of rights and freedoms defined in the Convention.

The first issue requires an answer to the question regarding the position the Convention will have in Lithuania's legal system. This is important because Lithuania's domestic laws must provide for a system which would secure the free exercise of the rights defined in the Convention, i.e., the domestic legal system must be adjusted to take account of the Convention. On the basis of Article 138 of the Constitution of the Republic of Lithuania, according to which "International agreements which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania", it is possible to state that the Convention will be incorporated into the national legal system and will be directly applicable in the proceedings of administrative and judicial institutions. This situation poses another question, namely the legal force the Convention has. According to

Article 12 of the Law on International Treaties of the Republic of Lithuania, "International treaties of the Republic of Lithuania shall have the force of law in the territory of the Republic of Lithuania". A systematic analysis of Articles 67 and 69 of the Constitution of the Republic of Lithuania makes it possible to distinguish between several types of legal acts according to their legal force:

1. the Constitution;
2. constitutional laws;
3. ordinary laws.

It must be noted that international agreements (including the Convention) are superior in legal force only to ordinary laws. An analysis of this situation is necessary since human rights are regulated both by the Convention and the Constitution, with the result that conflicts are unavoidable. The settlement of these conflicts is prescribed in Article 7 of the Constitution: "Any law or other statute which conflicts with the Constitution shall be invalid". A comparison of the rights and freedoms provided for by the Constitution and the Convention is therefore given below.

Comparison of the rights and freedoms provided for by the Constitution and the Convention.

Article 2 of the Convention

"1. Everyone's rights to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence by a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection".

Article 19 of the Constitution corresponds to this Article of the Convention:

"The right to life of individuals shall be protected by law".

Conclusion: The Constitution protects the right to life, whereas the Convention protects the right to live. On the other hand, the Constitution does not provide grounds for the lawful deprivation of life. With regard to this right there is no conflict or disagreement between the provisions of the Convention and the Constitution.

Article 3 of the Convention

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 21 paragraph 3 of the Constitution corresponds to this provision:

"It shall be prohibited to torture, injure, degrade or maltreat a person or to establish such punishments".

Conclusion: the texts are almost identical and differ only in structure.

Article 4 of the Convention

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term "forced or compulsory labour" shall not include:

a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d) any work or service which forms part of normal civil obligations".

Article 48 paragraphs 3, 4 and 5 of the Constitution correspond to the above Article:

"Forced labour shall be prohibited.

Military service or alternative service, as well as labour, which is executed during a war, natural calamity or epidemic or in other urgent circumstances, shall not be deemed forced labour.

Labour which is performed by convicts in places of confinement and which is regulated by law shall not be deemed forced labour either".

Conclusion: the Constitution of the Republic of Lithuania gives a broader interpretation of the term "convict" (this applies to any criminal punishment), whereas the Convention provides only for detention (i.e. deprivation of liberty) or conditional release from such detention. On the other hand, the Constitution contains no equivalent of Article 4 paragraph 3 sub-paragraph b of the Convention. In addition, the Convention defines the grounds for alternative service, namely a person's convictions.

Article 5 of the Convention

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of a person for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effective or unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation".

Article 20 of the Constitution corresponds to this Article:

"Personal freedom shall be inviolable.

No person may be arbitrarily arrested or detained. No person may be deprived of freedom except on the basis, and according to the procedures, been established by law.

A person detained *in flagrante delicto* must, within 48 hours, be brought to court for the purpose of determining, in the presence of the detainee, the validity of the detention. In the event that the court does not decide to place the person in custody, the detained individual shall be released immediately".

Conclusion: The Convention names all possible grounds for the restriction of liberty, whereas the Constitution lays down only a blanket rule, namely that the basis and procedures must be established by law. On the other hand, Article 20 paragraph 3 of the Constitution is problematic as it establishes a provision that "A person detained *in flagrante delicto* must, within 48 hours, be brought to court for the purpose of determining, in the presence of the detainee, the validity of the detention". The wording of the Constitution suggests that if a person is not detained at the scene of a crime but after having left it there is no need to bring him to court. Article 5 paragraph 3 of the Convention establishes the rule that everyone arrested or detained on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so must be brought promptly before a judge. Thus, the Convention requires that

everyone arrested or detained in accordance with criminal procedure be brought before a judge regardless of the place of detention. In this case the wording of the Article of the Constitution, which contains a special rather than a general rule, appears a little strange.

The question of whether the limit of 48 hours established in Article 20 paragraph 3 of the Constitution of the Republic of Lithuania corresponds to the word "immediately" used in Article 5 paragraph 3 of the Convention may also be considered, all the more so as analogous articles of the Constitutions of other countries refer to 24 hours. The Constitution of the German Federal Republic establishes that every detained or arrested person shall be brought before a judge no later than by the end of the next day after detention (arrest). Only the Constitutions of Italy and Portugal establish a 48-hour time limit.

Finally, according to the Convention the judge must assess the "lawfulness" of the detention, whereas the Constitution provides for the determination of its "validity".

Article 6 of the Convention

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

Several Articles of the Constitution (Articles 31, 109, 113, 114, 115, 116 and 117) correspond to this Article of the Convention.

Article 109 of the Constitution states:

"In the Republic of Lithuania, the courts shall have the exclusive right to administer justice.

While administering justice, judges and courts shall be independent.

While investigating cases, judges shall obey only the law".

The principle of the independence and impartiality of the judges is provided for by Articles 113-116 of the Constitution. Article 117 paragraph 1 of the Constitution provides that "In all courts, the investigation of cases shall be open to the public. Closed court sittings may be held in order to protect the secrecy of a citizen's private life or that of his or her family, or to prevent the disclosure of state, professional, or commercial secrets".

Article 31 of the Constitution provides that:

"Every person shall be presumed innocent until proven guilty according to the procedure established by law and until declared guilty by a final court judgment.

Every indicted person shall have the right to a fair and public hearing by an independent and impartial court.

From the moment of arrest or first interrogation, persons suspected or accused of a crime shall be guaranteed the right to a defence and legal counsel".

Article 117 paragraph 3 of the Constitution declares that "Persons who do not speak Lithuanian shall be guaranteed the right to participate in investigation and court proceedings through an interpreter".

Conclusion: compared to the Constitution, the Convention provides for a wider right to a defence and contains a more extensive list of the grounds for holding a closed hearing of the court, although there is no essential point of conflict between the Convention and the Constitution.

Article 7 of the Convention

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations".

The prohibitions laid down in Article 7 paragraph 1 of the Convention are obligatory both for the legislators and the courts. The Constitution of the Republic of Lithuania does not contain a direct equivalent of the above rules. In this connection it would be possible to comment on and compare several Articles of the Constitution of the Republic of Lithuania which protect human rights and the inviolability of the person (Articles 20 and 21), establish the presumption of innocence (Article 31) and regulate the administration of justice (Articles 109, 110). Provisions referring to certain laws (primarily the Criminal Code and the Code of Criminal Procedure) are contained in the above Articles of the Constitution. For example:

- Article 20 paragraph 2 of the Constitution: "No person may be deprived of freedom except on the basis, and according to the procedures, established by law".

- Article 31 paragraph 4 of the Constitution: "Punishments may only be imposed or executed on the basis of law".

Article 109 paragraph 3 of the Constitution: "While investigating cases, judges shall obey only the law".

It might be said that Section 3 of the Criminal Code of the Republic of Lithuania, which lays down what actions constitute criminal offenses, most closely corresponds to the analysed provisions of Article 7 paragraph 1 of the Constitution being analysed here:

"Only a natural person who is guilty of the commission of a crime, i.e. who has intentionally or through negligence performed an act dealt with under criminal law shall be held responsible under the criminal law.

No one may be held guilty of the commission of a crime or be sentenced for a criminal offence other than by a judgment of a court and in accordance with the law".

An even closer correspondence may be detected between the provisions of Article 7 paragraph 1 of the Convention and Article 7 of the Criminal Code of the Republic of Lithuania which regulates the validity of a criminal law in respect of time:

"Only a law which is in effect at the moment of the commission of an act shall determine whether the act is criminal or punishable.

The law which abolishes the punishability of an act or imposes a more lenient sentence shall have retroactive effect, i.e. it shall also apply to the acts committed before it was passed.

The law which defines the punishability of an act or imposes a more severe punishment shall not have retroactive effect".

The Constitution does not have a direct equivalent of the provisions of Article 7 paragraph 2 of the Convention either. The closest in this respect would be Article 135 of the Constitution:

"In conducting foreign policy, the Republic of Lithuania shall pursue the universally recognised principles and rules of international law, shall strive to safeguard national security and independence as well as the basic rights, freedoms and welfare of its citizens, and shall take part in the creation of a sound international order based on law and justice.

In the Republic of Lithuania, war propaganda shall be prohibited".

The latter constitutional provisions are partly realised through the provisions of Article 69 of the Criminal Code (Instigation of War), and the Law on Genocide. In addition, a draft of a new chapter "Crimes against Humanity and Peace" of the Criminal Code has almost been completed. It will help to cover Article 7 paragraph 2 (and partly paragraph 1) of the Convention as well as appropriate provisions of the Constitution.

Conclusion: The Constitution of the Republic of Lithuania does not contain a direct equivalent of the provisions of Article 7 paragraph 1 of the Convention. However, the above-mentioned provisions are mainly realised through Articles 3 and 7 of the Criminal Code of the Republic of Lithuania.

Article 8 of the Convention

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Several Articles of the Constitution correspond to this Article of the Convention. Primarily mention here should be made of Article 22:

"The private life of an individual shall be inviolable.

Personal correspondence, telephone conversations, telegraphic messages, and other interpersonal communications shall be inviolable.

The law and the court shall protect individuals from arbitrary or unlawful interference in their private or family life, and from encroachment upon their honour and dignity".

Secondly, it is necessary to refer to Article 24, which establishes that "A person's home shall be inviolable". These articles mention the time when these rights may be restricted:

"Information concerning the private life of an individual may be collected only following a court order stating the grounds for the measure and in accordance with the law.

Without the consent of the resident(s), entering a dwelling shall be permitted after a court has issued the relevant order, or in accordance with the procedure established by law when the objective of such an action is to protect public order, apprehend a criminal or save a person's life, health, or property".

Conclusion: the grounds for the restriction of rights enshrined in the Constitution are narrower than those mentioned in the Convention (for instance, under the Constitution only information concerning the "private life of an individual" may be collected, i.e. no reference is made to "family life").

Article 9 of the Convention

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

Article 26 of the Constitution corresponds to the above Article:

"Freedom of thought, conscience, and religion shall not be restricted.

Every person shall have the right to freely choose any religion or faith and, either individually or with others, in public or in private, to manifest his or her religion or faith in worship, observance, practice or teaching.

No person may coerce another person into adopting or professing any religion or faith (or be subject to coercion).

A person's freedom to profess and propagate his or her religion or faith may be subject only to those limitations prescribed by law and only when such restrictions are necessary to protect the safety of society, public order, a person's health or morals or the fundamental rights and freedoms of others.

Parents and legal guardians shall be free to ensure the religious and moral education of their children in conformity with their own convictions".

Conclusion: there is one inconsistency with regard to a restriction of this freedom, since the Constitution provides for a possibility of restricting "a person's freedom to profess", whereas the Convention provides only for limitations to which "freedom to manifest one's religion or beliefs" may be subjected.

Article 10 of the Convention

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Article 25 of the Constitution of the Republic of Lithuania is closest in its content to the above Article of the Convention:

"Individuals shall have the right to have their own convictions and freely express them.

Individuals must not be hindered from seeking, obtaining, or disseminating information or ideas.

Freedom to express convictions, as well as to obtain and disseminate information, may not be restricted in any way other than that established by law, when it is necessary for the safeguard of the health, honour and dignity, private life or morals of a person or for the protection of the constitutional order.

Freedom to express convictions or impart information shall be incompatible with criminal actions - the instigation of national, racial, religious or social hatred, violence or discrimination, and the spreading of slander or misinformation.

Citizens shall have the right to obtain any available information which concerns them from State agencies in the manner established by law".

The right of individuals freely to express their convictions is laid down in the Convention. The right embraces:

1. freedom of individuals to have their own convictions;
2. freedom freely to express their convictions;
3. freedom to seek, obtain and disseminate information and ideas without restriction.

It is clear that the contents and scope of the right freely to express one's convictions is basically identical in the Convention and the Constitution.

Secondly, taking into account the areas to which this right relates, it is necessary to emphasise that both the Convention and the Constitution focus on every person, except for the last paragraph of Article 25 of the Constitution, which states that citizens shall have the right to obtain from State agencies in the manner established by law any available information which concerns them. Thus, by restricting the number of specific subjects to which the right relates and the extent of the right to available information, an attempt is being made to emphasise and render definite the possibility of exercising this right.

Thirdly, neither the Convention nor the Constitution treat the right being analysed here, as an absolute one and specify the conditions for, and ways of, restricting it.

Thus, according to the Convention, the exercise of this right may be affected by the following formalities, conditions, restrictions or penalties:

a. those prescribed by law;
b. those necessary in a democratic society:

- in the interests of national security, territorial integrity and public safety;
- for the prevention of disorder or crime;
- for the protection of health or morals of other persons;
- for the protection of the reputation or rights of others;
- for preventing the disclosure of information received in confidence;
- for maintaining the authority and impartiality of the judiciary.

In Article 25 of the Constitution the restrictions imposed on the exercise of this right are defined in a slightly different way:

1. only by law, and
2. only when it is necessary for the safeguard of the health, honour and dignity, private life, or morals of a person, or for the protection of the constitutional order.

In addition, it is prohibited to use this right for the instigation of national, racial, religious, or social hatred, violence or discrimination and the spreading of slander or misinformation, i.e. for the performance of criminal acts.

Conclusion: the grounds for restricting the right enshrined in the Constitution are narrower in scope compared to those laid down in the Convention. The provisions of the Constitution correspond to those of the Convention, the only difference being in the wording.

Article 11 of the Convention

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on these rights by members of the armed forces, of the police or of the administration of the State".

Several articles of the Constitution correspond to the above Article of the Constitution. First of all we shall consider Article 36 of the Constitution:

"Citizens may not be prohibited or hindered from assembling in unarmed peaceful meetings.

This right may not be subjected to any restrictions except those which are provided by law and are necessary to protect the security of the State or the community, public order, people's health or morals, or the rights and freedoms of other persons".

Secondly, Article 35:

"Citizens shall be guaranteed the right freely to form societies, political parties, and associations, provided that the aims and activities thereof do not contravene the Constitution and ordinary laws.

No person may be forced to belong to any society, political party or association.

The founding of political parties and other political and public organisations shall be regulated by law".

Thirdly, Article 50:

"Trade unions shall be freely established and shall function independently. They shall defend the professional, economic and social rights and interests of employees.

All trade unions shall have equal rights".

Conclusion: the rights enshrined in the Constitution correspond in their content to those laid down in the Convention. However, compared to the Constitution, the Convention provides for more grounds for their restriction.

Article 12 of the Convention

"Men and woman of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

Several Articles of the Constitution correspond to the above Article. First of all, Article 38 of the Constitution:

"The family shall be the basis of society and the State.

Family, motherhood, fatherhood, and childhood shall be under the care and protection of the State.

Marriage shall be freely entered into by a man and a woman.

The State shall register marriages, births, and deaths.

In the family, spouses shall have equal rights".

Secondly, Article 39 of the Constitution:

"The State shall take care of families bringing up children at home and give them support in the manner established by law.

The law shall provide for paid maternity leave before and after childbirth, as well as for favourable working conditions and other privileges".

Conclusion: There are no basic problems as regards the correspondence of these Articles of the Constitution to Article 12 of the Convention, although the wording does not completely coincide (for example, there is no reference to marriageable age in the Constitution).

Article 13 of the Convention

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

Article 30 of the Constitution corresponds to the above provision in the Convention:

"Any person whose constitutional rights or freedoms are violated shall have the right to appeal to a court.

The law shall establish the procedure for paying compensation for pecuniary and non-pecuniary damages inflicted on a person".

When one compares the two provisions what strikes one at first is the considerable discrepancy between "shall have an effective remedy before a national authority" (the Convention) and "the right to appeal to a court" (the Constitution). In my opinion, we should turn our attention to the English (common) law term "remedy", which means possibility of bringing a suit in a court or a means of judicial defence.

In this case the word "effective" can be interpreted by taking into account the system and organisation of the courts, i.e. trial, appeal and cassation proceedings, the possibility of using the assistance of qualified legal counsel, etc. These questions are dealt with in Chapter 9 of the Constitution ("the Court"), the provisions of which guarantee an effective legal defence.

Conclusion: the provisions of the Constitution correspond in essence to the requirements of Article 13 of the Convention.

Article 14 of the Convention

"The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

This Article is comparable with Article 29 of the Constitution of the Republic of Lithuania:

"All people shall be equal before the law, the court, and other State institutions and offices.

A person may not have his or her rights restricted in any way, or be granted any privileges, on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions, or opinions".

These provisions, which establish the principle of equality and non-discrimination, are formulated slightly differently in the Convention and the Constitution. The Constitution of the Republic of Lithuania also lays down the principle of equality before the law and the courts. Article 14 of the Convention contains no corresponding provisions.

In addition, Article 14 of the Convention prohibits only negative discrimination, i.e., on the ground of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. However, the so-called "positive" discrimination i.e. the granting of privileges due to an objectively unequal position, for example disabled persons, women, etc., is not prohibited.

However, the Constitution prohibits the positive discrimination of a person on the grounds of sex, race, nationality, language, origin, social status, religion or convictions.

The Constitution also prohibits negative discrimination on the same grounds as those specified above (although fewer in number).

Conclusion: it is necessary to consider the question of inconsistency with regard to wording. In this case, the Convention has a broader scope of application, since it does not prohibit "positive" discrimination.

Article 15 of the Convention

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed".

This Article of the Convention provides for exceptions when under certain conditions (i.e., in time of war or public emergency threatening the life of the nation) it is permitted for the States Parties to the Convention to derogate from the obligations laid down in Article 1 of the Convention.

However, it is strictly prohibited to derogate from the duty to secure the right to life (except for deaths resulting from lawful acts of war) and also from the prohibition against torture, inhuman treatment, etc., from the prohibition against holding a person in slavery and servitude and from guaranteeing the presumption of innocence.

Provisions of the Constitution of the Republic of Lithuania corresponding to this Article of the Convention are contained in the Chapter "Foreign Policy and National Defence".

Article 145 provides that:

"During martial law or a state of emergency, the rights and freedoms specified in Articles 22, 24, 25, 32, 35 and 36 of the Constitution may be temporarily restricted".

Here, first of all, the conditions under which certain rights and freedoms may be restricted are strictly formalised, i.e. when martial law or a state of emergency is introduced in accordance with the procedure and on the grounds established by the Constitution.

Secondly, the above rights and freedoms may be restricted temporarily (this is, of course, a rather imprecise term). The following rights and freedoms may be restricted:

- inviolability of the private life of an individual, etc.;
- inviolability of a person's home;
- a person's right to have convictions and the freedom to express them;
- a citizen's right to move freely;
- citizens' right freely to form societies, political parties, and associations;
- citizens' right to assemble in unarmed peaceful meetings.

Conclusion: The Constitution imposes stricter and narrower rules for derogation from the obligation to secure human rights and freedoms than does the Convention.

Article 1 of the First Protocol to the Convention

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

Article 23 of the Constitution corresponds to this Article of the Protocol:

"Property shall be inviolable.

The rights of ownership shall be protected by law. Property may only be seized in the public interest and in accordance with the procedure established by law, and adequate compensation must be paid".

Article 46 of the Constitution declares that:

"Lithuania's economy shall be based on the right to private ownership and the freedom of individual economic activity and initiative.

The State shall support any economic efforts and initiative which are useful to the community.

The State shall regulate economic activity so that it serves the general welfare of the people.

The law shall prohibit the monopolisation of production and the market and shall ensure fair competition.

The State shall defend the interests of the consumer".

The provision of the First Protocol to the Convention that: "every natural or legal person is entitled to the peaceful enjoyment of his possessions" corresponds to the provision of Article 23 paragraph 2 of the Constitution that "rights of ownership shall be protected by law", since it is considered that the content of ownership rights, i.e. all rights relating to the ownership of property, are composed of three groups of rights: the right to possess property; the right to use property and the right to dispose of property. All these rights, as Article 23 of the Constitution states, are protected by law.

The provision of the First Protocol to the Convention that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law" has a corresponding provision in Article 23 paragraph 1 of the Constitution - "property shall be inviolable" - and the provision enshrined in paragraph 3 of the same Article that "property may only be seized in the public interest and in accordance with the procedure established by law, and adequate compensation must be paid". The fact that the Constitution provides for the possibility of seizing property only in accordance with the procedure established by law and does not provide for the possibility of seizing the property on the basis of general principles of international law does not decrease the guarantees of the rights of ownership. In addition, the Constitution contains the provision that when property is seized in the public interest, adequate compensation must be paid.

The provision of the First Protocol to the Convention that "every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties" corresponds in the most general sense partly to the provision enshrined in Article 46 paragraph 3 of the Constitution that "the State shall regulate economic activity so that it serves the general welfare of the people".

Conclusion: the provisions of Article 1 of the First Protocol to the Convention are reflected in Articles 23 and 46 of the Constitution which however lay down guarantees of the rights of the owner that are as firm as those established by Article 1 of the First Protocol of the Convention.

Article 2 of the First Protocol to the Convention

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

Several Articles of the Constitution correspond to the above Article of the Convention.

Article 41 of the Constitution:

"Education shall be compulsory for persons under the age of 16.

Education at State and local government secondary, vocational, and higher schools shall be free of charge.

Everyone shall have an equal opportunity to attain higher education according to their individual abilities. Citizens who demonstrate suitable academic progress shall be guaranteed education at establishments of higher education free of charge".

Article 40 of the Constitution:

"State and local government establishments of teaching and education shall be secular. At the request of parents, they shall offer classes in religious instruction.

Non-governmental teaching and educational institutions may be established according to the procedure established by law.

Institutions of higher learning shall be granted autonomy.

The State shall supervise the activities of establishments of teaching and education".

Article 42 of the Constitution:

"Culture, science, research and teaching shall not be subject to restrictions.

The State shall support culture and science, and shall be concerned with the protection of Lithuanian history, art, cultural monuments and other valuable parts of its heritage.

The law shall protect and defend the spiritual and material interests of authors of scientific, technical, cultural, and artistic works".

Conclusion: in general the provisions of Article 2 of the First Protocol to the Convention are reflected in the above mentioned Articles 40, 41 and 42 of the Constitution, although there is no direct correspondence in the wording of these Articles.

Article 3 of the First Protocol to the Convention

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

Several articles of the Constitution correspond to this Article of the Protocol. Firstly, Article 33:

"Citizens shall have the right to participate in the government of their State both directly and through their freely elected representatives, and shall have equal opportunities to hold public office in the Republic of Lithuania".

Secondly, Article 34:

"Citizens who, on the day of election, are 18 years of age or over, shall have the right to vote in the election.

The right to be elected shall be established by the Constitution of the Republic of Lithuania and by the election laws.

Citizens who are declared legally incapacitated by a court shall not participate in elections".

Thirdly, Article 55, which declares that:

"The Seimas shall consist of 141 representatives of the People, who shall be elected for a four-year term on the basis of universal, equal, and direct suffrage by secret ballot".

Conclusion: the provisions of the Constitution are in conformity with the content of Article 3 of the First Protocol to the Convention.

Articles 2 and 3 of the Fourth Protocol to the Convention

Article 2

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".

Article 3

"1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national".

Article 32 of the Constitution corresponds to the above Articles of the Protocol:

"Citizens may move and choose their place of residence in Lithuania freely, and may leave Lithuania at their own will.

This right may not be restricted except as provided by law and if necessary for the protection of State security or the health of the people, or to administer justice.

A citizen may not be prohibited from returning to Lithuania.

Every Lithuanian person may settle in Lithuania".

Conclusion: the Protocol to the Convention grants the right of movement to "everyone", whereas the Constitution grants it only to "a citizen".

Article 4 of the Seventh Protocol to the Convention

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, of if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this article shall be made under Article 15 of the Convention".

Article 31 paragraph 5 of the Constitution which provides that "no person may be punished for the same offence twice" corresponds to the above Article..

Conclusion: The provisions of the Protocol of the Convention are more detailed though in essence the Constitution corresponds to them.

Article 5 of the Seventh Protocol to the Convention

"Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children".

Corresponding articles of the Constitution are Articles 38 and 39:

"In the family, spouses have equal rights.

The right and duty of parents is to bring up their children to be honest individuals and loyal citizens, as well as to support them until they come of age.

The duty of children is to respect their parents, to care for them in old age, and to preserve their heritage".

"Children who are under age shall be protected by law".

Conclusion: To all evidence, the provisions of Articles 38 and 39 of the Constitution do not appear to contradict Article 5 of the above-mentioned Protocol, but the provisions of the latter are formulated to have a broader sphere of application. For instance, Article 5 of the Protocol says that not only the rights of spouses are equal but that they also have equal civil responsibilities in mutual relations and with regard to their children, both on the issues of contraction of marriage, living in marriage and in the event of its dissolution. There are no such provisions in the Constitution.

Comment: Certain provisions of the Protocols to the Convention do not have any equivalents in the Constitution, namely Articles 1 and 4 of the Fourth Protocol, Articles 1 and 2 of the Sixth Protocol and Articles 1, 2, and 3 of the Seventh Protocol. However, since international provisions have priority over domestic laws, no problems should arise in this case.

The second aspect is the influence of the case-law of the Strasbourg institutions on Lithuania's international obligations under Articles 32 and 53 of the Convention.

Obligations of States which ratify the Convention and the fact of that they are subject to the jurisdiction of the Commission and the Court in the case of specific complaints does not in itself mean that the text of the Convention is complied with (in the sense in which it is interpreted by the parties or their domestic courts) and respected. Obligations mean that the text of the Convention must be interpreted in accordance with the decisions taken by the Court in specific cases. This feature of the Convention may bring about drastic changes in Lithuania's practice, particularly in court proceedings, since it will become obligatory during the judicial investigation of cases to adhere to certain principles established in the decisions of the Court of Human Rights.

Nevertheless, the ratification of the Convention and the recognition of the Court's jurisdiction in all categories of cases relating to the interpretation and application of the Convention is by itself not sufficient to ensure that the Lithuanian courts, when applying the provisions of the Convention, will not apply them merely by reference to the text but also take into account the case-law developed by the institutions of the Council of Europe. For this purpose, it is necessary for the laws of the Republic of Lithuania to recognise this case-law as a source of law.

It is necessary to take into account one further issue, namely whether a judge can avail himself of procedural measures if, in his opinion, the application of a domestic law in a case would constitute a breach of the obligations of the Republic of Lithuania under the Convention. Article 110 of the Constitution of the Republic of Lithuania provides for the possibility of suspending the investigation of a case only when the law is in conflict with the Constitution. However, the judge will have no right to apply to the Constitutional Court should a "conflict" between the Constitution and the Convention arise as, under Article 106 of the Constitution, this right is vested only in the Seimas or the President.

Conclusions and Proposals

From the point of view of the ratification of the Convention, Article 1 will give rise to a few extremely serious problems, the mechanism for the resolution of which must be established now:

1. "Conflict" between the Convention and the Constitution.

A comparative analysis of the texts of the Convention and the Constitution indicates that there are several instances in which they do not correspond:

- structural and grammatical differences which do not relate to the essential aspects of rights and freedoms;

- the Constitution does not provide for certain rights and freedoms which are laid down in the Convention;

- significant instances of lack of correspondence between the Constitution and Articles 4, 5, 9 and 14 of the Convention and Article 2 of the Fourth Protocol.

It is obvious that the Constitution, as it is declared in Article 105 of the Constitution, may only be interpreted by the Constitutional Court, so that it is almost impossible to foresee the latter's attitude to the first two possibilities of a "conflict" between the Convention and the Constitution. The method to be chosen is probably that provided for in Articles 105 and 106 of the Constitution: the Seimas or the President request a decision from the Constitutional Court, which may in this case be given prior to the ratification of the Convention. The problem of the third "conflict" may be resolved in two ways:

a. by granting the Convention the status of constitutional law (Article 69 of the Constitution). It would be easier to do this, but it does not completely resolve the problem;

b. by amending Article 18 of the Constitution. This possibility is complicated with regard to its realisation, as it requires an amendment to the Constitution. Although this does not settle the problem completely, it becomes evident that the problems that arise should be resolved through the Constitutional Court.

2. Incorporating the Convention into Lithuania's legal system.

It should be borne in mind that the case-law of the Court not only affects judicial practice but also the legislative process of member States. Evidently, in the first years following the ratification of the Convention, Lithuania should not apply the provisions of the Convention directly but through its domestic law (i.e. adjust its laws to the legal precedents established by the Court). On the other hand, it is necessary to legalise judicial precedents as sources of law, which is dealt with in the draft of the Law on the Courts submitted to the Seimas.

ARTICLE 2 OF THE CONVENTION

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary.

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection".

Article 2 paragraph 1 of the Convention, which provides for a person's right to life, leads to several problems: capital punishment, abortion, transplant operations and euthanasia (deprivation of life, carried out by a doctor, when a person is suffering from a distressing, incurable disease, provided that consent is obtained from the sick person or his relatives). Moreover, paragraph 2 provides for the possibility of depriving a person of his or her life when it is absolutely necessary

a. in the case of justifiable defence;

b. while effecting the arrest of an offender;

c. in an attempt to prevent a crime and to ensure public order;

d. when quelling a riot or insurrection.

The first provision of Article 2 of the Convention is enshrined in Article 19 of the Constitution of the Republic of Lithuania which establishes that "The right to life of individuals shall be protected by law". However, Articles 104-109 and certain other articles of the Criminal Code make unlawful wilful deprivation of life or deprivation of life through negligence or criminal offence.

<u>The death penalty.</u>

Apart from the Convention, the issue of capital punishment is also dealt with in the Sixth Protocol:

"Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law".

Article 24 of the Criminal Code of the Republic of Lithuania allows execution by shooting only in exceptional cases of premeditated murder under aggravating circumstances, i.e. for:

1. matricide or patricide;

2. multiple murder;

3. the murder of a pregnant woman;

4. murder committed in a manner which creates a risk of death to a large number of people;

5. murder carried out with extreme cruelty;

6. murder carried out while committing another serious crime;

7. murder committed for the purpose of concealing another serious crime;

8. murder committed for self-seeking motives;

9. murder committed on the grounds of hooliganism;

10. murder of a person performing his or her public or civil duty;

11. murder committed by an extremely dangerous recidivist;

12. murder committed by a person previously convicted of a premeditated murder (except for privileged murder).

Capital punishment may not be imposed on persons who had not reached the age of 18 prior to the commission of the crime and women who were pregnant at the time of the commission of the crime or the passing of the judgment. A person who becomes legally incapacitated after the passing of the judgment and a woman who becomes pregnant or has a child may not be executed.

A death sentence imposed by a court may be commuted to life imprisonment - this act of mercy may be performed by the President.

The execution is regulated by a secret instruction of the Minister of Internal Affairs of the Republic of Lithuania and the Prosecutor General "On Capital Punishment - Execution of the Death Penalty by Shooting".

It must be noted that the Republic of Lithuania has not signed the Sixth Protocol, so that domestic laws are formally in conformity with the provisions of the Convention.

Abortion and organ transplants.

The issue of abortion is a very complicated one because, in the opinion of the Commission, an abortion is a "conflict" between three parties, i. e. the foetus, the mother and the father. The Commission has stated that the provisions of national law governing abortions, involving the wife terminating the pregnancy without the consent of the child's father, may violate Article 12 of the Convention *(Appl. No. 8416/79, X v. UK, Decisions and Reports 19/1980, pp. 244 ff)*. It is also confirmed that in the case of abortion there may be a conflict

between three Articles of the Convention: Article 2 guaranteeing the right to life, Article 8 ensuring the right to personal and family life, and Article 12 guaranteeing the right to marry and have a family.

It should be noted that, in the opinion of Hungarian experts, the question of whether the right to life may be applied to the foetus should be left to the Contracting Parties to decide. Therefore, in some countries the carrying out of abortions may be considered a violation of the Convention while it is not in others.

Standard laws of the Republic of Lithuania should be analysed in this respect. It should be noted that at present the issue of abortion in Lithuania is only dealt with by an Order of the Minister of Health (28 January 1994, N° 50) and Article 124 of the Criminal Code, which establishes liability under the criminal law for an illegal abortion performed by a physician, for the performance of an abortion in unsanitary conditions or by a physician who is without the adequate medical qualification. On the other hand, Article 19 of the Constitution declares that "The right to life of individuals shall be protected by law". This constitutional provision permits one to state that the law protects not only life but also the right to life. Thus, in such a case, a problem arises with respect to the term "person", i.e. whether it includes the foetus.

In the above-mentioned Order of the Minister of Health, the foetus is treated independently, without identifying it either as a "person" or referring to it as "life". For example, sub-paragraph 2.4 states that "in the event of a deformity of the foetus that renders it incapable of leading its own life being diagnosed...". However, other articles of the Constitution relating to abortion point to the above- mentioned "conflict" between the three parties. Thus, for example, Article 38 provides that "The family shall be the basis of society and the State. Family, motherhood, fatherhood, and childhood shall be under the care and protection of the State"; Article 21 prohibits any "violation of human dignity", and Article 22 declares that "the private life of an individual shall be inviolable". It is true that as a result of the declaration contained in Article 28 ("while exercising their rights and freedoms, persons must observe the Constitution and the laws of the Republic of Lithuania, and must not violate the rights or harm the interests of other people") the Constitution offers a certain mechanism for solving this problem. Moreover, Article 29 prohibits "restricting or granting privileges on the basis of a person's sex, etc."

In our opinion, these constitutional provisions mean that in the case of abortion, the foetus, the mother and the father have equal rights, so that the problem can only be resolved by coordinating these rights. For example, a ban on abortion would protect the rights of the foetus. However, it is not possible absolutely to prohibit abortions. It is imperative to provide for certain cases in which an abortion would be allowed but only with the consent of the mother and the father. The permission of the father may not be required in extraordinary cases, in which the mother's life is in danger.

The question of "life" is also of the utmost importance in the case of organ transplants because the issue of lawfulness and conformity with the Convention depends upon resolving it in a satisfactory manner.

Attention should be paid to the fact that the Hungarian Constitutional Court declared the Government Decree on Abortions unconstitutional since the issue should be regulated by law. We think that a law with the appropriate legal power, governing abortions and the transplantation of organs must also be passed in Lithuania because this would comply both with the provisions of the Convention and Article 19 of the Constitution, as well as with the general principle that "human rights and freedoms shall be governed only by law".

Euthanasia.

It should be noted that the laws of the Republic of Lithuania do not deal directly with the issue of euthanasia. An analysis of separate Articles of the Criminal Code and their application in practice shows that euthanasia is prohibited in Lithuania, since Article 110 of the Criminal Code makes it a criminal offence even to assist someone to commit suicide, whereas Article 15 of the Criminal Code deals with cases of urgency in which saving a person's life at the expense of another person is prohibited. It should be taken into account that Lithuania's laws do not specify a physician's duties and rights with respect to a patient. Bearing in mind that up to now the problem has not come before either Commission or Court and, therefore, the principles according to which it must be resolved have not yet been defined, it is difficult to assess the conformity with the Convention of Lithuania's legal provisions on these issues.

Article 2 paragraph 2 of the Convention establishes the grounds on which a person may be deprived of his or her life. It should be noted that, to the author's knowledge, neither the Commission nor the Court have hardly ever addressed these issues. We will therefore subject the laws of the Republic of Lithuania to a more comprehensive analysis. According to these laws, a person may be deprived of his or her life "in order to protect every person from illegal violence". This provision must be divided into several aspects, in respect of each of which the rules differ. First of all, there is the question of justifiable defence: Article 14 of the Criminal Code provides that an action which, although formally possessing the features characteristic of the act specified in the Criminal Code, has been committed as an act of justifiable defence - i.e. while defending oneself, another person, property, the inviolability of one's home, other rights, public interests or the state from a dangerous encroachment or a threat thereof - is not considered a crime if the limits of justifiable defence have not been exceeded.

A person has a right to defend himself or herself in a justifiable manner regardless of whether or not, at the moment of an attempt to commit a crime against him or her, he or she has a possibility of applying for help to other persons or government bodies.

Article 14(1) of the Criminal Code states that exceeding the limits of justifiable defence means putting up a defence that is not proportionate to the nature of the attempted crime or the danger posed by it. A person is not simply liable under the criminal law as a result of exceeding the limits of a justifiable defence because he or she is in a state of extreme confusion or fright caused by the attempted crime or when this occurs during an encounter with an intruder in his or her home or if the damage has been caused through negligence.

It should be borne in mind that individuals are allowed to acquire, keep and carry guns for defence purposes.

Moreover, Article 487 of the Civil Code of the Republic of Lithuania provides that no compensation is payable for damage which under justifiable defence has been inflicted on a person who commits assault, provided that the limits of a justifiable defence have not been exceeded.

Secondly, the Law on Police, the Law on the State Security Department and the Provisional Law on the Interior Service of the Republic of Lithuania and the Regulations of the Guard Service Department establish that the obligation of the officers of the above institutions and services is to protect every person from unlawful violence. These laws (except the Law on the State Security Department) and the Provisional Law on the Application of Measures of Social and Psychological Rehabilitation establish grounds for permitting the use of physical force and special measures (truncheons, gas, etc.) as well as firearms, in the employment of which officers must try to avoid serious consequences.

It must be noted that the "unlawful violence" referred to in the Article of the Convention is assessed according to the domestic laws of a member State. In this respect the defence of a person against unlawful violence raises a problem, namely in what instances violence in the form of psychological or physical action exerted upon a person's mind or physical integrity is considered unlawful. On the other hand, this appears quite devoid of logic because, for instance, the action of a physician who amputates a gangrenous leg would then be described as "unlawful violence" - the operation is not an extreme necessity (Article 15 of the Criminal Code) since in this case injury is not inflicted on a third party.

Bearing in mind the fact that a physician's duties and rights with respect to a patient are not regulated by law, we think that there is a gap in the law here which must be filled. Incidentally, attempts to harm a person's physical integrity at sports events (e.g. boxing, wrestling, football, etc.) should also be assessed by applying these considerations *mutadis mutandis*.

Article 2 paragraph 2 (b) of the Convention provides for deprivation of life "in order to effect a lawful arrest or to prevent the escape of a person lawfully detained".

The laws of the Republic of Lithuania provide for two different situations when a person is arrested or detained. First of all, when a person who has committed an offence is arrested at the scene of the crime. In such a case Article $14^{(2)}$ of the Criminal Code of the Republic of Lithuania provides that when a person who has committed an offence is being arrested and tries to avoid arrest, only minor bodily injury may be inflicted on that person, whereas during the arrest at the scene of a crime of a person who has committed pre-meditated murder, severe bodily injury may be inflicted on that person. If the person to be arrested resists, the rules established for justifiable defence apply.

Secondly, when arrest and detention in accordance with crime-prevention or administrative procedures or the prevention of escape are carried out by certain authorised officers (policemen, officers of the State Security Department or the Interior Service), these officers must comply with the appropriate procedural requirements:

1. Under the Constitution of the Republic of Lithuania and the Code of Criminal Procedure, when a person is arrested, a decision to remand that person in custody must be taken, and that decision approved by the prosecutor or a judge;

2. Under the Code of Administrative Offenses, when a person is being detained in accordance with administrative procedures, a report must be drawn up (in individual cases, the prosecutor must be notified or a warrant must be obtained).

3. When a person is being detained in accordance with crime-prevention procedures (Article $50^{(1)}$ of the Code of Criminal Procedure), formal decision must be taken to do so, and this decision must be sanctioned by a Supreme Court judge.

It must be emphasised that in all cases of detention the laws of the Republic of Lithuania prohibit the deprivation of a person's life (if the person does not resist arrest).

In order to prevent a person from escaping from arrest, detention or imprisonment, special measures relating to firearms or the use of physical force may be applied only on the grounds and in the manner established by the Law on Police, the Provisional Law on the Interior Service and the Corrective Labour Code. The officers must try to avoid any serious consequences of the action they take.

It should be noted at this point that at the present time Lithuania has no law on detention on remand so that in certain cases problems may arise because firearms, special measures and physical force are now used in pre-trial establishments in accordance with the Corrective Labour Code, although the legal position of sentenced and detained persons differs. Such a situation may constitute a violation of the principle of "proportionality" and the provisions of the Convention.

The last legal ground for deprivation of life is "in action legally taken for the purpose of quelling a riot or insurrection".

The Constitution of the Republic of Lithuania provides for the right of each citizen of the Republic of Lithuania to oppose anyone who uses force to harm the independence, territorial integrity or constitutional order of the State of Lithuania. If the constitutional system or public order is threatened, a state of emergency may be declared throughout the country or in separate parts of it.

There is no law directly governing the quelling of riots or insurrections in Lithuania. However, such a law is necessary since the Convention requires the State "to establish the manner" (it is also a principle of legality). On the other hand, it is also necessary in order to elaborate on those constitutional provisions that are too general.

Finally, at the end of this review and analysis of Article 2 of the Convention, attention should be paid to two aspects which may be important after ratification of the Convention. One of them is the use of firearms (in most cases deprivation of life is effected by using firearms). According to the laws of the Republic of Lithuania the following officers may possess firearms:

1. policemen (under the Law on Police);

2. officers of the Interior Services (under the provisional Law on the Interior Service)

3. officers of the State Border Protection Service of the Ministry of National Defence (under the Law on State Border Protection);

4. officers of the Guard Service Department (under the Regulation of the Guard Service Department approved by law);

5. servicemen (under the Law on National Defence);

6. volunteers (under the Law on the Voluntary National Defence Service);

7. officials of the State Security Department (under the Law on the State Security Department);

8. officers of the State securities at the Ministry of Finance dealing with coins, document production and document circulation security service;

9. prosecutors and investigators (under the Draft Law on the Prosecutor's Office).

However, in certain cases the grounds for and use of firearms is regulated by the Government (paragraphs 3, 5, 6 and 8 above), in other cases by law (paragraphs 1, 2, 4 and 9) or by the Statute, the legal status of which is not clear. Thus, the regulation of the grounds for and use of firearms differs both in essence and in form, and this leads to conflict. For instance, according to Article 2 paragraph 5 of the Law on the Voluntary National Defence Service, an officer of the service may be requested to assist the police in ensuring public order

or maintaining the peace and public safety. However, in this case he and the policeman would have different possibilities available to them with regard to the use of firearms.

The second aspect is the issue of compensation for injuries inflicted. In the case of a person putting up a justifiable defence, that person is not obliged to pay compensation for any injury caused. No other lawful cases of deprivation of life are dealt with by the laws of the Republic of Lithuania.

Conclusions and Proposals

Owing to the non-conformity of the laws of the Republic of Lithuania with the requirements of Article 2 of the Convention, the ratification of the Convention raises serious problems.

1. The regulation of capital punishment by Articles 24 and 105 of the Criminal Code of the Republic of Lithuania directly conflicts with the provisions of the Sixth Protocol, according to which a State may make provision for the death penalty only for acts defined in the law and committed in time of war or of imminent threat of war. (It should be borne in mind that Lithuania has not signed the Sixth Protocol.)

2. On the basis of the example of Hungary, it is possible to state that the provisions relating to abortions (similarly, on organ transplants) do not comply with the provisions of Article 2 with regard to the form they take, i.e. this issue should be regulated by law and not by an order issued by the Minister of Health. Due to the fact that neither the Commission nor the Court have formulated clear-cut criteria and principles in order to resolve this problem, it is difficult to assess whether or not the above-mentioned order complies with the provisions of Article 2 of the Convention.

3. At the present time it is almost impossible to resolve the problem of euthanasia as the Commission and the Court have not yet provided an interpretation of the provisions of the Convention regarding this aspect.

4. We think that the laws of the Republic of Lithuania which govern the lawful deprivation of liberty in cases of justifiable defence, the arrest of an offender and certain other cases are in general conformity with the provisions of Article 2 paragraph 2 of the Convention. On the other hand, we are of the opinion that some minor aspects should be improved:

a) it is necessary to draft a law regulating a doctor's rights and duties with respect to the patient (this is connected with the issues of abortion, euthanasia, and "unlawful violence");

b) in order to avoid an incorrect interpretation of the term "unlawful violence", the Criminal Code of the Republic of Lithuania should be amended by mentioning certain circumstances under which an act ceases to be considered criminally dangerous and a breach of the law (for instance, professional duty, sports events and so on);

c) no civil liability (i.e. compensation for injury) should arise in any case of lawful deprivation of life;

d) it is imperative to resolve the issue of the establishment of the grounds for and use of firearms, i.e. to make them uniform.

5. A law on states of emergency (war) is necessary.

ARTICLE 3 OF THE CONVENTION

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

As can be seen from the 1990 European Court of Human Rights Report on the cases investigated in the 1959-1990 period, in as many as four of these cases the Court concluded that the actions of the state constituted a breach of this Article. It should be noted that the Commission also relatively often finds a State guilty of a breach of Article 3 of the Convention.

A further reason why an analysis of this Article is necessary is that the rights enshrined in Article 3 of the Convention (alongside the rights enshrined in Articles 2, 4 paragraph 1 and 7, the restriction of which is prohibited under Article 15 of the Convention even in time of war or other public emergency) are in most cases violated as a result of the incorrect application of the law (or non-application).

In the majority of complaints addressed to the Commission concerning a possible violation of this particular Article, reference is made to the military service or prison life. In investigating cases allegedly involving breaches of Article 3 of the Convention, the Commission and the Court have made several attempts at defining the notions used in the Article: "degrading treatment" means treatment of a person in such a manner as to demean him or her in front of other persons or to force him or her to act against his or her will or conscience. "Torture may mean any act by which not only physical but also mental influence may be exerted causing mental pain or a state of suffering or stress." It must be stated that "cruel punishment" as defined in the list of principles for the protection of imprisoned persons approved by the UN in 1988 means a punishment having a physical or mental effect as a result of which the imprisoned person is irreversibly or temporarily deprived of his or her sense of hearing, sight, sense of space or sense of time.

The complaints addressed to the Commission may be divided into four groups. The first group comprises cases involving physical punishment. In the case of *Campbell & Cosans v. the United Kingdom, 1982,* the applicant alleged that at school two children were constantly under a threat of corporal punishment. Here it should be emphasised that the Court dismissed the application on the grounds that a breach of the Convention is recognised only if a person has actually suffered injury. However judging by other cases it is possible to draw the conclusion that any form of corporal punishment, regardless of where it is applied, constitutes a breach of Article 3 of the Convention.

Cases in which applicants have complained about the cruelty of police or prison officers may also be included in the group. Several cases are worth mentioning. The first one would be the case of *Klaas v. Germany, 1993.* In the summer of 1986, the applicant, who was driving in a car together with her 8-year old daughter was accused of having gone through a red light and having attempted to drive away. She agreed to be breathalysed for the purpose of measuring the amount of alcohol she had in her breath and was afterwards informed by the police that she would have to be taken to a hospital and be subjected to a blood test. The circumstances of the arrest and the subsequent turn of events became the subject of dispute, but the applicant asserted that the policeman had inflicted on her serious physical injuries, the presence of which was confirmed by medical tests. The blood test showed that her blood contained 0.82 mg/ml of alcohol and she was released. In 1986, an action was brought against the applicant on the charges of drunken driving and resisting a police officer. She was fined DM 30 and had her driving licence suspended for one month, since the amount of alcohol in the blood exceeded 0.80mg/ml. The applicant accused the officer of having assaulted her. However she later withdrew the charge.

In 1989, the Federal Constitutional Court dismissed her constitutional complaint. The Court of Human Rights ruled that there had been no breach of Articles 3 and 8 of the Convention. The Court pointed out that, according to the medical report and photographs, the physical injuries might not necessarily have been inflicted during the arrest, as the testimony given by the applicant and the police differed, while the witnesses confirmed the testimony of the police officer. Consequently, there had been no violation of Article 3 of the Convention.

Another example is the case of *Tomasi v. France, 1992.* Mr. Tomasi, a French national, was arrested on 23 March 1983 by the police on suspicion of having taken part in the commission of a murder and attempted murder. He was kept in police custody until 25 March 1983 and was afterwards convicted by a court and sentenced to imprisonment. In 1988 Mr. Tomasi was acquitted and the Compensation Board at the Court of Cassation awarded him 300,000 French francs. During his detention Mr. Tomasi lodged approximately 33 appeals, all of which were rejected.

During his detention in police custody the applicant made a verbal complaint to the investigating judge about the damage he had suffered to his health and demanded compensation. Medical experts found he had sustained various slight physical injuries. The Court of Cassation saw no ground for not dismissing the complaint. In 1987 the Court of Appeal decided to continue the investigation. However, after some time it decided to uphold the previous court judgment.

Mr. Tomasi complained about the length of time he was held in custody. The Court was of the opinion that even the gravity of the offence and the particular circumstances pointing to the applicant's guilt indicated by the law enforcement bodies did not justify the length of the pre-trial detention. The fear that the applicant may be dangerous to the public was, it stated, no justification - such a fear disappears after the lapse of a shorter period than the period of the applicant's detention. The danger that the applicant may abscond was no justification either - the problem could be resolved by initiating legal proceedings.

The Court also emphasised that French courts do not conduct proceedings within a reasonable time.

The physical injuries appeared during the period of pre-trial detention. This was also confirmed by four medical experts. The Court regarded as unjustifiable the methods of interrogation which resulted in physical injuries and therefore concluded that there had been a violation of Article 3 of the Convention.

In 1992 the Court of Human Rights announced its decision on this case that there had been violations of Article 5 of the Convention (detention on remand), Article 3 (injuries inflicted during detention in police custody) and Article 6. The responsible state paid the applicant 100,000 French francs in accordance with Article 50 of the Convention.

The second group of cases concern torture in time of war or during a state of emergency. In this regard the Republic of Lithuania must adopt several rules which may also apply in peacetime. The Commission has expressed its opinion that the Convention is also violated in cases in which torture or an improper act is blatantly unlawful but is tolerated in the sense that superior officers, who are responsible for their subordinates who commit such acts, take no action to put an end to their misconduct or to punish the guilty persons; or when superior institutions disregard applications they have received and refuse to conduct an official investigation, etc. In peacetime such provisions may be applied in organisations that have a strict hierarchical character - the army, prisons, psychiatric hospitals, homes for the elderly, kindergartens and schools.

The third group comprises cases involving complaints received from persons doing military service and from prisons. According to the data provided by Hungary, not a single case connected with military service referred to the Court has contained a complaint about a violation of Article 3 of the Convention, and the number of cases concerning this aspect which have been investigated by the Commission is not very large either. However, Lithuania must pay special attention to this issue because, judging from press reports, the situation in the national defence service is far from satisfactory.

On the other hand, the Court has investigated a number of cases in which the applicants were prisoners. There are certain aspects (e.g., being handcuffed in the presence of the public, the obligation to wear prison clothes or wear one's hair short, the restriction of contacts with the outside world or of sexual intercourse) which are treated by the Commission as a natural consequence of a sentence of deprivation of liberty. However, the cases investigated by the Commission in which it most often considers there has been a violation of Article 3 of the Convention involve the following aspects:

1. Isolation from the outside world and other prisoners (in Lithuania: solitary confinement in a penal or disciplinary cell, punishment cell, cell-like rooms, high-security prison, groups of difficult convicts). The Commission has already expressed its dislike of these measures. On the other hand, they may be justified, but only for security purposes and only in certain specific cases. The Commission analyses each individual case, taking into account the duration of the application of a certain measure, its purpose and justifiability, the convicted person's previous conduct and whether he or she at least has minimal contacts with other people, and it adheres to the principle of maintaining a balance between security and human rights. In one case the Commission recognised especially strict measures as justifiable, namely solitary confinement, permanent artificial lighting in the cell, keeping a person under permanent surveillance by means of a closed television system, the absence of newspapers and a radio set in the cell, and the prohibition of physical exercise (walks), because the measures were necessary to ensure the internal and external security of the prison. The persons subjected to these measures were dangerous criminals (terrorists) and there was an actual danger of their escaping with assistance from outside. In another case, the Commission concluded that strict measures applied by the prison administration were justifiable on the ground of the prisoner's extremely dangerous conduct. Similar measures are also justifiable in cases in which the prisoner has every possibility of manipulating other prisoners with the aim of breaching prison discipline.

In order to decide whether strict conditions in a certain prison are justifiable or not, the Commission, when investigating complaints about violations of Article 3, must determine whether under the conditions involved, the prisoner's mental and physical health has been adversely affected and whether this may be confirmed by an expert medical examination. Therefore, the applicant must obtain a medical certificate to be used as a document for the Commission's guidance during the investigation of the case. Should it turn out that under the prison conditions the prisoner's state of health has suffered serious and lasting physical or mental damage, the Commission may decide that there has been a violation of Article 3 of the Convention.

In many cases the applicants have alleged that their detention in itself was a violation of Article 3 of the Convention, as they could not tolerate prison conditions. The Commission does not automatically recognise such complaints as groundless, and such cases are also investigated. The principal question raised by the Commission and Court of Human Rights is whether the measure applied (and imprisonment) had a directly negative effect on the person's physical or mental health and, if so, whether the person informed the officers responsible, who in such cases must provide a possibility for a doctor to conduct a medical examination of that person (and, if necessary, treat him or her). In such instances, when

taking their decision, the Commission or the Court must rely on evidence proving that the person has been subjected to torture or cruel treatment and therefore suffered lasting damage to his or her health. The Commission and the Court recognise as proof conclusions reached by qualified medical experts (cases: *Tomasi v. France, 1992*; *Klaas v. Germany, 1993*; *Costello-Roberts v. the UK, 1993*).

2. Material conditions of confinement (overcrowded prisons, placement of several convicts in one cell, insufficient number of chairs or tables, etc.). Strange though it may seem, until 1986 the European Commission of Human Rights had not received a single application in respect of these aspects. The author has not found any data to confirm that the Court investigated such cases in later years.

3. Personal examination and body search. The Commission has investigated numerous applications claiming a violation of Article 3 of the Convention during a body search (including the anus). During its investigation of such cases the Commission takes into consideration the specific situation which develops in the prison, the possibility of dangerous objects being smuggled into the prison by a prisoner in his anus and the procedure for carrying out the search (for example, the Commission pointed out that the search had been carried out by high ranking officers in a separate room, in private and with the help of a mirror, etc.).

4. Application of disciplinary penalties. The Commission has investigated quite a number of applications, and decisions taken on them may be generalised by several principles. Firstly, the Commission is frequently guided by the provision laid down in the European Prison Rules, according to which the grounds and procedure for imposing a penalty must be laid down in domestic laws. Secondly, the penalty of placing a person in solitary confinement or a punishment cell is not treated as deprivation of liberty since this is merely a modified procedure of serving a lawful sentence. Thirdly, the penalty must be proportionate to the danger caused by the violation. Moreover, it should be borne in mind, that the Standard Minimum Rules for the Correction of Convicted Prisoners prohibit group penalties and locking up in punishment cells because they are brutal and inhuman.

It is worth mentioning a number of examples here. A man who had been detained for interrogation lodged an application with the Commission stating that he had been placed in a punishment cell and prohibited from having any contact with the outside world. The Commission dismissed the application since it was established that the isolation lasted for no longer than one month, was supervised by a court, a doctor would come at the request of the person under investigation, the applicant could have a rest while talking to his lawyer, and the measure had been lawfully imposed. As a result, it was possible to state that the measure was not inhuman treatment or torture. In another case, the Commission was notified that a person had been recognised as a dangerous criminal and locked up in "the prison's most secure cell". The Commission established the following circumstances: the person had been locked up in such a cell for safety purposes, because he was very dangerous (during his arrest he used a firearm). When assessing the conditions of his confinement, the Commission paid attention to the fact that cell windows could be opened; there were small bookcases with books and flowers by the walls; the walls were not soundproof; he could communicate with prisoners held in the cells opposite his own; he was allowed to use a radio and TV and he had a right to take a walk in the yard. The person was not under secret observation. It was noted that he was very isolated socially, as he could not take part in the social life of the prison in association with other prisoners and, in addition, his contacts with other prisoners were also restricted. The Commission rejected the application on the ground that only total social isolation can destroy the personality and only this can be recognised as a violation of Article 3 of the Convention. On the other hand, it went on, such isolation may not be legalised for security purposes because these rights are absolute. Thus, the Commission stated, the measures applied to the person did not destroy his personality and were not aimed at so doing.

5. Application of security measures. This means the use of handcuffs, strait-jackets and other means which restrict physical movement (they may not be used as punishment). When investigating cases, the Commission takes into account the European Prison Rules, which establish the grounds and procedure for the application of these measures.

The fourth group of cases in which Article 3 of the Convention is frequently applied is the status of foreigners and extradition.

According to the judgment of the Court in the Case of *Soering v. the UK, 1989*, extradition is prohibited if the rights enshrined in Article 3 of the Convention of the person whose extradition is being requested may be violated by reason of the so-called "death row phenomenon". Soering was a German national, and the United Kingdom, where he was detained, intended to extradite him to the USA to face charges of murder. The Criminal Court trial was to be held in Virginia. There was a serious likelihood that Soering would be sentenced to death by electrocution if found guilty by the court in Virginia. Taking into account the normal practice in Virginia (where an excessively large number of appeals are lodged), from 6 to 8 years would have passed from the passing of the sentence until its execution, and the convicted person would have been forced to spend all those years together with other prison inmates on "death row". It was maintained in the application lodged with the Commission that conditions in cells on death row led one to believe that the inmates there were subjected to torture and inhuman and degrading treatment. The Commission accepted Soering's arguments and prohibited the United Kingdom from extraditing him.

Apart from extradition, the expulsion from a state and the refusal to issue an entry permit or residence permit are also issues related to Article 3 of the Convention. Provisions regarding expulsion may also be found in Article 4 of the Fourth Protocol and Article 1 of the Seventh Protocol. However, these will not be discussed here. I would like to point out that only the expulsion of a foreigner and sending him or her to a state which does not guarantee the rights enshrined in Article 3 of the Convention may be treated as a violation of this Article. The Commission has investigated a number of analogous applications, and the decisions it has taken show that the fact that legal proceedings may be instituted against a person expelled from a state is not a reason to prohibit his or her expulsion, unless the criminal proceedings, likely sentence or its execution are in essence in violation of Article 3 of the Convention. In addition, the Commission pays a great deal of attention to the issue of whether persons may be expelled to a State Party which recognises the Commission's competence and the Court's jurisdiction. In the event of expulsion, when the person is married to a citizen of the expelling state, the Commission considers not only the issue of whether or not the expulsion violates Article 8 of the Convention, which guarantees respect for family life, but also Article 3 of the Convention, which prohibits the use of torture, since the separation of spouses and, in certain cases, their separation from their children may cause a certain amount mental suffering, and this may be described as inhuman treatment. Their refusal to issue an entry permit or residence permit to a foreigner who is married to a citizen of the state does not necessarily constitute a violation of Articles 3 and 8 of the Convention, since, as pointed out by the Court, it has not been established in the provisions of the Convention that a spouse who is a citizen of a different state should be issued with an unconditional entry permit and granted the right to reside in the state of residence of the other spouse.

An analysis of laws of the Republic of Lithuania should start with Article 21 of the Constitution, which prohibits "torturing, injuring, degrading or maltreating a person, as well as establishing such punishments." This prohibition covers any corporal punishment, whereas separate Articles of the Criminal Code lay down the penalties for physical injuries, body blows, etc..

Cases belonging to the second group above should also be assessed in a similar way (in wartime or a state of emergency). It must be emphasised that most violations of Article 3 result from the incorrect application (or failure to apply) domestic laws, so that in this instance it is expedient to provide the authorities of the Ministry of National Defence and the Corrective Labour Department at the Ministry of Internal Affairs with detailed information concerning international requirements and the consequences of their implementation.

With regard to the implementation of domestic laws on deprivation of liberty (prison sentences or detention on remand), the situation is more complicated. This is due to the fact that the subject-matter of Article 3 is dealt with in other documents of the Council of Europe (e.g. the European Prisons Rules, etc.). Mention should be made of those requirements of domestic law which are not in full conformity with provisions of international law.

First of all, in a certain sense Article $83^{(1)}$-$83^{(5)}$ of the Corrective Labour Code provide for a collective penalty. In the event of unlawful group actions by inmates which grossly violate the internal order of a corrective labour institution, the chief officer (director) of the institution has the right, upon notifying the prosecutor, to suspend:

- the sending of inmates' letters and delivery to them of letters, parcels and packages of printed matter received;
- permission to have visits;
- the purchase of foodstuffs and basic necessities;
- the granting of incentives and privileges.

Secondly, Article $83^{(1)}$-$83^{(5)}$ of the Corrective Labour Code offer a more comprehensive regulation of the grounds and procedures for the use of special means of restraint - handcuffs, straight-jackets, truncheons, gas, water cannon, police dogs, armoured personnel carriers and other equipment. If procedures were clearly laid down this would eliminate any doubts. Rules need to state that:

1) Special means can be used taking into account the nature of the violation of law and order, the offender's personality and the specific circumstances and situation. When applying special means of restraint, officers must try to avoid any serious consequences.

2) If circumstances permit, before the use of special means of restraint, the persons against whom they are to be used must be given a proper warning.

3) The use of special means of restraint must be stopped when the grounds for their use no longer exist.

4) It is prohibited to apply the above-mentioned means of restraint, except handcuffs, against women, minors and disabled persons with an obvious disability, except in cases in which it is they who are the assailants or in which they put up resistance by using force or a weapon.

The establishment of the basic principles without going into detail would correspond to international requirements, which are laid down in a more concise form. The Corrective Labour Code states the following:

Officers of corrective labour institutions who possess a special or a military rank may use handcuffs, strait-jackets, truncheons and gas for personal defence against inmates in the following cases:

- in order to protect the staff of a corrective labour institution and other persons from an attack endangering their life or health and when they are trying to release hostages;

- in order to apprehend an inmate who has committed an offence, if he or she refuses to comply with the lawful demands of an employee of a corrective labour institution or resists him or her by force;

- in order to repel an attack against guarded objects and vehicles;

- in the event of a mass riot or intentional group actions which grossly violate the internal order of a corrective labour institution.

Police dogs may be used in corrective labour institutions in the following cases:

- for guarding the territory of the institution;

- for escorting inmates;

- during inspections of prohibited areas within a corrective labour institution and neighbouring areas;

- for searching vehicles entering and leaving the corrective labour institution and checking the load being transported;

- when searching for hidden narcotic or toxic substances;

- when conducting a search for and apprehending escaped inmates;

- in order to protect the staff of the corrective labour institution and other persons from an assault creating a substantial risk of death when the use of other means proves to be of no avail.

By order of the Minister of Internal Affairs of the Republic of Lithuania or his deputy, water cannon, special gas, armoured personnel carriers, etc., may be used against inmates in cases of mass riots or mass resistance to the prison administration, accompanied by mass violence, arson, the seizure of hostages or other premeditated actions grossly violating the internal order of a corrective labour institution.

Analogous grounds are contained in the draft Law on Detention on Remand.

Thirdly, the regulations concerning the application of disciplinary measures are less than perfect, since the list of officers who have the right to allow incentives or impose penalties, and the powers these officers have, are determined by the internal order regulations of the corrective labour institution. However, the law does not specify what constitutes proof of an administrative violation. It should be noted that the law regulates in great detail and adequately the procedure for imposing and applying the penalty of locking up an inmate in a solitary-detention cell or punishment cell. The inmate who is punished by being locked up in a disciplinary cell, solitary-detention cell or punishment cell, or who must be transferred to a cell-like room, must be examined by a doctor or a member of ancillary medical personnel, who must indicate in the prison director's decision imposing the penalties, whether or not the inmate is able to endure the penalty.

In special cases, when the inmate shows no sign of a trauma or a dangerous illness, he or she may be locked up in a solitary-detention cell or punishment cell without the doctor's permission. However, a medical examination must be carried out no later than within 24 hours after he or she has been locked up in either of these cells.

Before being locked up in a solitary-confinement cell or punishment cell or before being transferred to a cell-like room, inmates undergo sanitary treatment and men have their hair cut.

Inmates transferred to cell-like rooms are deprived of all privileges.

Inmates locked up in solitary-confinement cells as a punishment or disciplinary measure have no right to receive visits, parcels or packages, to buy foodstuffs and basic necessities or to send letters. They are not permitted to play table games or smoke.

In addition, inmates who are detained in solitary confinement and punishment cells are not permitted to read books, magazines and other reading matter, are not allowed to take walks and are not given bed linen.

Juveniles in solitary confinement are allowed a one-hour walk each day.

Inmates who are in solitary confinement but are taken to work, are separated from the other working inmates.

In punishment cells inmates are kept in isolation.

Persons who are in solitary confinement and are not taken to work may be given, with the doctor's written consent, reduced portions of food. The rules concerning this measure must be approved by the Government of the Republic of Lithuania. The doctor must examine the inmate's health on a daily basis and submit his opinion on his ability to continue to endure the penalty. The chief officer of the corrective labour institution must accept the doctor's opinion.

It must be emphasised that the above provisions are applied only with regard to inmates sentenced to a term of imprisonment, whereas penalties to those arrested under the Code of Criminal Procedure must be determined by the draft Law on Detention on Remand. (The issue of persons detained in accordance with preventive detention procedures laid down in Article 50[1] of the Code of Criminal Procedure is more problematic, since their legal status is not clearly defined.)

Under the Provisional Law on the Application of Measures of Social and Psychological Rehabilitation (the provision is also retained in the new law) concerning the systematic refusal to comply with established requirements or an especially flagrant disciplinary violation, persons detained in general social rehabilitation institutions may be locked up in special cells for up to 10 days. The penalty is applied only with the doctor's permission in writing. However, the law does not regulate either the grounds or procedure for its application.

It must be pointed out that Article 60 of the Criminal Code provides for compulsory treatment, as follows:

"If an offence is committed by an alcoholic or a drug addict, the court may, when imposing a punishment for the offence committed, decide that the culprit should be subjected to compulsory treatment.

When these persons are given sentences other than deprivation of liberty, they will be subjected to compulsory treatment at medical establishments with a special treatment and work regime.

If such a person is sentenced to a term of imprisonment, he or she must be subjected to compulsory treatment at an establishment of deprivation of liberty. If it is necessary to prolong this treatment after release from the establishment of deprivation of liberty and must be at a medical establishment with special treatment facilities and a work regime.

Compulsory treatment shall be terminated by a court on the recommendation of the establishment at which the person is undergoing treatment".

In the author's opinion, the practice of compulsory treatment is in violation of the provisions of the Convention and may create preconditions for a violation of Article 3. Attention should also be paid to drying-out establishments, at which in certain cases persons are treated in a manner which could be described as "cruel or degrading treatment".

In the author's opinion, other provisions of the laws of the Republic of Lithuania do not present any major problems.

Conclusions and Proposals

With regard to Article 3, ratification of the Convention should not pose any exceptional problems. It should be emphasised once again that the Article is in most cases violated through the "incorrect" application of (or failure to apply) domestic laws. Therefore the authorities and officers of such institutions as the army, prisons, etc., must be familiarised with international requirements and notified of the consequences of their failure to comply.

At the present time, in order to ensure that the legal basis corresponds to the requirements of Article 3, the following action must be taken:

1. Passing of Law on the Detention on Remand (which has been drafted and submitted for consideration to the Government);

2. Repeal of Article 60 of the Criminal Code which provides for the compulsory treatment of alcoholics and drug addicts;

3. Repeal of Article $50^{(1)}$ of the Code of Criminal Procedure;

4. Definition in the new Code of Punishment Execution of:
   - an officer's powers with regard to imposing penalties;
   - the right of a convicted prisoner to ask to be locked up in solitary confinement;
   - more restricted grounds for the imposition of special penalties;
   - grounds for the imposition of ordinary penalties.

5. Enforcement of the provisions in the Law on the Application of Measures of Social and Psychological Rehabilitation defining an officer's powers with regard to imposing penalties, as well as a revision of the grounds for the imposition of penalties.

ARTICLE 4 OF THE CONVENTION

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term "forced or compulsory labour" shall not include:

a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d. any work or service which forms part of normal civic obligations".

Article 4 of the Convention prohibits slavery, servitude (serfdom) and forced or compulsory labour. In recent years, no cases involving a violation of these rights have been dealt with by the European Commission and Court of Human Rights.

An analysis of the content of Article 4 paragraph 1 and paragraph 2 of the Convention permits one to state that a person may perform a job he or she voluntarily chooses. In this respect, Article 2 of the Law on Employment Contracts of the Republic of Lithuania establishes the equality of the parties to the contract, and Article 8 provides that in the case of each employment contract the parties must agree on the place and nature of the work (professional training, qualifications, title of position). It should be kept in mind that the specific features of the work of some categories of officials (for example, judges, police officers, prosecutors, customs officers, etc.) are also regulated by other laws if this is not prohibited under the Law on Employment Contracts.

In our opinion, the labour laws of the Republic of Lithuania are in compliance with the provisions of Article 4 paragraph 1 and paragraph 2 of the Convention. More attention should be paid to what is not considered to be "forced or compulsory labour" under the Convention. Therefore, a more thorough analysis must be made of the obligation to work of the persons who are deprived of their liberty. In the sixties and seventies the Commission used to receive a great number of applications concerning "forced or compulsory labour", and certain important rules established in decisions can therefore be identified. First of all, the majority of applications were related to Article 4 paragraph 3a of the Convention, i.e. the duty of convicted prisoners to work. It should be noted that the applications contained allegations that prisoners were "slaves" of the state, that they were forced to work for private companies and were paid lower wages, that they were not covered by social insurance, etc.

As Article 4 is not related to the payment prisoners receive for their work and the right to social insurance, nearly all the applications were declared inadmissible by the Commission. This Article of the Convention does not prohibit the employment of prisoners in private companies. However, in this particular case it must be remembered that such work would also be compulsory in prisons.

First of all, it must be mentioned that Article 48 of the Constitution of the Republic of Lithuania provides that "every person may freely choose an occupation or business". The article also declares:

"Forced labour shall be prohibited.

Military work in lieu of military service, as well as work carried out in the course of a war, after a natural disaster, during an epidemic, or as a result of other urgent circumstances, shall not be considered to be forced labour.

Work which is performed by convicts in places of confinement and is regulated by law shall not be considered to be forced labour either".

One basic inconsistency which may bring about serious problems will be found while comparing the provisions of the Convention and the Constitution - the definition in the Constitution of work carried out by persons sentenced by a court is much broader than that contained in the Convention. In this case it is necessary to undertake a deeper analysis of the laws of the Republic of Lithuania which regulate the work of persons deprived of their liberty.

It must be pointed out that the Criminal Code of the Republic of Lithuania provides for various punishments for criminal offenses, one of the elements of which is a convict's duty to work. It is first necessary to mention deprivation of liberty (Article 25 of the Criminal Code). Article 51 of the Corrective Labour Code provides that each person sentenced to deprivation of liberty must work. The administration of a correctional labour institution must ensure that convicted prisoners are provided with work, taking into account their ability to work, and to the greatest extent possible, their occupation or profession.

It is usual for convicted prisoners in correctional labour institutions to be given work. Article 55 of the Corrective Labour Code provides that convicted persons may, without payment for their work, only be involved in cleaning the place in which they are detained and adjoining areas, and do work connected with the improvement of convicted prisoners' cultural and living conditions.

Prisoners take turns to do this work, which is carried out after the normal working hours. It should not last for longer than two hours a day.

The second type of punishment is corrective labour without deprivation of liberty (Article 29 of the Criminal Code). A sentence to corrective labour without deprivation of liberty is handed down for a period ranging from two months to two years and is served according to the court judgment either at the place of employment of the convicted person or in other places within the district of his place of residence. The period of corrective labour is calculated in months.

The third penalty is a conditional sentence involving deprivation of liberty and the obligation of the convicted prisoner to work (Article $25^{(1)}$ of the Criminal Code).

When imposing a punishment on an adult person who is capable of work and is sentenced for the first time for the commission of an intentional offence to up to three years' imprisonment and for an offence committed as a result of negligence to up to five years, the court takes into account the type of offence committed and the degree of its danger to society, the personality of the offender and other circumstances of the case, as well as the possibility of reforming him or her under supervision without isolating him or her from society. The court may decide to sentence the person conditionally by not depriving him or her of his or her

liberty and giving him or her compulsory work at the places prescribed by the bodies within whose competence the sentence is to be enforced.

The fourth penalty is a conditional sentence (Article 46 of the Criminal Code) with suspension of the enforcement of the judgment (sentence) (Article 47(1) of the Criminal Code). In such cases the law indirectly provides for a convicts' obligation to work.

The fifth penalty is conditional release from prison (Article 54(1) of the Criminal Code), which involves a person capable of work having, within a fifteen-day period after the day of release, to obtain employment or register at the Employment Office and notify the body enforcing the sentence of this.

The sixth penalty comprises coercive measures of a corrective nature applied to juveniles (Article 61 of the Criminal Code). One provision states that "a juvenile who has reached fifteen years of age may be obliged to compensate for the damage caused, provided that he has an independent source of earnings and the amount of the damage does not exceed twenty roubles, or he may be obliged to make amends, by his own work, for the material damage caused, provided that it does not exceed twenty roubles".

In our opinion, some provisions of the Criminal Code do not comply with the requirements of Article 4.

This conclusion is based on a simple comparison of the wording of the Constitution and the Convention ("work of persons convicted by a court" and "work required to be done in the ordinary course of detention ... or during conditional release from such detention"). This indicates that a sentence of corrective labour without deprivation of liberty (Article 29 of the Criminal Code) and certain penal measures (Articles 25(1), 46(1), 47(1) of the Criminal Code) conflict with Article 4 paragraph 3a of the Convention. On the other hand, neither the Commission nor the Court of Human Rights have ever investigated such a case, and a possible decision remains problematic because other documents of the Council of Europe encourage such measures as an alternative to the deprivation of liberty.

Apart from the Criminal Code, an administrative penalty - corrective labour - is provided for by Article 28 of the Code of Administrative Offences of the Republic of Lithuania. Corrective labour is imposed for a period of up to two months. A person who has committed an administrative offence performs corrective labour at his principal place of work, and from five to twenty percent of his or her wages are deducted and paid to the State. Corrective labour is imposed by a district court (district judge). A period of corrective labour may not be less than fifteen days, unless the laws of the Republic of Lithuania establish otherwise. Article 29 of the Code of Administrative Offenses of the Republic of Lithuania provides for another penalty, namely administrative arrest, and is prescribed and imposed for up to fifteen days only in exceptional cases for certain types of administrative offenses. Administrative arrest is imposed by the district court (district judge).

Administrative arrest may not be prescribed for pregnant women, women with children under 12, persons under 18 years of age, and group I and 2 invalids.

Persons in administrative arrest may be given physical labour in accordance with established procedures.

District and town councils are charged with organising the work of persons in administrative arrest.

During the arrest period, persons on whom administrative arrest has been imposed are not paid their wages at their permanent place of employment. The decision to impose administrative arrest is enforced by the police in accordance with the procedure established by the laws of the Republic of Lithuania.

Attention should be paid to the absence of laws governing the execution of the arrest. After an assessment of the provisions of the Code of Administrative Offenses with respect to arrest it must be admitted that they are not in conformity with the Convention and the Constitution. Article 339(1) of the Code of Administrative Offenses, which states that individuals in arrest may only be given "physical labour", may be problematic with respect to Article 3 of the Convention. The obligation of a person in arrest to work may be considered to be in conflict both with the Constitution and the Convention.

The obligation to work of a person placed in an institution of social and psychological rehabilitation is laid down in the Provisional Law on the Application of Measures of Social and Psychological Rehabilitation. Articles 16 and 17 of this Law state that persons held in a general institution of social and psychological rehabilitation are under obligation to work.

The work of the above persons is organised within the institution. The institution administration has the right to allow persons with exemplary conduct, who are also conscientious workers, to work outside the institution.

Persons placed in a general social and psychological rehabilitation institution may only be involved in the voluntary work of cleaning the institution and improving their cultural and everyday living conditions. This work is usually performed by rota and during leisure hours. Its duration should not exceed 2 hours per week.

Persons held in a special institution of social and psychological rehabilitation are allowed to work.

It must be noted that the Provisional Law on Social and Psychological Rehabilitation is not so much in conflict with the Convention (international instruments provide for the right to imprison a person for a reason other than the commission of an offence) as the Constitution. Of course, the word "convicted person" may be given a broader interpretation compared to its definition in the Code of Criminal Procedure. However, the decision of the Constitutional Court on this issue would then become unpredictable. It is considered that we should approve the provision in the draft of the new law stating that "individuals held in institutions of social and psychological rehabilitation may work".

In Lithuania, there is still no law governing the legal status of persons detained under the Code of Criminal Procedure. The prepared draft of the Law on Detention on Remand provides that imprisoned persons may only work in the institution where they are being detained on remand provided that they give their consent thereto and with the permission of the investigating officer or of the court under whose jurisdiction the case is being heard. Imprisoned persons are paid according to the amount and quality of the work done. The draft of the Law also contains a list of the work and duties prisoners are prohibited from doing.

Attention should be paid to certain aspects which may create conditions for a violation of Article 4 of the Convention.

First of all, some laws of the Republic of Lithuania provide for the possibility of legally depriving a person of his or her liberty - of committing him or her to a mental institution (both in accordance with general procedures and under Article 59 of the Criminal Code) - or of placing a minor in a special school or home (Article 61 of the Criminal Code). However,

neither these nor other laws of the Republic of Lithuania define the legal status of such persons (i.e. whether or not they must work).

Conclusions and Proposals

In general, laws of the Republic of Lithuania are in compliance with the provisions of Article 4 of the Convention, except for one aspect which may give rise to serious problems after the ratification of the Convention. Here we refer to Articles $25^{(1)}$, 29, 46 and $47^{(1)}$ of the Criminal Code, in respect of which it is imperative to decide whether or not to oblige convicted prisoners to work. On the other hand, provisions of certain laws must be made more specific:

1. The Criminal Code or some other legal provisions must provide for the duty (or right) to work for minors placed in special corrective institutions for having committed an offence.

2. It is necessary to pass the draft Law on Detention on Remand.

3. It is necessary to draft a law on mental health care (assistance) which would deal with the legal status of persons committed to mental institutions and also the question of work.

4. It is necessary to prepare a draft of amendments to the Code of Administrative Offenses which would allow persons under arrest to work (not only physical labour) provided that they give their consent.

5. It is necessary to prepare a draft law on public works (the name is not fixed).

ARTICLE 5 OF THE CONVENTION

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation".

Article 5 of the Convention is devoted to the protection of personal rights to freedom and security. However, on the basis of the Strasbourg case-law, the personal right to security (inviolability) must be laid down in such a manner as to ensure the effectiveness of the basic principle that "no one shall arbitrarily be deprived of his liberty".

The first essential question to be answered when analysing this article is what constitutes deprivation of liberty. In order to decide whether a certain measure carried out constitutes deprivation of liberty, the Strasbourg institutions examine how it affects the person's freedom of movement, the period for which the restriction is prescribed and the general legal status of the person to whom the measure is applied. In this case, the

confinement of a person in prison, even though he or she might be able to freely move inside (or even though he or she may have the right to go outside), constitutes deprivation of liberty. It must be emphasised that the Strasbourg institutions investigate whether or not in each individual case a certain measure constitutes deprivation of liberty, because, as the Commission has pointed out, it is possible to determine that a measure is deprivation of liberty only after identifying its content and scope.

It is mainly when considered from this point of view that a night curfew or restrictions imposed in an order issued by the authorities prohibiting a certain person from leaving his or her place of residence, are not recognised as deprivation of liberty. Likewise, the Commission interprets a case in which a person must stay in a specified place and regularly present himself or herself at the police station or in which a person is prohibited from leaving the country as a restriction of the freedom of movement, which is enshrined in Article 2 of the Fourth Protocol.

House arrest under police supervision also falls within the scope of this Article of the Convention, since here contacts with the outside world are considerably limited. In the case of *Guzzardi v. Italy, 1980* the Court, taking into account the extent of such isolation from the outside world, described the compulsory holding of a person in one place as deprivation of liberty.

Various compulsory measures applied to the military present specific problems. In the case of *Engel v. Holland, 1976*, the Court unequivocally declared that in determining disciplinary rules for the armed forces, member States must act in compliance with the provisions of the Convention. Undoubtedly, in order to decide whether or not a certain disciplinary sanction constitutes deprivation of liberty, the circumstances of military life and different standards applied in respect of the military should be taken into account, since the liberty of persons serving in the army is already restricted when compared to civilian life. It is only recognised that a measure constitutes deprivation of liberty when a restriction imposed by means of a disciplinary sanction produces a substantial difference when compared to the general and normal conditions of military service.

In the above-mentioned *Engel* case the Court explained that military law distinguishes three forms of detention depending on the dangerous nature of the offence and the offender's rank: general (denying home leave when off duty), strict and close (locking the offender up in a cell-block). The Court decided that only close arrest can be regarded as a deprivation of liberty, because only in this case does a person not perform military service, i.e. he does not live a "normal" military life. As far as the military is concerned, one further problem needs to be considered, namely the right to impose disciplinary penalties. In this case, an officer in the military administration will most often impose deprivation of liberty. In such instances the Strasbourg institutions are of the opinion that the court may refer the case to the military authority or grant permission to apply a disciplinary penalty.

In such cases legal proceedings are held and the court transfers its powers to impose a punishment to the institution which has the right to impose and execute disciplinary penalties after the completion of the court trial. In doing so, the court provides a possibility of applying more lenient sanctions than those prescribed by the criminal law.

Alternative forms of proceedings which substitute court proceedings are also recognised in the practice of the Strasbourg institutions in acoordanco with the widespread criminal policy of many Council of Europe member States. However, such alternative proceedings require the prior or subsequent (explicit or implicit) consent of the accused. Various forms of summary proceedings, e.g. delivery of a summary judgment, are also not in violation of the Convention. There are no provisions that prohibit a disciplinary or

administrative body (not a court) from taking decisions on issues related to responsibility and imposing penalties, provided that the person has a possibility of availing himself of the right to a fair and open hearing, in accordance with the law.

In a case like that described above, it is necessary for a person who waives his right to a full hearing to agree to his case being tried in summary proceedings, in which sanctions may be imposed that are identical to those imposed at a full and open hearing. This condition should not be applied in cases where proceedings are substituted by summary proceedings (as happens in the case of a summary conviction). In the case of *Eggs v. Switzerland, 1984* the decision of the Commission confirmed this view. Since Swiss law does not provide for the possibility of a judicial review of the penalty of putting an officer into custody, which was imposed by a military officer, the Commission declared that there had been a breach of the Convention.

The conclusion can be drawn from this that the sanction of deprivation of liberty may also be imposed by non-judicial bodies. However, a court has the right to review the decision. The second important issue is the fact that a person may be deprived of his or her liberty only in compliance with the procedure provided for by law. This question needs to be elaborated from two points of view:

1) What is the procedure for the deprivation of liberty as provided by domestic law? In this case the decision-making procedure is relevant since the task of the Commission and the Court is to "determine the lawfulness of arrest and not the expediency of the arrest". For example, in the *Winterwerp v. the Netherlands, 1979* case the applicant stated that in his case formal violations of the Mentally Ill Persons Act were committed when it was decided to commit him to a psychiatric hospital. The commentary of the Court in this case ran as follows: "Whilst it is not normally the Court's task to review the observance of domestic law by the national authorities, it is otherwise in relation to matters where, as in the present case, the Convention refers directly back to that law; for in such matters disregard of the domestic law entails a breach of the Convention, with the consequence that the Court can and should exercise a certain power of review".

The observance of domestic laws is one of the state's obligations to its citizens. It is impossible to correct, on the basis of Article 5 of the Convention, procedural mistakes of having *ex post facto* deprived a person of his or her liberty.

2) The question of whether the deprivation of liberty procedure is impartial and fair. In the above-mentioned *Winterwerp* case the Court pointed out that domestic law must correspond to the grounds and principles laid down in the Convention. Here the quality of the law is important for the Strasbourg institutions. In addition, the Court has ruled that the domestic law must not only be accessible to all persons but its wording must also be sufficiently accurate, i.e. each person must have the possibility of regulating his or her behaviour in accordance with the requirements of the law. Moreover, the domestic law must meet the objective criteria of impartiality and fairness as laid down in the Convention.

Before carrying out an analysis on the grounds for the deprivation of liberty detailed in the Convention, it is necessary to mention the question of lawfulness, which means that the authorities must observe the domestic laws. In addition, there must not be any abuse of authority in adopting a decision, since Article 18 of the Convention points out that restrictions applied to freedoms "shall not be applied for any purposes other than those for which they have been prescribed".

The issue of the abuse of powers came to the fore in the *Bozano v. France, 1986* case. The person was convicted *in absentia* of child abduction and murder and sentenced to

life imprisonment. He was later arrested in France without legal basis. The French courts extradited him to Switzerland, although trial *in absentia* is incompatible with French public policy (*ordre public*). The Swiss courts deported him to Italy, where he began to serve his sentence. The Court decided that when they arrested the person, the French courts had acted in contravention of the requirements of security of person and methods of arrest established in Article 5 of the Convention.

Article 5 Paragraph 1 sub-paragraph a

The first ground for deprivation of liberty mentioned in Article 5 is the lawful detention of a person after his or her conviction by a court. This includes cases in which a person is imprisoned after the sentence has been passed, but before it comes into effect or before an appeal has been heard. This ground may give rise to several problems. First of all, deprivation of liberty is possible not only as a result of the execution of a sentence but also as a direct result of a conviction. This principle evolves from the *Van Droogenbroek v. Belgium, 1982* case, in which the applicant had been sentenced to two years' imprisonment and, after the expiry of the sentence, to being placed for a term of 10 years at the Government's disposal. The sentence was passed in accordance with Belgian law, the purpose of which is to protect society from recidivists and to ensure the latter's rehabilitation. After two years in prison, the applicant was imprisoned under the executive order. The object of the dispute was whether these periods of detention occurred after the conviction and whether they fell within the ambit of sub-paragraph (a) of Article 5 paragraph 1 of the Convention.

The Court held that the detention periods actually followed and depended upon the original (first) conviction. The second problem that arose was the question of whether there was a causal link between the subsequent detention and the original (first) conviction. The principle underlying the decision evolves from the case of *Weeks v. the UK, 1987*. The applicant was sentenced to life imprisonment but later released under an administrative order. He was subsequently rearrested. The applicant insisted that under Article 5 paragraph 1 sub-paragraph (a), there was no justification for returning him to prison. The Court considered that the person's release and subsequent return to prison was possible only if there were new grounds for detaining him. However, this does not apply if there is a specified period within which the person may be returned to prison. This is precisely what happened in this case, since there was a link between returning the applicant to prison and the original judgment. It should be noted in this case, that when a person is returned to prison in pursuit of goals which run counter to those pursued by the court in passing the original sentence, the subsequent reimprisonment should be treated as arbitrary deprivation of liberty and, consequently, as a breach of Article 5 of the Convention.

The third problem connected with the above-mentioned ground for deprivation of liberty is the changing of a penalty imposed by an administrative institution to a term of imprisonment (an action carried out on the orders of, or sanctioned by, a court). It should be emphasised that compliance with the provisions of the Convention is possible only when domestic laws provide that administrative violations, which are treated as "criminal offenses" following the practice of the Strasbourg institutions, shall be heard in the court to which the provisions of Article 6 of the Convention apply. A judicial review of the "lawfulness" of a decision to change a penalty to detention does not "transform" such a decision of the administrative body into a "conviction by a competent court." Detention carried out in the above manner is not lawful deprivation of liberty within the meaning of Article 5 paragraph 1 of the Convention.

A question may arise as to whether the imposition of detention for failure to pay fines imposed by an administrative authority may be interpreted as a rule defined by Article 5 paragraph 1 sub-paragraph (b), according to which deprivation of liberty may be imposed only

"in order to secure the fulfilment of any obligation prescribed by law". This provision of the Convention has been subjected to frequent criticism, since its vague wording may create preconditions for legal insecurity and arbitrary interpretation. The Strasbourg institutions place a restrictive interpretation on this sub-paragraph, so that it does not legalise deprivation of liberty as a sanction (this includes cases of administrative detention).

To sum up, it is possible to assert that not a single ground for detention as provided by Article 5 of the Convention legalises the changing of a penalty imposed by an administrative authority to detention, even if the court determines the formal lawfulness of such a change.

The fourth problem relates to cases investigated by the Strasbourg institutions concerning the execution of a court sentence of deprivation of liberty when the deprivation of liberty has been imposed by administrative authorities. The Commission and the Court have had to give their opinion on whether in these cases deprivation of liberty really falls within the scope of Article 5 paragraph 1 sub-paragraph (a). In other words, whether or not the implementation of the sanctions imposed by a court decision signifies "lawful detention of a person after conviction by a competent court".

According to the Commission's explanation, it is acceptable for a death sentence passed by a court to be commuted to life imprisonment by administrative authorities and not by a court, but if administrative authorities change a penalty to deprivation of liberty, this, to quote Peukert and Hungarian experts, violates the Convention. In the above-mentioned *Van Droogenbroeck* case the Court considered a similar problem.

Article 5 Paragraph 1 sub-paragraph b

We now come to the second ground for deprivation of liberty mentioned in Article 5 - lawful detention or arrest of a person when there has been no conviction but the court has issued a lawful order for the purpose of securing the fulfilment of an obligation prescribed by law. In this case detention is possible if there are obstructions to the implementation of certain decisions of the court. Detention is permitted in the following cases:

- when it is necessary to carry out blood tests;
- when a psychiatric report is required concerning the person detained;
- when a fine must be paid;
- in other cases in which the person refuses voluntarily to perform certain actions;
- in order to secure the fulfilment of obligations prescribed by law.

Moreover, it must be noted that Article 1 of the Fourth Protocol to the Convention prohibits deprivation of liberty on the ground of inability to fulfil a contractual obligation. The Court has also pointed out that detention for the purpose of securing the fulfilment of obligations prescribed by law embraces a rather wide sphere and may be used, for example, for justifying the administrative detention of persons in order that legal obligations are fulfilled.

The following requirements are laid down for such a case:

a) the obligation must be of a "definite and specific nature". This follows from the case of *Lawless v. Ireland, 1961*, in which objections were raised with regard to Ireland's anti-terrorist law, which permits the detention of persons who are presumed to be involved in "an activity detrimental to the security of the State". The applicant had been kept in detention for five months. The Irish authorities argued that this was justifiable given a person's obligation not to commit crimes against public order and state security. In the opinion of the Court, such detention is not related to any specific

obligation, so that it is not in compliance with Article 5 paragraph 1 sub-paragraph (b) of the Convention.

The second requirement:

b) is the necessity to take into account provisions of domestic law. In the case of *McVeigh, O'Neill and Evans v. the UK, 1981*, for example, once again the obligation "to submit to further examination", as prescribed by the anti-terrorist laws, was contested. Three applicants had been detained for 45 hours on their entry into the United Kingdom. The Commission established that they had had "a definite and specific obligation" to provide the officers with information on the reasons for their arrival and status, and not, as the applicants insisted, a simple obligation to comply with the detention order. A certain importance was also attached to the fact that the obligation referred to above arises only in the presence of certain circumstances, namely, "when crossing a geographical or political State border", and that the purpose of the investigation had been strictly defined - to combat organised terrorism.

The final requirement:

c) is that a person must be aware of the necessity to fulfil a certain obligation before he or she is detained. The case of *Ciulla v. Italy, 1989* might be cited as an example in this connection. The Italian authorities explained that the arrest and detention of the applicant had been necessary in order to secure the fulfilment of his obligation to reside in a certain district. This order, however, had been introduced after the applicant's detention. The Court ruled that Article 5 paragraph 1 subparagraph (b) may not be used to justify such an instance of deprivation of liberty.

Article 5 Paragraph 1 sub-paragraph c

The third ground for the lawful arrest or detention of a person is the reasonable suspicion of the competent legal authorities and when it is necessary to prevent that person committing offenses in future and fleeing from the law enforcement bodies.

This sub-paragraph governs a person's detention before the commencement of the judicial investigation of the case. It should be analysed alongside Article 5 paragraph 3 of the Convention, which guarantees the arrested or detained person the right to have his or her case immediately referred to a judge or other authorised officer and dealt with within a reasonable time. The court, when deciding on the issue of the lawfulness of the arrest, must also act in accordance with this Article, which guarantees full personal protection from the arbitrariness of law enforcement bodies in depriving a person of his or her liberty.

Regardless of which of the above-specified grounds is the basis for a person being detained, his or her detention must in any case be authorised by a court or officer authorised by law. However, this does not mean that if the person has been detained without a court judgment or prior to the investigation of his or her case, there has been no reasonable ground to restrict his or her liberty and, consequently, there has been a breach of Article 5 paragraph 1 sub-paragraph (c). However, if there are no grounds for suspecting a person of having committed an offence, he or she may no longer be detained for this reason. Article 5 paragraph 1 sub-paragraph (c) of the Convention does not contain a full list of grounds and, therefore, may not be considered comprehensive and may not be relied upon in detaining a person for the purpose of his or her possible extradition or seeking to obtain information.

Whether the ground is reasonable and sufficient depends on specific facts. When investigating the issue of a person's detention on the ground of suspicion, the authority must

ascertain whether or not the act, of which the person is suspected, is treated as criminal under the domestic law. The question frequently arises as to how to define reasonable and sufficient grounds for suspicion. In the *Brogan and Others v. the UK, 1988* case, four persons were detained on suspicion of having committed acts of terrorism. Proceedings were not instituted against them, and they therefore challenged the lawfulness of the detention, arguing that they had been suspected without having their crimes specified. The Court dismissed the application, emphasising that they had been detained in order to confirm or deny the suspicion they had aroused. The Court decision was in conformity with Article 5 paragraph 1 sub-paragraph (c) of the Convention, which does not state that when arresting or detaining a person the police must necessarily have proof in order to bring charges.

The second ground for the detention of a person specified in this sub-paragraph is crime prevention. In most cases crime prevention is implemented through administrative proceedings.

Domestic laws, especially in those states where political terrorism or organised crime are spreading rapidly, treat crime prevention as grounds for the detention of persons. It must be noted that the Strasbourg institutions do not recognise general prevention directed against a person or a group of persons as grounds for the detention of a person in order to prevent possible offenses. In the implementation of Italy's criminal laws, dealing with the possibility of detaining a person in order to "protect the public and public morals", a person was deprived of liberty in the *Ciulla* case. The person was suspected of links with the structures of organised crime, defined as crime by the laws of Italy. The respondent in the case - the Government of Italy - argued that the person's detention was lawful because a real threat existed that that person would commit crimes in future. The court dismissed their arguments since in that case the application of Article 5 paragraph 1 sub-paragraph (c) of the Convention was inadmissible. As the charges had been pressed against the person, the application of preventive detention was inadmissible, the more so that the charge was based on suspicion of the commission of a crime. The Court did not underestimate the importance of Italy's struggle against the Mafia, but emphasised repeatedly that "the list of grounds for the detention of a person is exhaustive and must be interpreted strictly".

This provision makes it possible for law enforcement bodies to detain a person who, it is reasonably considered, will flee in order to escape punishment. The basic criteria for determining whether or not a person may attempt to flee from the prosecution by the law enforcement bodies are the possibility of a heavy sentence, the absence of effective communications between different regions, etc.

Article 5 Paragraph 1 sub-paragraph d

The fourth ground for lawful detention set out in Article 5 is the lawful detention of a minor for the purpose of educational supervision or for the purpose of bringing him before the competent legal authority. Each person, regardless of his or her age has the right to the guarantees enshrined in Article 5 of the Convention. Without elaboration the wording "detention for the purpose of bringing him before the competent legal authority" provides for wider possibilities of carrying out a criminal prosecution whilst making it possible at the same time to employ special procedures in respect of minors.

The Commission and the Court scrupulously examine every decision to deprive a minor of his or her liberty. In the case of *Bouamar v. Belgium, 1988* law enforcement bodies placed a minor in a cell of a remand prison for adults. Under the laws of Belgium a minor may be placed in a prison for adults if it is materially impossible to place him or her in an appropriate institution for juveniles. The respondent in the case - the Government of Belgium - argued that the minor had been deprived of his liberty for the purpose of educational

supervision. However, the Court established that the person had been detained in full isolation and that there had been a lack of adequately trained personnel and special educational programmes. Therefore the Court recognised that the ground for the deprivation of liberty did not correspond to that specified in Article 5 paragraph 1 sub-paragraph (d) of the Convention. The Court also laid down that every placement of a minor in a prison must be in keeping with the purpose of the measure and that the place of imprisonment (open or closed) must be adequately prepared.

Article 5 Paragraph 1 sub-paragraph e

The fifth ground for the deprivation of liberty is the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.

For the welfare of society and in the interests of the persons themselves, the deprivation of liberty of the above mentioned persons is regulated by Article 5 paragraph 1 (e) of the Convention. The Court has not dealt with cases of these categories, except for those relating to the detention of mentally ill persons and vagrants.

The Court has not provided a clear definition of the notion "unsound mind", since this is directly connected with the relation between an individual's and society's attitudes and the conception of reality, and there is also no established opinion generally held by psychiatrists on this issue. For this reason, the Court is especially interested in the rules on the application of this law. On the basis of the decision in the *Winterwerp* case, the Court points out three basic conditions for the detention of a person on these grounds. First of all, there must be an objective finding of medical experts on the person's mental capacity. The court must then decide on the basis of that finding the expediency of the person's detention. After that, the detained person must be subjected to permanent observation, and if it is not considered necessary to keep him or her in detention any longer, the court will decide whether to release him or her.

In deciding a case of this type, the Court will, in each case, closely examine the compliance with the three above-mentioned conditions.

A special regime of imprisonment to which a person is subjected must be based on the lawfully established fact of the person being of unsound mind. When a person has been released and transferred to a medical institution, appropriate conditions must be provided for his treatment. Attention must be paid to several additional aspects of this ground for detention. First of all, in the case-law of the Strasbourg institutions, acts of persons of unsound mind, for which a punishment of deprivation of liberty is imposed, are not treated as being of exceptional significance. In this case, the principal question is that of mental disorder or, to be more exact, recognising that a person is of unsound mind. This was emphasised in the *Luberti v. Italy 1984* case and the Court, having given up its former indecisive stand, specified that sub-paragraph (a) of Article 5 paragraph 1 of the Convention - the "lawful detention of a person after conviction by a competent court" - is not applicable in cases in which a person must be acquitted by reason of mental illness, regardless of the fact that upon his or her acquittal a decision is taken to place him or her in a psychiatric isolation ward. (Comparing Articles 6 and 7 of the Convention with Article 5, the Court came to the conclusion that it is possible to speak about a conviction only if, under national laws, the commission of a criminal offence has actually been established, although this depends on a person actually being convicted, which may not be done in the case of mentally unsound persons).

Secondly, there are specific requirements relating to this ground for detention that have to do with the guarantees enshrined in Article 5 paragraph 4. The Strasbourg institutions have

laid down that the court must carry out a review, but this does not mean that the proceedings may be conducted only by an "ordinary" court which forms part of the judicial system. For example, the Commission treats as a court within the meaning of Article 5 paragraph 4 of the Convention a body set up specially for the purpose of taking decisions on the further detention of persons of unsound mind, with the defence lawyer or physician acting as a consultant and the chairman of the body as a judge.

A person who has been arrested for the purpose of bringing him or her before a court has the right to request that the court should have effective authorisation which means that the role of the court should not be merely formal. A judicial review, whereby it is simply being attempted to check compliance with procedural and formal orders (instructions), does not signify effective judicial measures and, consequently, the requirements laid down in Article 5 paragraph 4 of the Convention are not met.

The court must promptly adopt a decision concerning the lawfulness of the detention. However, depending on the ground of detention the acceptable duration may differ. For this reason, the Strasbourg institutions have not yet taken a common stand on the issue. Therefore it is advisable to orient oneself on the judgment given against Norway, in which the period of eight weeks from the day of detention until the commencement of the proceedings to review the judgment was treated as an excessively long period and, therefore, a violation of the Convention.

The proceedings must not necessarily meet in every detail all the requirements laid down in Article 6 of the Convention. However, they must provide all the guarantees prescribed for detention of this type and give the person concerned opportunity to present his or her arguments prior to being put in detention. As the Court indicated in the *Winterwerp* case, the specific position of persons of unsound mind requires that they should have access to a court and be heard either in person or, where necessary, through some form of representation. In order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of attending the judicial proceedings, special procedural guarantees must be enshrined in the domestic legal system. On the basis of the complaint lodged against Belgium, Hungary put forward the following idea: a person's right to present in his or her own name an expert analysis of the official findings of a medical expert is also obligatory for the proceedings to conduct a fair judicial review provided for by Article 5 paragraph 4 of the Convention.

This sub-paragraph also mentions vagrants. The Convention and judicial practice do not define the notion "vagrant". This is left to domestic legislation. In the practice of the courts, the term is understood to have a general meaning. In the case of *De Wilde, Ooms and Versyp v. Belgium, 1971* the persons detained on this ground were characterised as "having no fixed abode, no means of subsistence and no regular trade or profession". The Court established that such a definition corresponded to the general meaning of the term "vagrant", so that sub-paragraph (e) of Article 5 paragraph 1 was applicable. However, the term may be abused. In the *Guzzardi* case the Government of Italy, which had detained members of a criminal organisation, defined them as "vagrants" and applied this ground for detention, arguing that they had no permanent means of subsistence and occupation. The Court established that the way of life of the detained persons did not correspond to the definition of the term "vagrant" used in the Convention. A special confinement regime which corresponds to the ground of detention must be applied to the persons who are detained on this ground.

Article 5 Paragraph 1 sub-paragraph f

The last ground for detention set out in the Convention is the lawful arrest or detention of a person to prevent his or her unauthorised entry into the country or for the purpose of his or her deportation or extradition.

The Convention does not grant a person the right freely to choose his or her place of residence in any country he or she wishes, and it gives no guarantees that a person will not be subjected to deportation or extradition. However, expulsion from a country or the denial of a permit to enter a country may give rise to disputes based on other articles of the Convention. A person may be detained only on the grounds specified above. The Strasbourg institutions rely on them when they examine whether the ground for detention as defined by the Convention actually exists (decision concerning extradition or deportation). However, the quality of the rule of domestic law (i.e. to what extent it punishes any arbitrary application) that serves as a ground for deportation or extradition is not being examined. Nor is lawfulness of extradition or deportation. Therefore, Hungary has no fears that it will have to defend itself in Strasbourg merely on the grounds of the provision of Decree No. 19 of 1982, which lays down that "a foreign national whose presence in the territory of the Republic of Hungary poses a threat to the interests of the State or State security may be expelled." This is confirmed in the *Zamir v. the UK, Appl. No. 9174/80* case (1985), in which the Commission stated that it is only competent to establish whether or not a person's detention has been effected with a view to deportation and whether this has been carried out in compliance with the domestic law.

It must also be kept in mind that deprivation of liberty effected with a view to extradition is a separate ground for detention, so that the specific guarantees enshrined in Article 5 paragraph 3 of the Convention will not be applicable even in cases where the person's detention is effected for the purpose of "bringing him before a competent legal authority on a reasonable suspicion of having committed an offence".

The procedure of a judicial decision to bring the detained person before a court, as prescribed by Article 5 paragraph 4 of the Convention, is also applied in the case of deprivation of liberty pending extradition or deportation, and the court must speedily decide on the lawfulness of the detention. Hungary is of the opinion that in practice the Strasbourg institutions consider that detention for no longer than 144 hours pending deportation does not constitute deprivation of liberty for a short term, and in such an instance it is permissible not to apply the judicial review proceedings provided for by Article 5 paragraph 4 of the Convention.

On the other hand, detention pending extradition may be longer than other short-term detention, since it is conditioned by the peculiarities of extradition. Here mention should be made of the case of *Kolompar v. Belgium, 1992.* In 1983, Italy contacted the Belgian law enforcement institutions and requested the applicant's extradition for offenses committed in Italy. In 1984 the applicant was detained pending extradition, and in 1985 he was also sentenced to one year's imprisonment for an offence committed in Belgium. In 1987, the applicant was extradited to Italy. The Court of Human Rights, having examined all the circumstances of the case, established that there had been no breach of Article 5 paragraphs 1 and 4 of the Convention. Mr. Kolompar complained that he had been detained in prison in Belgium for 2 years and 8 months pending extradition and that this was not in conformity with Article 5 paragraph 4 of the Convention. The Court determined that the term of detention had been conditioned by the legal peculiarities of the extradition procedure as well as by the obstructive behaviour of the offender.

We shall now proceed to analyse the cases of deprivation of liberty mentioned in the laws of the Republic of Lithuania. They will be divided into those that come under:

1) the oriminal law;
2) the law relating to criminal procedure; and
3) administrative law.

In criminal law there are several cases in which a person can be deprived of his or her liberty. First of all it is necessary to mention long-term deprivation of liberty (Article 25 of the Criminal Code).

Long-term deprivation of liberty is defined as imprisonment for between three and ten years for especially serious crimes, for crimes with especially grave consequences and for especially dangerous recidivists. In the cases dealt with by this Code, imprisonment may be for a term not exceeding 15 years.

Moreover, Article 24 of the Criminal Code provides that "the court sentencing a person to death may commute the sentence to life imprisonment. The death penalty may also be commuted to life imprisonment by granting a pardon". Persons given a life sentence are kept in prison.

In addition to the above-mentioned penalties, the Criminal Code also provides for the placement of a soldier with a disciplinary battalion or in an educational-labour institution. Servicemen may be placed with the disciplinary battalion in the cases provided for by law for between three months and two years, as well as in cases where the court, taking into account the circumstances of the case and the personality of the convicted individual, deems it expedient to punish him by placing him with disciplinary battalion for up to three years instead of depriving him of his liberty for the said term.

An offender may be punished by being placed in an educational-labour institution, the sentence for which being for a period of months or up to two years.

Instead of imposing a period of imprisonment of between one and two years for vagrancy or a similarly parasitic way of life, for up to one year for refusing to pay alimony or child support or for up to one year for a violation of passport regulations, the court, taking into account the circumstances of the case and the personality of the accused, may sentence him to the same term in an educational-labour institution.

It must be borne in mind that Article 29 of the Criminal Code provides that for servicemen corrective labour without deprivation of liberty shall be substituted by a period in the guard-house.

If a person, who has been sentenced to a term of corrective labour without deprivation of liberty and is to serve the sentence in the place of his employment, avoids serving the sentence, the court may, on the recommendation of the internal affairs body or at the request of a public organisation or the staff of the place of employment, send that person to serve his sentence in another place chosen by the bodies in charge of corrective labour. This place must be in the district of the convicted person's place of residence.

If a person who has been sentenced to corrective labour without deprivation of liberty persistently avoids serving his sentence, the court may change the unserved term of corrective labour to imprisonment for the unserved term.

In addition to the above-mentioned cases concerning criminal penalties, the Criminal Code of the Republic of Lithuania provides for compulsory medical measures in respect of mentally ill persons and compulsory educative measures in respect of minors. Article 59 of the Criminal Code provides for the following measures to be applied in respect of mentally sick persons and carried out by health care bodies:

1) placement in a psychiatric hospital under general observation;

2) placement in a psychiatric hospital under intensified observation; and

3) placement in a psychiatric hospital under strict observation.

The court may order a placement in a psychiatric hospital under general observation in respect of a mentally ill person who, by reason of his or her mental state and the nature of the dangerous act committed, must be confined in a hospital and given compulsory treatment.

The court may order placement in a psychiatric hospital under intensified observation in respect of a mentally ill person who has committed a criminal act not related to an attempt at a person's life and who, as a result of his mental condition, poses no threat to society but who, nevertheless, must be committed to hospital and given treatment under intensified observation conditions.

The court may order placement in a psychiatric hospital under strict observation in respect of a mentally ill person who, by reason of his or her mental condition and the nature of the dangerous act committed poses, an especially serious threat to society and who must be committed to a hospital and given treatment under the conditions of strict observation.

Persons committed to psychiatric hospitals and kept under intensified or strict observation are kept in such a way as to prevent their committing another dangerous act.

Compulsory medical measures are applied until the person recovers or no longer poses a threat to society. The application of the measures is terminated or their nature is changed by the court in accordance with the findings of the medical institution.

Persons who fall ill with a chronic mental disease after having committed a crime and in respect of whom compulsory medical measures are applied may be subject to punishment upon recovery if the terms provided by Articles 49 and 50 of this Code have not expired from the date of the crime or the conviction.

If a penalty is imposed on persons specified in subsection 7 of this Article, the period in which compulsory medical measures are carried out shall be included in the period of deprivation of liberty.

If there is no necessity to apply compulsory medical measures with respect to a person, and if the court exempts him or her from the application of such measures, he or she may be placed by the court in the care of relatives or other persons and, at the same time, be put under medical observation.

Article 61 paragraph 1 subsections 8 and 9 and paragraph 2 provides for:

"the placement of minors in a special medical or educational or corrective training institution for children and juveniles;

and the placement of minors in a corrective training institution for juveniles.

A compulsory placement in a special medical, educational or corrective training institution may be imposed for the term required for reforming the offender, but only until that person becomes 18 years of age. If it proves necessary to continue the educative process, the term may be prolonged until the offender reaches the age of 20".

It is considered that the provisions of the Criminal Code correspond to the requirements of the Convention and, bearing in mind the fact that in future only a few

penalties will remain (deprivation of liberty, arrest, corrective labour and fines), a more detailed analysis is superfluous. Moreover, it is hardly necessary to regulate in criminal statutes the detailed procedure for placing incapable persons in special hospitals. In this case it is advisable to provide for general principles and for procedures to implement them, taking into account the requirements of the Strasbourg institutions, to be specified in greater detail in a special law.

Under the Code of Administrative Offenses, arrest may be imposed. Administrative arrest is prescribed and imposed for up to 15 days only in exceptional cases for certain types of administrative offenses. Administrative arrest is imposed by a district court.

Administrative arrest may not be imposed on pregnant women, women with children up to 12 years of age, minors or group 1 and 2 invalids.

Moreover, if a person avoids corrective labour, the unserved term may be changed to administrative arrest by order of a district judge, counting one day of arrest for three days of corrective labour, but for no longer than 15 days.

The placement of a person in a social and psychological rehabilitation institution for a term of up to one year for alcohol, drugs or toxic substance abuse also falls under administrative law.

Article 5 Paragraph 2

Article 5 paragraph 2 of the Convention provides for a procedural guarantee of lawful arrest or detention - "informed promptly in a language which he understands of the reasons for his arrest and of any charge against him".

It must be noted that the above provision is applied in all cases of paragraph 1, except those covered by sub-paragraph c. Of great importance in this case are the time, method and contents of such notification. The legal ground for detention and the main aspects of the lawfulness of such a decision must be presented in simple language ("not legal jargon") understandable to the detained person. This need not include the grounds for suspicion of having committed an offence.

In the Commission's opinion, a person arrested on suspicion of having committed an offence must also be asked whether or not he or she pleads guilty to the offence. This requirement should not necessarily be fulfilled promptly, since the suspect may not be in a position to obtain the required information from, or have it sent by, his or her defence lawyer. He or she must be informed promptly, but this does not mean at the moment of arrest (for example, in the case of *Fox, Campbell and Hartly v. the UK 1990* the Court did not find any violation of the requirement "promptly" when during the arrest the person was given minimum information concerning the ground for his arrest with the rest of the facts being provided only after several hours). In another case (*Ireland v. the UK 1978*) the Court recognised as a violation the fact that "the detained persons were not informed of the ground for the deprivation of liberty - they were merely notified that this was being effected pursuant to the effective laws." In the case of *Van der Leer v. Holland, 1990* the applicant was committed to a hospital merely by reason of an accident and kept there for 10 days. A breach of the Convention was established, since committal to a hospital is a voluntary matter and was not explained to the applicant in this case.

Thus, before beginning to analyse from this point of view the laws of the Republic of Lithuania, it is necessary to consider how detention is carried out in practice and how the provisions of the Convention might be violated.

Detention is regulated by the statutes of several branches of law. Firstly, there is administrative detention. Under the Code of Administrative Offenses, a report is drawn up in which the following are indicated: the time and place in which it is drawn up; official duties and full name of the person who draws it up; particulars of the detained person; time and place of and grounds for detention. The report shall be signed by the officer who draws it up and by the detained person. If the detained person signs it, a note is made in it to this effect.

At the request of the person detained for an administrative offence, his or her relatives, employer or educational institution are notified of his or her whereabouts. In the case of the detention of a minor it is necessary to inform the parent or persons *in loco parentis.*

A person who has committed an administrative offence may be detained only by the bodies (or officers) duly authorised under the laws of the Republic of Lithuania:

1) the police may detain persons for acts of hooliganism; deliberate disregard of the lawful orders of a police officer; illegal operations involving foreign currency and payment documents; profiteering on a small scale; consumption of alcoholic beverages in public places or drunkenness in a public place, thereby committing a violation of human dignity and public morals; in cases where there is reason to believe that the person is engaging in prostitution; a violation of road traffic regulations; a violation of regulations governing hunting, fishing and the protection of fish supplies; violations of other laws regulating the protection of wildlife, as well as other cases directly governed by other laws of the Republic of Lithuania;

2) officers of the border protection police and customs may detain persons for violations of border regulations, of the procedure for passing through the checkpoints at the border of the Republic of Lithuania, or the customs regulations;

3) a senior officer at the site of an object under protection may detain persons for violations of law connected with attempts to commit offenses towards the protected objects or other state or public property;

4) officers of places of detention and remand facilities, and social and psychological rehabilitation institutions may detain persons for handing over or attempting to hand over substances, articles and objects prohibited under the regulations.

The administrative detention of a person guilty of an administrative offence may be for no longer than three hours, except in cases where the law lays down other terms of administrative detention.

Persons who violate border regulations or the procedure for passing through checkpoints at the border of the Republic of Lithuania may be detained for up to three hours in order for a report to be drawn up. In case it is necessary to establish the person's identity and ascertain the circumstances of the violation, this may be extended by up to three days, with written notice being given to the prosecutor within 24 hours from the moment of detention, or for up to 10 days with a prosecutor's warrant issued by the prosecutor if the offenders have no documents confirming their identity.

Persons who commit minor acts of hooliganism or acts of profiteering on a small scale may be kept under detention until the case, within the time limits prescribed by law, is examined by a local district court judge or the police commissioner.

The term of administrative detention is calculated from the moment the person is brought in for the drawing up of the report and, in case of a drunken person, from the moment he or she is sober.

In addition to administrative detention the Code of Administrative offenses provides for the offender to be brought before the competent authority or police station.

A police officer may bring the offender to the police station or the local authority for the report on the administrative violation to be drawn up when this cannot be done at the place of the commission of the offence and the report is necessary.

In the case of a violation of road traffic regulations, road safety rules, regulations for ensuring the safety of goods in transit, fire prevention regulations, rules of hygiene and rules for the prevention of epidemics in transport, a duly authorised person may bring the offender to the police station if he or she has no documents confirming his or her identity and there are no witnesses who can provide the required information about him or her.

In the event of a violation of forestry rules, or regulations pertaining to hunting or fishing, forestry or national parks, reserve employees, state environmental protection inspectors, as well as other persons duly authorised under the laws of the Republic of Lithuania, may take the offender to the police station or local authority for a report to be drawn up if the offender's identity cannot be established at the place of the violation.

In the event of a violation related to an attempt to damage or destroy objects under protection or other state or public property, the offender may be taken by the paramilitary guards to the paramilitary guard station or to a police station for the purpose of preventing the violation, establishing the offender's identity and drawing up a report of the offence.

The offender must be promptly taken to the local authority or police station but may not be detained for more than one hour.

The detention for up to 72 hours of persons in respect of whom a placement in social and psychological rehabilitation institutions may be applicable but who refuse to appear before a court may be ordered under the above-mentioned regulations. An analogous rule is established for persons who leave the social and psychological rehabilitation institution without permission or fail to return to it in time.

The Code of Criminal Procedure provides for several cases of restriction of liberty - placing a person under arrest, preventive detention, detention on remand, and the placement of the accused in a medical facility for continuous observation or tests when this is required for a forensic medical or psychiatric examination.

Arrest as a measure of detention on remand is only possible following a court order, the decision of a judge or a warrant issued by the prosecutor in cases of crimes punishable under the law by deprivation of liberty for more than one year. In exceptional cases, detention on remand may also be applied in cases concerning crimes punishable under law by deprivation of liberty for less than a year's term. Arrest as a measure of remand is applicable after taking into account the circumstances set forth in Article 98 of the Code of Criminal Procedure.

In cases relating to crimes provided for by Articles 62-70, 75, 78 (crimes against the state), Article 90 paragraphs 3 and 4, Article 91 paragraphs 3 and 4, Article 92, Article 93 paragraph 3, Article 94 paragraph 3, Article 95, Article 99 paragraph 2 (crimes against state property), Articles 104, 105, 111, 118, 131[1] (crimes against the person), Article 144 paragraph 1, Article 146 paragraphs 3 and 4, Article 147 paragraphs 3 and 4, Article 148, Article 153 paragraph 2 (crimes against personal property), Articles 180, 180[1], 181 (malfeasance), Article 203[1], Article 232[1] paragraphs 2, 3 and 4, Article 232[4], Article 232[5] paragraph 2, Article 249[2], Article 250 paragraph 3, Article 252 sub-paragraph (c), Article 253 sub-paragraph (c),

Article 254 sub-paragraphs (b) and (c), Article 255 sub-paragraph (c), Article 256, Article 260 sub-paragraphs (b) and (d), Articles 261, 262, Article 263 sub-paragraph (b), Article 265 sub-paragraphs (b) and (c), Article 269 sub-paragraph (f), Article 271 sub-paragraph (d), Article 274 sub-paragraph (c) Article 276 sub-paragraph (b), Articles 277, 278, Article 279 sub-paragraph (b), Articles 280 and 281 (military crimes). Arrest as a measure of detention on remand may be applied merely because of the dangerous nature of the crime.

The arrest order must state the specific circumstances which served as grounds for the application of this measure.

Before deciding to issue the arrest warrant, the prosecutor must familiarise himself in detail with the entire material which gives ground for arrest and, if necessary, question the suspect or accused.

The right to issue the arrest warrant is vested in the Prosecutor General of the Republic of Lithuania, his deputies, district and city prosecutors, as well as military, transport and other prosecutors acting as district or city prosecutors.

During the investigation of a case, detention may not last longer than two months. If there are sufficient grounds, the term may be extended by the district (city) chief prosecutor. If the case is particularly complex, the Prosecutor General of the Republic of Lithuania or his deputies may extend the term of detention for up to nine months. In exceptional cases the Prosecutor General of the Republic of Lithuania may prolong the term of detention for up to 18 months.

When the court remits a case for reinvestigation when the term of detention of the accused has expired but, given the circumstances of the case, the measure of remand (arrest) may not be changed, the prosecutor who supervises the investigation may extend the term of detention for no more than one month after the moment he receives the case. This term is further extended, in accordance with established procedure and within the scope provided for by paragraph 1 of this Article, taking into account the length of the period the accused was kept under arrest until the court remitted the case.

The procedure and conditions of arrest as provided by the Code of Criminal Procedure violates numerous requirements of the Convention:

a) sub-paragraph (c) of Article 5 paragraph 1 refers to "lawful arrest", which should be understood as arrest following a judge's decision on the issue. Arrest (detention) without a judge's decision may therefore be lawful only when the person is arrested at the place of the crime or detained by prosecuting him or her immediately after the commission of the crime - in Lithuania the majority of arrest warrants are issued by the prosecutor who, as an official performing the function of prosecuting an offender, may not, under the case-law of the Court of Human Rights, be considered "an official performing judicial functions". This conclusion may be drawn from the case of *Brincat v. Italy, 1992*. The Court pointed out that "the prosecutor did not adhere to the principle of impartiality which requires that he, having issued the arrest warrant, should no longer participate in the case as public prosecutor, and at the same time he violated Article 5 of the Convention". (A similar case was the case of *Skoogström v. Sweden 1984*).

b) a breach of Article 5 paragraph 3 of the Convention which requires bringing the arrested person before a judge, because under the Lithuanian system, arrested persons are not brought before a judge or any other official. And although Article 104 paragraph 4 of the Code of Criminal Procedure lays down a rule to the effect that "while deciding the question concerning the issue of the arrest warrant, the prosecutor must familiarise himself in detail with

the entire material which gives ground for arrest and, if necessary, himself question the suspect or the accused", it is obvious that this rule may in no way be considered to be in compliance with Article 5 of the Convention. It would sound more convincing if it were simply called a cynical rule: a person is often detained on remand for many months, whereas the prosecutor (not the judge) in deciding on such an important issue, may even find no time to question the person himself (which in practice quite often happens).

Article 5 Paragraph 3

Article 20 paragraph 3 of the Constitution of the Republic of Lithuania prescribes that a detained person must be brought before court within 48 hours (the Convention requires that he should be brought before a judge "promptly"). This constitutional rule is incomplete, since it refers only to the bringing before a court of persons arrested *in flagrante delicto*. And if, after entering into effect, the rule is interpreted literally, it will still not be required under the Constitution to fulfil the requirement of Article 5 paragraph 3 of the Convention, i.e. to bring all detained or arrested persons (regardless of the time and place of their arrest (detention)), before a judge. Everything will depend on the interpretation provided by other laws, primarily the Code of Criminal Procedure, of the rather vague wording of Article 20 paragraph 2 of the Constitution: "No person shall be arbitrarily arrested or detained. No person may be deprived of freedom except on the basis of the law, and according to legal procedures".

In addition, Article $50^{(1)}$ of the Code of Criminal Procedure provides for preventive detention.

On the basis of information obtained in accordance with the procedure established by the laws of the Republic of Lithuania, having reasonable grounds to believe that a person may commit a dangerous act the *indicia* whereof are provided for by Articles 75 (armed robbery), $227^{(1)}$ (organising a criminal association), or $227^{(2)}$ (terrorising a person) of the Code of Criminal Procedure of the Republic of Lithuania, and seeking to prevent the commission of such crime, the head of the Police Department of the Ministry of Internal Affairs or the district (city) police commissioner or the police officer acting for him has the right to detain such a person following a justified decision authorised by the Prosecutor General of the Republic of Lithuania or his deputies or city (district) chief prosecutors. The prosecutor decides the question concerning the issue of the arrest warrant only upon having familiarised himself in detail with the facts that provide grounds for the arrest. City (district) chief prosecutors immediately notify the Prosecutor General of the Republic of Lithuania of the warrants they have issued in accordance with the procedure established by this Article. The decision authorised by the prosecutor is brought to the knowledge of the arrested person no later than 24 hours after his or her arrest.

The issue of the validity of the arrest is decided within 48 hours by the chairman of a local district court, or a Supreme Court judge or vice chairman of the Supreme Court in the presence of the police officer who has taken the decision and the officer from the prosecutor's office who has issued the warrant or the officers authorised by them.

At the judge's discretion, the arrested person may also be present when the issue of the validity of the arrest is being decided, but the judge may also take a decision in the absence of the arrested person. Persons who are present when the judge decides on the validity of the arrest are entitled to provide the judge with explanations concerning the arrest. In addition, the judge familiarises himself with the entire facts presented by the police officer who presents the grounds for the person's arrest, but he has no right to make this information publicly available. Upon hearing the explanations and the prosecutor's findings, and having familiarised himself with the facts, the judge takes a decision either to allow the detention or to release the person concerned.

The arrested person has the right to appeal, either himself or herself or through his or her defence lawyer, and the prosecutor may appeal against the judge's decision to a superior judge: decision of the chairman of a local district court - to a Supreme Court judge; decision of the Supreme Court judge - to the vice chairman of the Supreme Court; decision of the vice chairman of the Supreme Court - to the chairman of the Supreme Court. An appeal can be lodged within three days from the day the judge's decision was taken.

The defence lawyer, as a representative of the arrested person, has the right to visit the latter in the presence of the police officer or the prosecutor after the judge has taken the decision concerning the validity of the arrest and before the expiry of the period allowed to appeal. During such a meeting the officers of the police or the prosecutor's office have the right to use technical devices.

A superior judge decides on the appeal within 7 days of its receipt. The person is kept in detention until the superior judge allows or dismisses the appeal. His decision is final. If the judge orders the person's release, a copy of the decision is sent within 24 hours directly to the administration of the place of detention for implementation. If the prosecutor does not appeal against the judge's decision to disapprove the arrest and to release the person, the detained person is released immediately upon the expiry of the period allowed to appeal.

With the prosecutor's warrant approved by a judge, a person may be detained for no longer than two months. The term of detention is fixed by the prosecutor who issues the warrant. Upon the expiry of a term of preventive detention, the person must be released immediately. If during the detention period the indications are that the detained person has committed the crime, criminal proceedings are instituted against the detained person in accordance with the procedure established by law. In this case the term of preventive detention is included in the period of arrest.

In the event that a crime is prevented by detaining a person, the latter may be released on the decision of the prosecutor who issued the arrest warrant or of the Prosecutor General prior to the expiry of the term of detention for which the warrant was issued.

Every person who has been unjustifiably detained under this law has the right to compensation in accordance with the procedure established by law.

The non-compliance of this rule with the Convention is obvious, since this ground for detention is not included in any other grounds for deprivation of liberty. This ground is "legalised" by the provisions of Article 5 paragraph 1 of the Convention stating the possibility of depriving a person of his or her liberty "when it is reasonably considered necessary to prevent his committing an offence". Preventive detention cannot be justified on the basis of this provision of the Convention because the latter states that a person may be deprived of liberty only on the reasonable suspicion that he or she may attempt to commit a specific offence, in which case detention on remand - arrest - is chosen.

Under Article $50^{(1)}$ of the Code of Criminal Procedure, a person is arrested not on the basis of the information available on the commission of a specific crime or on plans to commit a crime, but only on the basis of the general characteristics of the person to be arrested.

The detention of a person under Article $50^{(1)}$ of the Code of Criminal Procedure also constitutes a violation of Article 5 paragraph 2 of the Convention, since the legal status of the arrested person is not definite - he or she is neither the accused, nor the suspect nor a witness or any other party to the case governed by the Code of Criminal Procedure. It therefore stands to reason that it is impossible to explain on what grounds he or she has been arrested and what charges are being brought against him or her.

The Code of Criminal Procedure provides for the provisional detention of persons on suspicion of having committed an offence.

The body conducting the inquiry, or the investigator, only have the right to arrest a person on the suspicion that he or she has committed an offence punishable by deprivation of liberty on one of the following grounds:

1) when the person is caught in the act of committing the offence or immediately after having committed it;

2) when the eye-witnesses, including the victims, directly point to the person as having committed the offence;

3) when distinct traces of the offence are detected on the person of the suspect, or on his or her clothes or in his or her home.

When other information giving grounds for suspecting the person of the commission of a crime is available, the person may be arrested only if he or she attempts to escape or when he or she has no permanent place of residence, or when the identity of the suspect has not been established.

The procedure for provisional detention of persons on suspicion of having committed an offence is established by the Regulations concerning the Short-Term Detention of Persons on Suspicion of Having Committed an Offence.

At first sight, the deprivation of liberty provided for by this Article might be said to correspond to the case of deprivation of liberty provided for by Article 5 paragraph 3 sub-paragraph (c) of the Convention. Article 137 of the Code of Criminal Procedure allows the detention of a person in the process of committing an offence or planning to commit an offence or after committing the offence. Codes of Criminal Procedure in other countries also have similar rules, but elsewhere this is referred to as temporary detention. It is applicable when a person is caught in the act or immediately after the commission of a crime and it is impossible immediately to identify the detained person or if, upon establishing his or her identity, he or she is likely to flee from the law enforcement bodies and, consequently, must be immediately temporarily detained pending the decision (order) to arrest him or her. In Lithuania, according to Article 137 of the Code of Criminal Procedure, it is not obligatory to deprive a person of his/her liberty immediately after the commission of a crime.

At any stage of pre-trial investigation the liberty of a person may be restricted on the decision of the body of inquiry or the investigator, if they believe that he or she may be connected with the commission of an offence, although in general such a restriction is not imperative for a criminal prosecution. The officer conducting the inquiry or the investigator may use this Article of the Code of Criminal Procedure as a means of exerting pressure or as a deterrent, because when it becomes necessary to isolate such a person, he or she will have to be remanded in custody. The institution of detention may remain within the Code of Criminal Procedure only as an urgent step when measures are to be taken against a person caught in the act of committing a crime.

It is also noteworthy that the Code of Criminal Procedure does not fix the duration of the suspect's detention. Article 137 of the Code of Criminal Procedure still makes reference to the no longer applicable Soviet Regulations concerning the Short-Term Detention of Persons on Suspicion of Having Committed an Offence, which laid down a period of detention of up to 72 hours. A similar duration has remained in subordinate legislation in Lithuania and effectively takes the place of the above provisions.

Thus, we undoubtedly have an abnormal situation, in which a person is deprived of his or her liberty on the decision of the officer conducting the inquiry or the investigator, while the duration of detention (72 hours) and the procedure implementing it are governed by subordinate legislation.

The Code of Criminal Procedure also provides for the accused to be placed in a medical institution for the purpose of an expert forensic medical or psychiatric examination. If, in the course of such an examination, it becomes necessary to subject the accused to permanent observation or examination, the investigator places him or her in an appropriate medical institution. This is specified in the order prescribing an examination.

The prosecutor's, or his deputy's, order is required in order to commit the accused to a psychiatric hospital, except in cases when he or she is under arrest.

The time spent by the accused in a psychiatric hospital is included in the period of detention.

The accused is placed in a medical institution when it is necessary to subject him or her to permanent observation or an examination. This is also a case of deprivation of liberty under the Code of Criminal Procedure. When the accused, who is under arrest, is being sent to undergo an expert examination this does not give rise to any special problems since such a person's liberty is already restricted, and this entails merely a change in the place of detention on remand. Greater problems arise when the accused, who is not under arrest, is being subjected to a psychiatric examination. Such deprivation of liberty is allowed under Article 5 paragraph 1 sub-paragraphs (b) and (c). However, it stands to reason that in such a case, compliance with the other requirements of Article 5 is also imperative. Unfortunately, the Code of Criminal Procedure only superficially regulates the placement of the accused in a medical institution: Article 212 provides that the prosecutor's, or his deputy's, warrant is required for committing the accused to a psychiatric hospital, except in cases when he or she is under arrest. It is also stated in the Article that the time spent by the accused in a psychiatric hospital is included in the period of detention.

The harmonisation of the rules of the Code of Criminal Procedure with the Convention also calls for a more comprehensive regulation of the issue. Only a judge ought to be authorised to send a person to a psychiatric hospital to undergo an expert examination; moreover, such a decision by a judge should be subject to appeal. The duration of the accused's detention in such an institution should be regulated by law (at the present time it is regulated by an instruction). The law should also resolve the issue of the temporary provision of medical treatment after experts have determined that the accused is dangerous to society, although there are still not any arrangements for a court to examine the conduct for which compulsory medical treatment should be prescribed.

Article 5 Paragraph 4

a) Article 97 of the Code of Criminal Procedure provides for the possibility of detaining suspects on remand. The enforcement of the provision constitutes a breach of Article 5 paragraph 2 of the Convention, which provides that "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". When the suspect is arrested, he or she is, at best, informed of the reasons of his or her arrest, and under Article 97 the charges against him or her must be brought within 10 days. It is highly doubtful whether these 10 days correspond to the term "promptly" as prescribed by the Convention. And if the authorities fail to bring the charges within this period, the person is released "as if nothing has happened". The application of remand measures is essentially indicative of the defects in Soviet-style criminal proceedings,

especially as regards human rights. In a state which respects the provisions of the Convention, one can hardly imagine a situation where a person may be deprived of his or her liberty without any substantial grounds for believing he or she has committed an offence, which is quite often the case in Lithuania with regard to the application of Article 97 of the Code of Criminal Procedure. It stands to reason that after the institution of a criminal prosecution it is often impossible to establish precisely to what extent a person has contributed to the commission of the offence and how the act itself should be described. All this is a task for further investigation, but arresting a person without bringing a specific charge against him is not permissible.

b) there is a violation of the right enshrined in Article 5 paragraph 4 to appeal to a court against the decision to arrest or detain a person because, as has already been mentioned, under the Code of Criminal Procedure of the Republic of Lithuania the arrest warrant is in most cases issued by the prosecutor, whereas under Article 244 of the Code of Criminal Procedure, complaints against the prosecutor's actions and decisions are lodged with the superior prosecutor. It is true that Article 30 paragraph 1 of the Constitution of the Republic of Lithuania states that "Any person whose constitutional rights or freedoms are violated shall have the right to appeal to a court". Thus it is theoretically quite feasible that we may have a situation where a person, believing that the measure of remand - arrest or detention - has been chosen unlawfully and unjustly in his or her case, may opt to put up a legal defence. The action of the court upon receiving such a complaint and realising that it has not been lodged in compliance with the rules of the Code of Criminal Procedure is difficult to foresee.

c) when a person is not guaranteed the right enshrined in Article 5 paragraph 4 of the Convention to lodge a complaint with the court to clarify the issues of the lawfulness and validity of the arrest, the right laid down in Article 5 paragraph 3 of the Convention to trial within a reasonable time or to release pending trial is not guaranteed either. This may be accounted for by the fact that the issues concerning the necessity to arrest a person and the possible duration of the detention are settled by one and the same institution - the prosecutor's office, which is responsible for conducting a criminal prosecution and, therefore, is in principle unable to settle the above matters objectively. The prosecutor's office, as the institution which conducts criminal prosecutions will always tend towards the detention of a suspect, even in cases where the investigation of the criminal case would be quite possible without this measure. Although at first sight the provision of Article 106 of the Code of Criminal Procedure, which states that "detention on remand may not last in excess of two months", appears rather progressive compared with the laws on detention on remand of even the most developed European states, the possibility provided for by the same article to extend the term of detention for up to 18 months actually turns the general rule (two months) into an empty declaration. We should also keep in mind one slight detail, namely the fact that the term (18 months) provided for by Article 106 is applied only at the pre-trial investigation stage, whereas from the moment the prosecutor refers the criminal case with the indictment to the court, the period of detention is no longer counted. Thus, given such a procedure for ordering detention and the possibility of extending the term of that detention, there are no grounds for speaking about the possibility of guaranteeing in Lithuania the right to a trial within a reasonable time.

d) the Court and the Commission investigating cases of human rights violations (especially as regards deprivation of liberty), have on many occasions, emphasised the necessity to adhere to the so-called principle of proportionality, the essence of which is the requirement that a violation of human rights is permitted only when:

1) it is really necessary, i.e. a common interest (for example, in clearing up a crime and punishing an offender) outweighs the interest of a separate individual in the protection of his or her human rights, and

2) when the goal may not be achieved by less stringent means that would violate human rights to a lesser extent.

Therefore, the requirement to abide by the above principle when issuing the detention order is directly laid down in the codes of criminal procedure of many countries, many of which also provide for additional requirements to be taken into account when applying the measure of detention on remand discussed above. The Code of Criminal Procedure of the Republic of Lithuania contains no analogous requirements.

Moreover, criminal law provides for certain cases of detention. First of all, under the Corrective Labour Code, if persons given a suspended prison sentence with compulsory employment avoid receiving a written order to leave for their place of work, or fail to leave when due to do so, or fail to go to their place of work altogether, the internal affairs body in possession of the prosecutor's warrant detains the convicted person for a term not exceeding 30 days in order to establish his or her reasons for violating the procedure whereby he or she should go to the place of work of his or her own motion. The internal affairs body sends the detained person to the place of work in accordance with the procedure established for persons sentenced to detention or, if information concerning the avoidance of the execution of the sentence is available, refers the material to the court of the place of work of the detained person in order for it to decide whether to send him or her to the place of deprivation of liberty in compliance with the sentence.

Under Article $25^{(1)}$ of the Criminal Code, a convicted person who goes, without permission, beyond the boundaries of the administrative district of his or her place of work is detained by the internal affairs body with a prosecutor's warrant for a period not exceeding 30 days in order to establish the reasons for leaving without permission. The internal affairs body sends the convicted person to the place of work in accordance with the procedure prescribed for persons given a prison sentence or, if information has been obtained about the avoidance of the execution of the sentence, refers the material to the court of the place of detention of the convicted person so that it can decide whether to send him or her to the place of deprivation of liberty in accordance with the sentence.

In addition, if a person who is capable of work has been conditionally released under Article 54 of the Criminal Code and avoids work or systematically or persistently violates labour discipline, and when a conditionally released person systematically or persistently violates public order, the internal affairs body, seeking to prevent the avoidance of the execution of the sentence, may detain him or her with a prosecutor's warrant for a period not exceeding 10 days and refer the material to a court so that it can decide whether to send that person to the place of deprivation of liberty in accordance with the sentence.

Thus, in all cases of administrative, criminal and procedural detention under the laws of the Republic of Lithuania, officers of the law are only indirectly obliged to inform the detained person of the reasons for his or her detention and of the charges brought against him or her. Furthermore, it is not provided that this should be done in "a language which he understands". And - one more point - there are gaps in the law (e.g. the compulsory placement of a patient in a hospital, etc.).

Article 5 Paragraph 5

Article 5 paragraph 5 provides that every person who has been detained or arrested in violation of the provisions of this Article is entitled to compensation. Decisions of the Court of Human Rights delivered in respect of this paragraph 5 are indicative of certain problems and the Court's attitude towards them.

The first problem may arise when the Convention is not incorporated into the domestic legal system (in Lithuania this is possible only to a certain extent, since under Article 138 of the Constitution "International agreements which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania". However, domestic laws must provide for the right to compensation, because otherwise complaints may be lodged merely in respect of this aspect. Consequently, it is possible that cases of detention that are lawful under domestic law could be in contravention of the Convention. In this case the Court abides by the Convention as, for example, in the case of *Brogan v. the UK, 1988*, where the Government's argument concerning the lawfulness of detention was dismissed because it relied exclusively on domestic law.

The second problem is that compensation is possible only if the injured party proves that material or moral damage was inflicted through unlawful detention. However, compensation is out of the question in the absence of such damage. In the case of *Wassink v. Holland, 1990* the Court established that committing a person to a psychiatric hospital constituted a breach of domestic procedural requirements. However, in this particular case it was practically impossible to determine the amount of damage incurred by the person concerned.

The laws of the Republic of Lithuania in this respect are as follows. First of all it is necessary to refer to Article 30 of the Constitution, which states that "Any person whose constitutional rights or freedoms have been violated shall have the right to appeal to a court" and demand compensation. Article 486 of the Civil Code provides for the compensation for damage inflicted by pre-trial officers by reason of unlawful detention, arrest or corrective labour. Apparently the constitutional provision is sufficient to allow the domestic law to be considered to correspond to the requirements of paragraph 5 (the assessment of the amount of the damage is laid down in Articles 7, $7^{(1)}$ and 225 of the Civil Code). On the other hand, the assessment will be to a very great extent predetermined by the manner in which the Convention is incorporated into Lithuania's legal system (and whether or not the latter recognises as "constitutional" the rights and freedoms laid down in the Convention). It should be said, however, that the Criminal Code does not lay down the grounds and the procedure for paying compensation for damage inflicted as a result of the formal application of the law (for example, a person is arrested on a justifiable ground and in accordance with the required procedure, but the court acquits him).

Finally, attention is drawn to a number of additional aspects of which no mention is made in the laws of the Republic of Lithuania:

a) disciplinary statutes may allow detention (i.e. deprivation of liberty) to be imposed on officers of the national defence forces, the voluntary national defence forces, the interior service and the police. These are in most cases executive acts and, moreover, they do not provide any procedural guarantees etc. for persons who are put under arrest;

b) sending persons to a reception-distribution centre;

c) taking drunken persons to drying-out centres;

d) placing persons in special schools, juvenile homes, boarding houses (non-voluntary and not under the Criminal Code).

Conclusions and Proposals

Ratification of the Convention would bring about serious problems for Lithuania as regards the non-compliance of its laws with the requirements of Article 5 of the Convention.

The resolution of these problems must be linked to the following two aspects:

1) the grounds and procedure of any deprivation of liberty is established only by law based on Article 5 paragraph 1 of the Convention;

2) any deprivation of liberty, the duration of which exceeds 48 hours, is imposed on the basis of a court decision and procedure.

The following amendments of and supplements to laws are required in order to implement the above requirements:

1. Amendments must be made as follows to the provisions of the Code of Criminal Procedure which regulate the grounds and procedure for detaining a person on remand:

a) the detention on remand may be imposed only by a judge;

b) the judge must personally interview every arrested or detained person;

c) the arrested person must have the right to appeal against the judge's decision to impose detention;

d) the judge (the court) must check from time to time whether it is necessary to continue to apply this measure of detention on remand;

e) when issuing the detention order, it is necessary to specify the grounds for the application of this measure; (When choosing to detain a person on remand, it is necessary to observe the principle of "proportionality").

2. Article $50^{(1)}$ of the Code of Criminal Procedure must be repealed.

3. The institution of the detention of the suspect must be abolished. It could be substituted by the institution of the temporary detention of a person.

4. It is necessary to revise the provisions of the Code of Criminal Procedure by stating that the placement of a person in a psychiatric hospital for expert examination is within the exclusive competence of a judge, whose decision may be appealed against. The Code of Criminal Procedure must establish how long a person may be kept in such an institution.

5. The Code of Criminal Procedure should regulate the procedure for applying compulsory medical measures until a court order comes into effect.

6. The laws (the Criminal Code, the Code of Criminal Procedure, the Code of Administrative Offenses, etc.) must provide that in any case of deprivation of liberty the officer involved must immediately notify the person of the grounds on which he or she is deprived of his or her liberty.

7. It is necessary to pass a law on mental health care incorporating detailed aspects of committing a person to a psychiatric hospital - i.e. judicial procedure, systematic monitoring, etc. - which could be transferred from the Criminal Code.

8. It is necessary to pass a law on medical institutions which would regulate the right of medical personnel to restrict a person's liberty in certain cases and the mechanism for the realisation of that right.

9. Necessary amendments to the Code of Administrative Offenses:

- caring for "vagrants" (reception-distribution centres);
- taking drunken persons to drying-out centres;
- placing persons in special schools, juvenile homes, boarding houses.

10. Disciplinary statutes (for the national defence service, the police, etc.) must be approved only by passing a law and laying down the grounds for imposing detention, the judicial procedure relating to this, etc. A longer period of time will be required for the realisation of this proposal, and it is imperative to consider making a reservation to the Convention.

11. The provisions of the Civil Code regarding compensation must be supplemented to include the case where damage is inflicted lawfully but where compensation is paid from the state budget.

ARTICLE 6 OF THE CONVENTION

" 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

Article 6 Paragraph 1

Paragraph 1 of Article 6 guarantees every person the right to a court decision on criminal charges against him/her and the resolution of all disputes concerning his or her rights and obligations in court. There are no problems concerning the obligation to consider all criminal cases in court. A more complicated problem is the possibility of the judicial resolution of, and the application of guarantees provided by this Article of the Convention to, disputes arising from other (non-criminal) legal relations. Here certain problems are created even by the possibilities of translating the text of the Convention into Lithuanian: the French version *droits et obligations de caractère civil* is translated into Lithuanian by *pilietinës teisës ir pareigos*, whereas the English version "civil rights and obligations" can also be translated as *civilinës teisës ir pareigos.* For example, the German translation has opted for the version 'civil' (*Zivilrechtliche Ansprüche und Verpflichtungen*). The practical work of the European Commission of Human Rights and the Court reveals that Article 6 paragraph 1 of the Convention is applicable in deciding disputes arising from legal relations which come under both civil (private) and public law.

A suitable example here would be the case of *Zander v. Sweden, 1993*, in which the Court established a violation of Article 6 paragraph 1 of the Convention. The gist of the case was as follows: because of a public dump which was located in proximity to people's wells, the water in the wells became polluted. The inhabitants of the neighbourhood requested that pure water from other sources should be provided for them free of charge. The government

institution, which was the instance of last resort, declined the request. According to Swedish legislation there was no possibility of appealing to a court against this decision.

In *König v. Germany, 1978* the Court decided that the provisions of Article 6 paragraph 1 were also applicable to a dispute over the deprivation of the right to have a private clinic and engage in private medical practice.

The question of the applicability of Article 6 to violations of administrative law is also problematic. In *Öztürk v. Germany, 1984* the Court established that a case which had been considered to involve a violation of administrative law, should have been considered as a criminal case in the sense of the Convention and that in the proceedings all the rights provided by the Convention should have been guaranteed. Some members of the Court dissented and expressed their independent opinion that for lesser violations of law the State should have the right to apply penalties which do not belong to the system of criminal law penalties.

Article 30 paragraph 1 of the Constitution of the Republic of Lithuania guarantees every person whose constitutional rights or freedoms have been violated the right to bring his/her case to a court. This is, to be sure, a progressive rule, but it does not ensure the judicial examination of all disputes concerning personal rights.

Article 33 paragraph 2 of the Constitution guarantees the citizens' right to criticise the work of public servants and officials and to appeal against their decisions. However, it is not quite clear which appeal procedure - administrative or judicial - the Constitution has in mind. For example, a similar provision in the Constitution of Germany (Article 19 paragraph 4) formulates this idea more clearly: " Every person whose rights have been violated by public authorities shall have the right to bring his or her case to court".

The existing legislation of the Republic of Lithuania provides for a great number of cases in which disputes are not subject to consideration by a court:

1) eviction from premises occupied illegally, from premises which are in danger of collapsing and from hotels (Civil Code, Articles 352, 355, 366);

2) dissolution of marriage when both spouses agree to submit an application to this effect to the Civil Registry if they do not have children in common who are under age and if they do not dispute possession of joint property or the provision of subsistence (Articles 37 and 38 of the Marriage and Family Code);

3) dissolution of marriage if a husband applies for the dissolution of his marriage without the consent of his wife when she is pregnant or when less than a year has elapsed since the birth of a child (Articles 34 Marriage and Family Code);

4) identification of a father, if a person's name is recorded in the registry of births (Article 53 Marriage and Family Code);

5) recovery of unpaid or underpaid taxes and the imposition of penalties for understating income (Articles 13, 32, 40 of the Provisional Law on Income Tax of Natural Persons);

6) recovery of contributions not paid into the budget of the state social insurance scheme when due and penalties from the insurers who are legal persons (Article 38 of the Law on State Social Insurance);

7) a dispute arising between a person wishing to obtain a passport as a citizen of the Republic of Lithuania and the internal affairs department responsible for determining the citizenship of a person (Article 14 relating to the issue of a passport to a citizen of the Republic of Lithuania);

8) disputes between the parties, arising in the course of collective bargaining and in the conclusion and implementation of collective agreements (Article 18 paragraph 1 of the Law on Collective Agreements);

9) disputes concerning the actions of privatisation agencies (Article 6 of the Law on the Initial Privatisation of State Property);

10) disputes concerning the determination of insolvency of special-purpose enterprises, their winding up or reorganisation (basic provisions of the Byelaws relating to Special-Purpose Enterprises approved by Government Decree No. 75 of 22 February 1991);

11) disputes concerning the refusal to issue permission for the accreditation of a representation of a foreign enterprise (Government Decree No. 223 of 31 May 1991 concerning the Registration of the Representations of Foreign Enterprises and Banks in the Republic of Lithuania);

12) disputes concerning admission to the Internal Affairs Service (Statute of the service within the Internal Affairs system approved by Government Decree No. 304 of 29 July 1991);

13) disputes relating to persons being put on the waiting list for the acquisition of a plot of land for the construction of a private house and to the removal from this list (Regulations concerning Individual Constructions approved by Government Decree No. 278 of 12 July 1991);

14) disputes concerning the decisions of local agricultural reform departments on the acquisition of land (Article 19 of the Law on Land Reform);

15) disputes concerning the decision to expel a foreigner from the Republic of Lithuania (Article 36 of the Law on the Legal Status of Foreigners in the Republic of Lithuania);

16) disputes between the disabled and the state medico-social examination commission (Article 30 of the Law on the Social Integration of the Disabled);

17) disputes concerning the refusal to take on a job, with the exception of disputes when employment was refused for the reasons specified in Article 19, subsection 1 of the Law on Employment Contracts (Article 19 of the Law on Employment Contracts);

18) disputes concerning the actions of the state department for the supervision of the construction and operation of buildings (Regulations of the Department for the Supervision of the Construction and Operation of Buildings, approved by Government Decree No. 931 of 8 December 1992);

19) disputes concerning the refusal to exchange residential premises located in houses or apartments belonging to individuals as a result of their right of ownership (Regulations relating to the Exchange of Residential Premises), approved by Government Decree No. 496 of 29 November 1991);

20) disputes concerning the operation of social insurance certificates (Regulations of the Registry of the Insured with the State Social Insurance Scheme, approved by Government Decree No. 584 of 23 December 1991);

21) collective labour disputes (excluding disputes specified in Articles 13 and 19 of the Law on the Settlement of Collective Disputes);

22) disputes concerning decisions of the committee in charge of elections to court, taken when voting is completed; complaints concerning the recognition of invalid elections (Articles 78[1], 83 of the Law on Elections to the Seimas).

From the point of view of Article 6 paragraph 1 of the Convention not all of these exceptions are justifiable as in most of the cases specified disputes arise from civil rights and duties. The situation is improved by the Law on Amendments and Supplements to the Code of Civil Procedure (which came into effect on 1 January 1995), Article 269[1] of which provides that:

"A person who thinks that his or her rights or freedoms have been violated or restricted by the acts, action or inaction of state authorities or government institutions or civil servants, shall have the right to lodge a complaint. In the event of an actionable dispute concerning a right, a person must bring his or her case to court". In addition, Article 29 of the Code of Civil Procedure provides that:

"If there are several inter-related claims, one of which is subject to the consideration of a court, and others which are to be decided out of court, all the claims must be examined in court".

"If any doubt arises as to the actionability of a dispute or if there is a conflict of laws, the dispute shall be resolved in court".

If these rules established by the Code of Civil Procedure are applied consistently, the settlement of disputes in court will be possible in virtually all cases in conformity with the Convention.

From the point of view of the ratification of the Convention, the Code of Administrative Offenses of the Republic of Lithuania poses serious problems. It is very difficult to determine the dividing line between the offenses described in the Criminal Code and administrative offenses, at least by using the strictness of a sanction as a criterion, as in recent years the sanctions provided for by the Code of Administrative Offenses have become very strict. Article 32 of the Criminal Code provides that the minimum amount of the penalty, as the basic punishment, is 10 times the subsistence standard, i.e. a little more than 500 Lt, whereas the Code of Administrative Offenses specifies a large number of offenses for the commission of which considerably stricter sanctions are imposed. For example, for carrying out contractual construction work without permission a penalty of up to 20,000 Lt may be imposed (Article 159[1], subsection 1) and for the building of a house or other building or structure without permission, up to 25,000 Lt (Article 159, paragraph 2). For the production and dissemination of mass media (Article 214[1]) and for organising teaching and study centres, without obtaining permission, a fine of up to 30,000 Lt may be imposed.

In addition to heavy fines, the Code of Administrative Offenses provides for other very strict penalties: the confiscation of an object by means of which an administrative offence was committed; deprivation of a special right (a driving, hunting or fishing licence), correctional labour for up to two months, the payment of from 5 to 20 percent of an offender's wage into the state budget; administrative detention up to 30 days; suspension from office.

In most cases the imposition of such strict penalties affects a person almost as seriously as a conviction under the Criminal Code. In such cases dealing with such administrative offenses from the point of view of the Convention (bearing in mind the above mentioned *Öztürk* case) may be compared with the hearing of criminal cases, which means that such cases should be heard in conformity with the principles and guarantees enshrined in Article 6 of the Convention.

According to the Code of Administrative Offenses, the right to impose very severe penalties shall be vested in the courts. However, there are exceptions to this rule. The Code of Administrative Offenses provides for a considerable number of bodies which are also authorised to hear cases involving administrative offenses and impose penalties. At the present time such bodies include: administrative commissions in the districts, municipal boards, communes, local chief executives, district and city mayors, the police, state fire prevention bodies, railway transport bodies, sea transport bodies, internal water transport bodies, air transport bodies, public road and electricity transmission bodies, the State Road Transport Inspectorate within the Ministry of Transport, state road maintenance bodies, job safety bodies, the State Nuclear Energy Safety Inspectorate, state statistics bodies, the Customs of the Republic of Lithuania, the bodies of the Ministry of National Defence, the State Hygiene Inspectorate, state bodies for the supervision of animal breeding and veterinary surgery, the Lithuanian State Quality Inspectorate within the Lithuanian State Standardisation Department, nature protection bodies, the State Geological Survey Authority, the bodies of the Ministry of Forestry, the national parks authorities, bodies supervising state plant protection, the State Electric Communications Inspectorate, state bodies supervising construction work, state bodies for the supervision of agricultural machinery, "Lietpraba" the Lithuanian state assaying office, the Press Control Board within the Ministry of Justice, the Securities Commission of the Republic of Lithuania.

The Code of Administrative Offenses contains only a few articles governing the hearing of cases involving administrative offenses. The cases must be heard according to the same procedure both in and out of court. Therefore, there is no need to detail the application of the principles and guarantees enshrined in Article 6 of the Convention in the course of such proceedings. Attention should also be drawn to the fact that the decision of the local court of a district or town which has heard an administrative case, is final. The decisions of other bodies may be appealed against in the local district court, whose decision is final. The Code of Administrative Offenses does not cover the judicial examination procedure of such an appeal.

Thus, the Code of Administrative Offenses has to be reformed prior to the ratification of the Convention. Two variants are possible:

1) To make the most dangerous administrative offenses, for which the strictest penalties are imposed, criminal acts and to transfer them to the Criminal Code so that any punishment for these offenses would be imposed by observing all the rules laid down in the Code of Criminal Procedure. However, such a step would be too drastic: the offender's position would even become worse in some respects - it is highly likely that coercive procedural measures would be applied which are not provided for in the Code of Administrative Offenses, and the offender would have a criminal record. In addition, it is probable that it would take longer to decide such cases (the Code of Administrative Offenses provides that the penalty must be imposed no later than two months from when the commission of the offence becomes known). Consequently, the number of criminals in society would increase and, from the point of view of criminology, this would not be a very welcome phenomenon.

2) It would be a better solution to establish that administrative offenses shall be tried by a court when one of the following penalties can be imposed: confiscating and using as compensation the object by means of which the administrative offence was committed or which was the direct reason for committing it; seizing of the object by means of which an administrative offence has been committed or which is the direct reason for committing it (if the value of that object is 500 Lt or more); depriving the offender of his or her driving licence; corrective labour; administrative detention, suspension from office and a fine of 500 Lt or more. The proceedings should be carried out in compliance with all the principles laid down in the Code of Criminal Procedure, and the offender and his or her legal representative (defence counsel) must be guaranteed all the rights accorded an accused (defendant) and his or her counsel by the Code of Criminal Procedure. In order not to breach Article 2 of Protocol No. 7 of the Convention, it is necessary to provide for the possibility of an appeal to a higher court against the court's decision.

The proposed limit of 500 Lt may, of course, be the subject of debate. This figure is proposed because since 1 January 1995 this has been the minimum fine that may be imposed on a defendant under the Criminal Code.

Article 6 of the Convention (where applicable) guarantees everyone the possibility of settling disputes in a court. For example, in the case of *Golder v. the UK, 1975*, the Court of Human Rights ruled that there had been a breach of the Convention because the prisoner was only able to bring civil action after obtaining permission from the Home Secretary.

In the case of *Deweer v. Belgium, 1980*, the Court of Human Rights explained that it was not permissible to impose any sanctions on a person until the case had been tried and decided in a national court. In this case, the Court established that there had been a violation of Article 6, paragraph 1 of the Convention. The butcher, against whom a criminal action was instituted for breaching the rules governing price marking, was required to pay a fine immediately, and he was threatened with the closing down of his shop if he did not do so and waited until the end of the proceedings.

Article 6, paragraph 1 of the Convention provides that "everyone is entitled to a fair trial". This means that both parties to the trial must be treated equally and must be entitled to the same opportunities to prove their case. The judgment delivered by the Court of Human Rights on 27 October 1993 in the case of *Dombo GmbH v. Holland* may serve as an example of a breach of this provision of the Convention. It was established in this case that Holland had violated the principle of equality of the parties in a civil case, as the parties had not been provided with equal opportunities to call witnesses. In the civil dispute between the company Dombo and its bank, concerning the freezing of accounts, the court refused to question as a witness a former manager of the company, who was also a shareholder, on the ground that the person it was proposed to call as a witness was one of the parties to the dispute. However, the manager of the bank branch which had Dombo's accounts was questioned as a witness even though Dombo objected to this. The Court of Human Rights held that there had been a violation of the Convention, but only by five votes to four.

Procedural laws in Lithuania do not contain rules discriminating against any party to the proceedings. Article 2 of the Law on the Courts states that "everyone is equal before the law and the court". However, it is unlikely that a simple answer can be given to the question of whether the Lithuanian courts perceive the principle of equality before the law in concrete cases in the same manner as the Commission and the Court.

In Lithuania, at the present moment, the possibility of hearing a criminal case in the accused's absence is being considered. Article 266 of the Code of Criminal Procedure

provides that "it is only permissable to hear the case in the accused's absence when he or she is outside Lithuania and avoids appearing in court". The Code of Criminal Procedure does not establish any special rules indicating how such proceedings should be conducted. Nevertheless, if it is decided that court proceedings may be held in the accused's absence, it should be borne in mind that in the opinion of the Court of Human Rights, the accused's presence in the hearing of a criminal case is essential both to the right of the accused to be heard before court and in order to be convinced of the truthfulness of his evidence and to compare it with the evidence of the plaintiff (*Poitrimol v. France, 1993*). It should be noted that, in principle, the Court of Human Rights has not objected to the possibility of such proceedings.

Article 6 paragraph 1 of the Convention also guarantees the right to the hearing of a case within a reasonable time. The Strasbourg institutions have not set any definite time limits within which a case of one type or the other should be examined. The reasonableness of the duration of the proceedings depends on the circumstances of each concrete case. The Court of Human Rights ruled that there had been a violation of the right to the hearing of the case within a reasonable time in the above-mentioned *König* case: the German Administrative Court failed to deliver a judgment at first instance over a 10 year period. Similarly, in the case of *Eckle v. Germany, 1983*, the criminal proceedings concerning the commission of economic crimes lasted for 17 years. The same decision was adopted by the Court of Human Rights in the case of *Zimmermann-Steiner v. Switzerland, 1983*: the hearing of the case, which was a simple one judging from its circumstances, lasted three years in the Swiss Federal Court, and owing to a backlog of pending cases, nothing was done for a long period. In the case of *Deumeland v. Germany, 1986* the proceedings in the Social Court lasted for 10 years 7 months and 4 weeks. By contrast, in the case of *Buchholz v. Germany, 1981* the Court held that there had been no violation of the Convention, even though the proceedings concerning the applicant's dismissal from his job had lasted for almost five years before three courts.

The Commission receives a large number of complaints about breaches of this right, in particular from Italy, Portugal and France, and this shows that in many countries it is rather problematic to guarantee the exercise of this right. It does not seem that the guarantee of this right could cause problems in Lithuania. The procedural laws prescribe rather short time limits for setting the date of the hearing of the case. For example, Article 262 of the Code of Criminal Procedure provides that the question of bringing a case before court must be decided within 15 days from its referral to the court, and the hearing of the case must commence no later than 15 days from the taking of the decision (ruling) to bring the accused to court. However, in practice, such time-limits are not always observed because of a heavy work load, but this is very likely to be solved when the new judicial system begins to function. Nevertheless, it would be expedient to adopt the practice of the German Federal Court, which has been approved by the German Constitutional Court and to provide the possibility of terminating a criminal case on account of the length of the proceedings.

Article 6 paragraph 1 of the Convention provides that cases must be heard by an independent and impartial court established by law.

The Court of Human Rights has had to give its opinion on a violation of this rule. The principle of impartiality is breached if a person, who has acted in a case as a prosecutor, later sits in the same case as a judge (*Piersack v. Belgium, 1982*). A similar breach is also committed if the judge, who during the preliminary investigation of the case has exercised the functions of an examining judge, later sits in the same case during the court hearings (the case of *De Cubber v. Belgium, 1984*).

Violations of the Convention of this type should not be committed in Lithuania. Article 29 (2) of the Code of Criminal Procedure provides that the judge may not sit in the case both

at the stage of committing the accused to trial and during court hearings, if he has acted in that case as a prosecutor. If such a situation arises, the judge must withdraw or be withdrawn. The position of an investigating judge does not exist in Lithuania, but its introduction is envisaged in the proposed reform of the legal system. However, this and other Articles of the Code of Criminal Procedure must be supplemented before the institution of an investigating judge begins to function, by providing that a person who took part in the investigation of the case as an investigating judge may not at a later stage sit in the court hearings on the same case.

Legislation in Lithuania also guarantees the independence of the courts. Article 109 of the Constitution states that "While administering justice, judges and the courts shall be independent" and "while investigating cases, judges shall obey only the law". These constitutional rules are specified in procedural laws. Article 8 of the Code of Civil Procedure states that "While administering justice the judges and the courts shall be independent and obey only the law". The judges and the court shall decide civil cases on the basis of the laws and under conditions that will make it impossible to exert outside pressure on the judge. State and government institutions, members of the Seimas and other officials, political parties, political and public organisations or natural persons are prohibited from interfering with the activities of judges and courts, and anyone violating this rule will incur the penalty prescribed by law. Rallies, pickets, and other actions held closer than 75 metres to the court building or in the court and aimed at exerting influence on the judge or the court are considered to constitute interference with the activities of the judge or the court and must be prohibited.

When the activities of a judge or the court administering justice are being interfered with, the court or the judge must react in accordance with the procedure established by law.

The wording of Article 14 of the Code of Criminal Procedure is similar to the corresponding text of the Code of Civil Procedure:

"While administering justice in criminal cases, judges shall be independent and obey only the law. The judges shall decide criminal cases on the basis of laws and be governed by their conscience, under such conditions which would prevent outside pressure being exerted on them. Any interference with the activities of a judge or the court administering justice shall be prohibited by law and any violation will incur the penalty established by law".

The provision of Article 36 of the Law on the Courts, pursuant to which judges are appointed until they reach the age of 65, with the exception of local court judges who are initially appointed for a term of five years, should also be considered to be an additional condition guaranteeing the independence of judges.

Taking into account the present situation in Lithuania, the provision of Article 113 paragraph 2 of the Constitution, which prevents judges from taking part in the activities of political parties and other political organisations, is of equal importance. The rule established by Article 114 paragraph 2 of the Constitution, pursuant to which criminal proceedings may not be instituted against judges, who may not be arrested or restricted in their personal freedom without the consent of the Seimas, or in the period between sessions of the Seimas, of the President of the Republic of Lithuania, also helps to secure the independence of judges. Articles 111 and 112 of the Constitution, relating to the judicial system in Lithuania and the procedure for the appointment of judges also comply with the requirement of the Convention that a court must be established by law. The procedure for establishing courts and appointing judges is regulated in detail by the Law on the Courts and the laws on the establishment of courts of different levels.

In implementing this requirement of the Convention and in guaranteeing the impartiality of the court, in particular, certain problems may arise because no schedules for the distribution of the workload are being drawn up at the present time. Therefore the criteria on the basis of which a judge is appointed to sit on a case are not clear. Certain manipulations are possible. Even though such schedules are not drawn up in all democratic states, Lithuania should follow the example of countries such as Germany, and introduce annual or half-yearly schedules for the distribution of the workload in the courts. This is merely an organisational issue which does not require the enactment of a separate law, so the instructions of the Minister of Justice would suffice.

Article 6 paragraph 1 of the Convention states that everyone is entitled to a public hearing of his/her case and the judgments of the court shall be pronounced publicly. However, in some cases the Convention provides for the possibility of excluding the press from all or part of the trial. This may be done in the interests of morals, public order or national security in a democratic society or where the interests of juveniles or the protection of the private life of the parties require it, or in other special circumstances where publicity would prejudice the interests of justice. So it can be seen that the Convention does not provide for a comprehensive list of cases in which the principle of a public hearing does not have to be observed. The Convention allows for a certain free interpretation when deciding in what "interests of private life" or in what "special circumstances" the non-observance of the principle of publicity would be justifiable. Without doubt, this principle is of great importance in every democratic state and exceptions may be made only when during the public hearing of a case, an interest of special importance may be prejudiced.

In Lithuania the principle of publicity is established in several legal acts that also mention cases in which the principle of publicity does not have to be observed. Article 117 of the Constitution states that "Closed court sittings may be held in order to protect the secrecy of a citizen's or his or her family's private life or to prevent the disclosure of state, professional and commercial secrets". Under Article 6 of the Law on the Courts "court hearings may be closed to the public in order to protect the inviolability of a person, his or her private life and property, and if the public hearing of the case may disclose state, professional or commercial secrets. However, the final part of the decision or judgment at such hearings must be pronounced publicly". Under Article 16 of the Code of Criminal Procedure, closed court hearings may be held in order to protect state secrets, as well as in cases involving offenses committed by persons under 16, cases involving sexual abuse, and other cases in which it is necessary to prevent information from being made available to the public on intimate aspects of the lives of persons involved in the case or when evidence is taken from a witness or an injured party whose identity has been concealed. Article 10 of the Code of the Civil Procedure provides that after the adoption of a justified ruling, the court sitting may be closed when this is required in order to protect the secrecy of a person's private life or property and when a public hearing of the case may reveal state, professional, or commercial secrets.

It is considered that cases in which closed sittings may be held, as provided for in the Constitution and other laws, are not in conflict with the Convention. Likewise, no problems should arise due to the lack of correspondence between the text of the Convention and the Law on the Courts. Under the Convention the court decision must be pronounced publicly, whereas under the Law on the Courts only the final part of the decision and judgment adopted at a closed hearing must be pronounced publicly. The form and structure of court decisions and judgments is purely a matter of domestic law. Thus, it should not be held that there is a violation of the Convention if only the final part of the judgment is made to the public.

A public hearing of the case must be held only at the court of the first instance. At the appeal stage, the proceedings may be conducted in writing. The Commission voiced this opinion in the case of *Sutter* and *Axen* and *Pretto v. Italy, 1983.* In general, the right to an

oral hearing of the case is closely related to the principle of publicity. In the case of *Fredin v. Sweden, 1994* the Court of Human Rights decided that the courts which deal with a case at first and last instance may also meet the requirement of an oral hearing by allowing a public hearing of the case. The Court held that there had been a violation of Article 6 paragraph 1 of the Convention in this case, because when the case had been examined by a higher administrative court at which the plaintiff sought a reversal of the decision of the Ministry of Nature Protection and Energy, the plaintiff's request that an oral hearing be held was rejected. It is interesting to note that this case was examined under the Sweden Act adopted in 1988, providing for the possibility of an appeal against certain decisions adopted by government authorities. Sweden had to adopt such a law because former laws did not provide for such a possibility (the cases of *Sporrong and Lönnroth, 1982* and *Pudas and Boden v. Sweden,1987*).

In Lithuania there should be no problems like the *Fredin* case, because the right to an oral hearing, as one of the principles of court hearings, is embodied in procedural laws.

Article 6 Paragraph 2

The principle of the presumption of innocence is laid down in Article 6 paragraph 2 of the Convention, to which special importance is attached by every state subject to the rule of law. Having examined a number of cases, the Strasbourg institutions found violations of Article 6 paragraph 2 of the Convention. In the case of *Neubecker v. Germany, Appl. No. 6281/73* (1976) the Commission found a violation of the presumption of innocence because the court had adopted a ruling on the reimbursement of the costs of the proceedings after the case had been suspended on appeal, whereas the case dealt with the justifiability of the conviction at first instance. The text of that ruling was published in one of the journals on heraldry (the criminal case had also related to heraldry). This case did not reach the Court of Human Rights, as a friendly settlement had been reached under Article 28 paragraph 1 (b) of the Convention. In the case of *Minelli v. Switzerland, 1983*, a violation of Article 6 paragraph 2 of the Convention was established in the decision of the Court of Human Rights. This case also related to the reimbursement of costs. The criminal case was terminated on account of limitation, but the accused was nevertheless ordered to pay the costs of the proceedings on the ground of his guilt and on the basis of another criminal case in which another accused was convicted. The decision could not be appealed against because the proceedings were terminated by reason of limitation.

In Lithuania, the principle of the presumption of innocence is laid down in the Constitution. The wording of Article 31 paragraph 1 is as follows: "every person shall be presumed innocent until proved guilty according to the procedure established by law and declared guilty by final court judgment". This rule is repeated word by word in Article 3 of the Law on the Courts. There should be no problems as regards the rules of the Code of Criminal Procedure, which establish the procedure for the reimbursement of expenses. Under Article 123 of the Code of Criminal Procedure, the court costs must be borne by the accused only when the case ends in a conviction, whereas Article 124 paragraph 1 of the Code of Criminal Procedure provides that "in the event that the criminal case is terminated or ends in an acquittal, and if a person who is to bear the court costs does not have sufficient means, the costs shall be born by the State".

Some problems relating to the presumption of innocence arise owing to the practice of the preliminary examination bodies, which have been inherited from the Soviet period. In the case of documents, such as the indictment, it is stated that "the guilt of the accused has been proven" or "has been proven by this evidence". Thus, judicial officers declare a person guilty of an offence before a court has passed final judgment, and this violates the principle of the presumption of innocence. However, recently such documents have been presented in

criminal cases less frequently. In order to eliminate such documents altogether, the prosecutor general and the Minister of Internal Affairs should give relevant instructions to the officers of departments for which they are responsible. No amendments to the Code of Criminal Procedure are necessary in this case.

Article 6 Paragraph 3

Article 6 paragraph 3 of the Convention specifies the minimum rights of persons charged with a criminal offence.

As the concept of the accused varies under different national laws, the provision of such guarantees should not depend on whether a person is considered to be the accused under national law. The state must provide these guarantees to everyone who is prosecuted for his actions. Judging from the above mentioned *Öztürk* case, the conclusion may be drawn that the Court of Human Rights demands that these guarantees be provided under certain circumstances in a case which, under domestic law, should be examined as one involving an administrative offence.

The protection of the rights enshrined in Article 6 paragraph 3 of the Convention is of utmost importance for the hearing of the case before a court. However they must also be guaranteed during the preliminary investigation of the case.

Article 6 Paragraph 3 sub-paragraph a

The first right enshrined in Article 6 paragraph 3 of the Convention is the right of everyone charged with a criminal offence to be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation. This right is closely related to other rights of the accused, primarily to the right to a defence, as it is impossible to defend oneself in person without knowing the nature and cause of the accusation. The accused must be informed of the nature and cause of the accusation before the case is brought to court, at the latest. Everyone in respect of whom procedural coercive measures are applied must also be informed of the charges brought against him. The Code of Criminal Procedure, which is in force in Lithuania at present, is very formalised and establishes the institution of the bringing of a formal charge at the stage of preliminary investigation. Articles 161 - 174 of the Code of Criminal Procedure provide rather detailed regulations concerning the procedure for the bringing of charges, the examination of the accused, and any changes and additions to the charges. In addition to other rights of the accused, Article 32 of the Code of Criminal Procedure provides for the right to be informed of the charge brought against a person and for explanations to be given. Problems arise due to the fact that in addition to the accused, the Code of Criminal Procedure also provides for a suspect to be a party to criminal proceedings. According to Article 59 of the Code of Criminal Procedure "the suspect is a person who is detained on suspicion of having committed an offence, or a person who is detained on remand prior to charges being brought against him, or a person who is being questioned on account of a criminal act committed by him". The suspect is the same as the accused but he has fewer rights, i.e. a concrete accusation is not brought against him, even though he may be detained on remand, but under Article 97 of the Code of Criminal Procedure, he may not be detained on remand for more than 10 days. However it is not normal to hold a person in detention for 3 days (the suspect may be held in police custody for 3 days before being detained on remand) without informing him of the charges brought against him. Therefore the institution of the suspect should be abolished. In order that the Code of Criminal Procedure can conform with Article 20 paragraph 3 of the Constitution, the term "suspect", as a party to the criminal proceedings, should be replaced by "temporarily detained person", who can be held in confinement for no longer than 48 hours. After being remanded, he or she would become the accused.

Article 6 Paragraph 3 sub-paragraph b

Article 6 paragraph 3 (b) of the Convention guarantees the right of the accused to have adequate time and facilities for the preparation of his defence. The purpose of this right is to protect the accused from too hasty a conviction, i.e. without a proper consideration of his or her defence and without him or her being able to obtain effective legal assistance. Some problems may arise when the defence counsel is appointed but not chosen by the accused. The Strasbourg institutions are of the opinion that in such a case a reasonable time-limit would be 17 days. However, of course, everything depends on the complexity of the case, and it would not be expedient to prescribe definite time-limits by law. The requirement of Article 6 paragraph 3 (b) of the Convention is met in Lithuania first of all by Article 226 of the Code of the Criminal Procedure, which provides that after the conclusion of the preliminary interrogation, the accused and his defence counsel shall be granted the opportunity to familiarise themselves with all the material of the case. They may copy out from the file any necessary information. Sub-paragraph 5 of this Article establishes that "The time necessary for the accused and his defence for familiarising themselves with the case material may not be limited. However, if the accused and his defence counsel noticeably delay familiarising themselves with the case material, the investigator has the right to bring an indictment, giving his reasons for doing so, and fix a reasonable time-limit for this to be done. This decision must be approved by the prosecutor". In our view, the rule laid down in the second sentence of this sub-paragraph is logical and reasonable. After the accused has familiarised himself or herself with the case material, an indictment is drawn up and a copy presented to the accused. Article 259 of the Code of Criminal Procedure provides that the hearing of the case in court shall commence no earlier than three days after the submission of a copy of the indictment to the accused. Is the term of three days always adequate? Bearing in mind, as stated above, that a formal indictment must be brought against the accused at the stage of the preliminary examination (Articles 161-174 of the Code of Criminal Procedure) and the fact that the accused is informed of the nature and cause of the charges against him at an early stage, i.e. prior to the indictment, and that there may be no other grounds for the accusation than those stated in the decision to bring an indictment against that person, there should not be any problems.

Article 6 Paragraph 3 sub-paragraph c

Article 6 paragraph 3 (c) of the Convention guarantees rights of the accused that are related to the right to defend himself or herself in person and through legal assistance of his or her own choosing, or if he or she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. In the case of *Pakelli v. Germany, 1983*, the Court of Human Rights decided that the accused also had the right to be given legal assistance free in cassation proceedings. Germany lost the case, because the defence counsel who had been appointed to assist the accused at a lower court, was prohibited from taking part in his defence on appeal. In the decision of 28 November 1991, in the case *S. v. Switzerland*, the Court of Human Rights held that there had been a violation of Article 6 paragraph 3 (c) of the Convention as the accused, who had been detained on remand, had not been allowed to consult with his defence counsel in private. The Court of Human Rights has pointed out that even though the European Convention on Human Rights, contrary to the right of the accused to communicate freely and privately with his counsel provided for in Article 8 paragraph 2 (d) of the American Convention on Human Rights, does not directly prohibit preventing the accused from communicating with the defence counsel in private, such a prohibition is established in another document of the Council of Europe. Article 93 of the "Standard Minimum Rules for the Prisoners" (Annex AA73 of the Resolution of the Committee of Ministers of the Council of Europe) states "The consultations of the accused with his counsel may be observed by the police or prison officers, but they may not be either directly or indirectly overheard". In the opinion of the Court of Human Rights, the assistance of the

defence counsel may not be sufficiently effective if he is not provided with the conditions necessary for confidential consultations, and the Convention aims at ensuring concrete and effective rights and guaranteeing a fair trial. This decision of the Court of Human Rights is very important in Lithuania too, as Article 58 paragraph 2 (3) of the Code of Criminal Procedure provides that where there is a ground for believing that the consultations of the defendant with the defence counsel in private will have a negative impact on the comprehensive and impartial examination of the circumstances of the case, the person conducting the inquiry and the investigator shall be allowed to be present during those consultations for the first 15 days of detention or detention on remand and, if consent is given by the prosecutor or a judge, for a longer period. Recently the Constitutional Court of the Republic of Lithuania had to reply to the question of whether this provision of the Code of Criminal Procedure is in compliance with Article 31 paragraph 6 of the Constitution, according to which "persons suspected or accused of an offence shall be guaranteed the right to a defence and a legal counsel from the moment of the arrest or initial interrogation". The Constitutional Court decided (18 November 1994) that "this is a rather civilised procedural measure" (Article 58 paragraph 2 (3) of the Code of Criminal Procedure) whereas the defence counsel's wish to win the case by all means conflicts with the principle of the Criminal Code that the court, prosecutor, investigator and any person conducting the inquiry must apply all the measures provided by law so that the circumstances of the case can be examined comprehensively and impartially...". It is therefore possible to state that the Constitutional Court reached an entirely different decision from that taken by the Court of Human Rights in a similar case. Even though the Constitutional Court of the Republic of Lithuania considers that Article 58 paragraph 2 (3) of the Code of Criminal Procedure is in conformity with the Constitution of the Republic of Lithuania, it is evident that this rule conflicts with Article 6 paragraph 3 (c) of the Convention and should be abolished prior to the ratification of the Convention.

The Code of Criminal Procedure does not pose any further problems from the point of the view of Article 6 paragraph 3 (c) of the Convention. Article 56[1] provides that if the accused does not have sufficient means to pay for a defence counsel, he or she is entitled to be given legal assistance, the costs of which shall be met from the state budget. The implementation of this rule in practice sometimes causes difficulties - lawyers are not willing to participate in such proceedings because the fee paid to them is too small.

The Code of Criminal Procedure entitles the defence counsel to act at all stages of criminal proceedings, and the amendments to the Code of Criminal Procedure which have been in force since 1 January 1995 provide that the participation of a defence counsel in appeal and cassation proceedings is obligatory.

Article 6 Paragraph 3 sub-paragraph d

Article 6 paragraph 3 (d) of the Convention guarantees the right of the accused to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The Court of Human Rights has established violations of these rights on a number of occasions: in the case of *Kostovski v. Holland, 1989* a violation was found because witnesses whose identity had not been revealed to the defence, were examined by the investigating judge but were not called to appear in court; in the case of *Delta v. France, 1990* a witness was examined only by the police; in the case of *Barberà, Messegué and Jabardo v. Spain, 1988* a violation was found because the accused had been sentenced to a term of 30 years' imprisonment at the court trial which lasted for only one day, and at which prosecution witnesses were not examined and sentence was passed on the basis of the written material of the case. In such cases, where prosecution witnesses have not been examined during court hearings and the sentence has been passed on the basis of evidence given by witnesses at the preliminary stage of the investigations, when neither the accused nor the defence counsel

have been provided with the opportunity to question these witnesses, the Court of Human Rights has found a violation of Article 6 paragraph 3 (d) of the Convention and a violation of Article 6 paragraph 1 of the Convention, which guarantees a fair hearing. The same decision was also made in the case of *Lüdi v. Switzerland, 1992*: the courts refused to call to the court hearing the police agent whose identity had been concealed and passed the sentence on the basis of his written statement.

In Lithuania problems may arise concerning the fact that the Code of Criminal Procedure mentions participants in proceedings whose identity has been concealed, such as witnesses and the injured party. Article 317 paragraph 1 of the Code of Criminal Procedure, which is in force at present, states that:

"if during the preliminary investigation, the data establishing the identity of a witness or the injured party have been concealed, the court may not summon such a witness to the court hearing and his evidence given during the pre-trial proceedings shall be read aloud.

If the court decides that a witness or the injured party must be questioned at a court sitting, the court shall direct the officer responsible for the concealment of the identity of that person to arrange for his appearance in court in such a manner that his identity will not be revealed.

The court shall examine such persons in the absence of the parties to the trial. In this case the evidence given by a witness shall be recorded in the minutes of the court sitting by one of the judges.

If the court decides to examine a witness whose identity has been concealed or the injured party at the court hearing, the court may do so in camera, by employing audiovisual means that prevent other parties to the trial from establishing the identity of a witness".

Nothing is said in this provision about the possibility of the accused questioning a witness or the injured party whose identity has been concealed. An additional provision to this effect is required.

Article 6 Paragraph 3 sub-paragraph e

Under Article 6 paragraph 3 (e) of the Convention the accused is entitled to "the free assistance of an interpreter if he cannot understand or speak the language used in court".

In Lithuania no problems should arise concerning this right of the accused. Article 15 of the Code of Criminal Procedure provides that all parties to the criminal proceedings (not only the accused) who cannot understand or speak Lithuanian shall be entitled to the free assistance of an interpreter. Investigation and trial documents shall be presented to the accused and other parties to the trial, translated into their native languages or into any other language understandable to them. Article 123 of the Code of Criminal Procedure establishes that the court may recover the costs of the court proceedings from the convicted person, except for the costs of an interpreter.

Conclusions and Proposals

The ratification of the Convention will pose serious problems for the Republic of Lithuania as national legislation is not in compliance with the requirements of Article 6. The following amendments to the laws are necessary:

1. The harmonisation of standard laws with the latest amendments to the Code of Civil Procedure, by providing that everyone shall be entitled to a legal defence if he or she considers that acts, actions or the inaction of state bodies and government institutions and public officials violate his or her rights.

2. A reform of the Code of Administrative Offenses by providing for a court hearing in cases concerning administrative offenses for which one of the following penalties is imposed: confiscating and using as compensation the object by means of which an administrative offence has been committed or which is the direct reason for committing it; seizure of the object by means of which an administrative violation of law has been committed or which is the direct reason for committing it (if the value of that object is 500 Lt or more), depriving the offender of his or her driving licence; corrective labour; administrative detention; suspension from office and a fine of 500 Lt or more. During court hearings a person who has committed an administrative offence, and his or her representative must be entitled to all the rights provided to the accused and his defence counsel by the Code of Criminal Procedure. The decision taken by the court should be subject to an appeal to a higher court.

3. An amendment to the Code of Criminal Procedure to provide for the possibility of terminating a criminal case when the proceedings have lasted too long through no fault of the accused.

4. The introduction in the Code of Criminal Procedure of the institution of an investigating judge. This provision is to establish that the same judge may not exercise the functions at pre-trial proceedings and later take part in court proceedings in the same case.

5. The issue of a recommendation to the Ministry of Justice to prepare the methodology for drawing up schedules for the distribution of the workload of judges, and the establishment of a procedure for substituting judges in the event of illness or in other necessary cases.

6. The issue of a recommendation to the Office of the Prosecutor General and the Ministry of Internal Affairs to instruct the officers of the departments subordinate to them to the effect that the documents of a criminal case drawn up by the officers conducting an inquiry or pre-trial examination may not contain statements which violate the principle of the presumption of innocence.

7. The abolition in the Code of Criminal Procedure of the concept of the suspect.

8. The repeal of Article 58 paragraph 2 (3) of the Code of Criminal Procedure, which provides for the possibility of the person conducting the inquiry and the investigator being present during the consultations of the detained or arrested and accused person with his or her defence counsel.

9. An amendment to Article 317 paragraph 1 of the Code of Criminal Procedure providing the accused or his defence counsel with the possibility of questioning a witness or an injured party whose identity has been concealed.

ARTICLE 7 OF THE CONVENTION

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations".

Article 7 paragraph 1 of the Convention formulates two main principles of criminal law, i.e. *nullum crimen sine lege* and *nullum poena sine lege*. The first principle means that a person can only be held liable for a criminal offence which at the time of its commission was defined in criminal law as a crime. The second principle prohibits applying a heavier punishment than that provided for in the law in force at the time of the commission of the crime.

It must be noted that according to the first principle it is prohibited to bring criminal charges against a person under a law which was enacted after the commission of the offence, even when the sentence is only declarative, because even a declarative sentence may have undesirable repercussions (record of the conviction, second or subsequent offence, etc.) and harmful effects for the person concerned.

In its practical work (on the basis of this Article of the Convention) the Commission of Human Rights prohibits the establishment of the elements of a criminal offence by analogy, i.e. the legislator must define very precisely the limits of a criminal offence. In this respect one question may be problematic: how and to what extent should these limits and the criminal offence itself be defined so as to be in line with the requirements of the Convention? In establishing the degree of precision in the definitions of criminal offenses, account must be taken of the recommendations made by the Strasbourg institutions.

It is obligatory both for the legislators and the courts to observe the principle of *nullum crimen*. In the system of continental law, courts have more freedom to interpret the elements of *corpus delicti*. This principle does not permit the court to treat an offence too narrowly or literally. Judges should not be afraid that a free interpretation of a crime from the point of view of the Strasbourg institutions might contradict the Convention. A good example to illustrate this principle is *Appl. No. 4161/69*. The appellant complained that the Section entitled "Sexual perversion" had been interpreted too broadly and mutual masturbation had been treated as incriminating. The Commission did not consider the problem of interpretation, it just established that this had been the explanation given by the highest judicial authority and it had been in effect at the time of the act. The Strasbourg institutions have also pointed out several violations of the principle of *nullum poena sine lege* which requires that at least the maximum punishment should be established.

Article 7 paragraph 1 is based not only on national law but also on international law: no one is to be considered guilty of any act or omission which was not interpreted by international law as a crime at the time it was committed. At first sight, this recourse to international law may seem redundant because international law usually obliges states to incorporate several *corpus delicti* into national law by way of exception.

Article 7 paragraph 2 of the Convention does not specify exactly when international law justifies the established limitations. In this case the circumstances of the origin of paragraph 2 should be borne in mind: during the preparatory stage of the Convention, the expert

committee pointed out that the aim of this paragraph was to explain that the *nullum crimen sine lege* idea was not applicable to the laws which had been issued at the end of World War II under exceptional circumstances with the aim of punishing for war crimes, treason, collaboration with the enemy, and that it did not try to give a moral or legal assessment of these laws. It merely proclaimed that the sentences of the Nuremberg Tribunal had been lawful.

In cases in which representatives of national authorities apply a law retrospectively to punish war criminals and collaborators, the Strasbourg institutions place restrictions on the acceptance of applications attempting to justify prohibiting retroactive validity. In such cases the complaint is considered inadmissible and is not considered further if the criminal behaviour was recognised at the time as a criminal offence.

Proceeding from the interpretation of the Strasbourg institutions, the provisions of Article 7 of the Convention are applied only in criminal proceedings. However, it is necessary to keep in mind that there are requirements for a lawful and fair consideration of any case (not only in criminal but also in administrative proceedings). Therefore the stipulations concerning the retroactive validity of a law should be applied to all the categories of cases in which the law has been violated.

In comparing the laws of the Republic of Lithuania with the Convention it is necessary to emphasise that the Constitution does not provide for the prohibition of the retroactive validity of laws in general, while Article 7 of the Criminal Code states that:

"the criminality and punishment of an act shall be established by the law in effect at the time of the act...

The law which cancels the criminality of an act or mitigates the punishment.... has retroactive validity, i.e. it is applicable to persons who committed an act that was punishable before such a law came into effect....

The law which asserts the criminality of an act or stipulates for a more severe punishment.... does not have retroactive validity....".

A similar rule is established by Article 8 of the Code of Administrative Procedure, which says that:

"a person guilty of a violation of administrative law is liable under laws valid at the time and place of the commission of the act.

Laws mitigating or cancelling liability for administrative offenses, have retroactive validity, i.e. they are applicable to violations of administrative law committed before the passing of these laws. Laws introducing or aggravating liability for administrative offenses do not have retroactive validity.

The judicial consideration of administrative offenses is carried out under the laws valid at the time and place of the judicial consideration of the case".

More problematic are the following three aspects of criminal law:

(1) Blanket provisions of the Criminal Code. These are the rules on illegal behaviour which do not define the *corpus delicti* but refer to other legal rules. In this case rules may be statutory and regulatory. When the rules are established by a Government resolution, then in a certain sense criminal liability is created by their violation, but this is not in conformity with

the principle of *nullum crimen sine lege* formulated in Article 7 of the Convention. On the other hand, it is impossible to do without blanket provisions, and one should be guided by the following principles:

(a) the use of blanket provisions which refer to the resolutions of the Government should be limited;

(b) blanket provisions should include additional formal or evaluating properties of acts or their consequences, such as "grave consequences", "great damage" and the like;

(2) Article 225 of the Criminal Code legitimises, in fact, the application of the prohibited principle of analogy, for the definition of hooliganism as "deliberate actions causing a serious disturbance to public order and indicative of obvious disrespect for the public" is applicable to any offence committed in public.

(3) Article 24 and 25 on life imprisonment, Article 59 on committing persons to a psychiatric hospital, and Article 61 on the enforced 'placing of a juvenile in a specialised educational institution' do not define the maximum punishment. In such cases a time limit should be laid down after which cases should be reviewed.

In our opinion, the Law on the Liability of Lithuanian Citizens for Genocide in the Republic of Lithuania is completely in line with Article 7 of the Convention, and we do not think it is necessary to analyse it.

Conclusions and proposals

The ratification of Article 7 of the Convention should not create any great problems for Lithuania although it is necessary to do the following:

1. To repeal the present version of paragraph 1 of Article 225 of the Criminal Code, which legitimises the application of the principle of analogy in criminal law.

2. To revise Articles 24 (life imprisonment), 59 (commitment to a psychiatric hospital) and 61 (placement in a specialised institution for juveniles) of the Criminal Code by specifying a time limit after the expiry of which cases should be reviewed.

3. To propose to the group working on the project of a new Criminal Code to limit the use of blanket provisions to cases in which they are indispensable, and to formulate additional characteristics of the act or its consequences.

ARTICLE 8 OF THE CONVENTION

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Article 8 of the Convention is closely linked to Articles 9-12, and these links have been underscored by the Commission and the Court more than once. It is necessary to emphasise that Articles 9-12 of the Convention elaborate the special provisions of Article 8 by referring to concrete and different spheres of private life. This situation enables us to make the important conclusion that the content of Article 8 is rather broad and general.

This Article protects four different interests - personal life, family life, inviolability of one's home and the confidentiality of one's correspondence, which may be described as the right to privacy. It is noteworthy that the Parliamentary Assembly of the Council of Europe has defined private life as "the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially", (Resolution 428/1970 on the mass media).

Article 8 Paragraph 1

One of the most important requirements of this Article is the protection of personal information. There is a very close connection between the prohibition of the collection, registration, accumulation, disclosure, and publication of personal information, and interference in personal life. Theoretically, we may find a "conflict" of two principles here: on the one hand, the day-to-day functioning of the state (economic and national security interests, public order, prevention and control of crime) demands the obligation of persons to give certain personal information to state institutions; on the other hand, it is a violation of privacy when the state collects information on the private life of its population. Decisions of the Commission and Judgments of the Court, as well as the experience of Hungary, enable us to formulate certain principles for the resolution of this "conflict":

1. collection of personal information may be open (voluntary or compulsory) or secret (the latter will be discussed later separately because of its specific features);

2. the reasons and purposes for the collection of personal information may be prescribed only by law.

It should be noted that the collection of general information on the circumstances of a person's life (for example, birth, death, education, citizenship, marriage, profession, etc.) is, by definition, not considered a violation of Article 8 of the Convention, and the use of information relating to criminal statistics (particularly previous convictions) is most often (but not always) recognised as lawful by the Commission and the Court;

3. personal information may be collected, accumulated, disclosed and used only under a procedure established by law;

4. the disclosure of personal information is permissible only with the person's consent. On the person's refusal to grant permission, such information may be made public only on the basis of national laws which are in conformity with paragraph 2 of Article 8 of the Convention;

5. national legislation must provide for the protection of personal information (this does not refer to personal information collected by the state. This requirement proceeds from Article 1 of the Convention);

6. the information collected may be used only for the purposes and under the procedure prescribed by law. It should be noted that Article 18 of the Convention sets forth the rule pursuant to which "restrictions permitted under this Convention to the said rights and freedoms (i.e. also collection of personal information) shall not be applied for any purpose other than those for which they have been prescribed".

One more principle concerning the secret collection of information:

7. the secret collection of personal information is permissible only in the cases provided for in Article 8 paragraph 2 of the Convention, i.e. "in the interests of national security, public safety...., for the prevention of disorder of law or crime...." and when it "is necessary in a democratic society".

It is necessary to take note of the phrase "when it is necessary in a democratic society", which is very often used in the Convention. An analysis of the decisions of the Commission and the Court indicates that this phrase is an indispensable element of Article 8 paragraph 2. It is, in fact, impossible to consider this phrase on the basis of its formal properties because, in the opinion of the Court, each concrete case requires the determination of whether "there was a well grounded connection between the measures applied and the purpose sought" and whether "the connection maintains the principle of balance" and also whether "the measures applied were at least minimally necessary". Intervention of the state into personal or family life must have a lawful reason, and the legal norms regulating the right of the state to intervene in personal or family life cannot be expressed in general terms (*Olsson v. Sweden, 1988*; *Herczegefalvy v. Austria, 1992*; *Crémieux and Miailhe v. France, 1993*).

Let us therefore analyse the laws of the Republic of Lithuania which govern the collection, accumulation, publication; etc. of personal information. First of all, it should be noted that Article 22 of the Constitution of the Republic of Lithuania provides that "the private life of an individual shall be inviolable... Information concerning the private life of an individual may be collected only by order of a court and in accordance with the law. The law and the court shall protect individuals from arbitrary or unlawful interference in their private or family life, and from a violation of their honour and dignity".

Before embarking upon an explanation of the provisions of the laws of the Republic of Lithuania, it is necessary to distinguish several aspects of particular importance. Firstly, various bodies are engaged in the collection of information about a person. They may be either state institutions or private entities. Secondly, it is necessary to consider the manner in which the information is collected, which may be with or without the person's consent.

We shall start with information collected by state institutions, (remembering that state institutions are subject to the restrictions contained in Article 8 paragraph 2).

At present, Lithuania does not have a general comprehensive law on the collection, accumulation, systematisation, publication and security of personal information. However,

several specific laws govern certain defined spheres of life. One such law to be mentioned first is the Law on the Population Register which governs the establishment of the Population Register (which contains standard information on each citizen). Another such law is the Law on Statistics, which governs the obligation to provide certain kinds of information and the right to use it. Apart from these laws on the collection of information Lithuania has a number of other laws, e.g. the Law on the Courts, the Law on Police, the Law on the Prosecutor's Office, the Provisional Law on the Interior Service, the Law on the Security of State Borders, the Law on Customs, the Law on State Defence, the Law on the Security Department etc.), which require that a person applying for a job in the aforementioned institutions shall provide certain specific information about himself/herself (e.g. citizenship, age, education etc.). However these laws do not govern the procedure for the use, dissemination or disclosure of this information.

Another group of laws provide that persons seeking to obtain state support (benefits, pensions etc.), to immigrate, emigrate, obtain Lithuanian citizenship, attend an educational institution, marry, register a company, start a business etc., must provide certain personal information, but these laws do not govern the procedure for the use, accumulation or publication of this information either.

The third group of laws grant the right to certain state institutions to collect information on individuals in the course of their duties:

(a) Guard Service Department of National Defence (Article 7 paragraph 7);
(b) Police (Article 18 paragraph 3);
(c) Interior Service (Article 2 paragraph 8);
(d) State Security Department (indirectly Article 8 paragraph 1);
(e) Department of Statistics;
(f) State Tax Inspectorate;
(g) Bank of Lithuania.

It should be noted that, in practice, both state and private institutions collect information on various aspects of people's lives, more for habitual than legal reasons (e.g. biographical information collected when hiring a person, various items of information in connection with salaries and wages, etc.). The problem is that in cases where legislation entitles a state institution to obtain a certain type of information, it usually does not lay down rules or procedures for the use and publication of such information. Very often, laws are restricted to a general phrase, such as "to keep confidential information secret". This can be illustrated by Article 7 of the Law on Police, which covers how to deal with personal information, and paragraph 23 of the Statute of the Bank of Lithuania:

"The Bank of Lithuania is obliged to keep information on its clients and correspondents, their commercial transactions and the balance in their accounts secret. The Bank may only provide information on the commercial transactions of its clients and the balance in their accounts to:

(1) the clients themselves;
(2) courts of law or arbitration tribunals in cases specified by law;
(3) financial institutions with respect to taxes.

All employees of the Bank of Lithuania are obliged to keep information on bank records and transactions confidential".

In practice, not a single law (with the exception of the Law on Statistics, the Law on Police and the Law on the Population Register) provides for the possibility of a person himself or herself receiving information on the data concerning him or her which has been collected by state institutions, although this right is enshrined in Article 25 of the Constitution of the Republic of Lithuania.

These problems are dealt with in greater detail by Articles 13 and 14 of the Law on Statistics:

"Article 13: Confidentiality of Statistical Data.
Statistical data may be used exclusively for statistical purposes and made public only in summary reports unless there are other agreements with the provider of the data. Information which constitutes a state or commercial secret shall be disclosed in accordance with the procedure established by the Department of Statistics and the Ministry of Communications and Informatics.

Statistical services must protect the anonymity of the data submitted and may not disclose information on business relations and personal situations which may be concluded from it. It is prohibited to present data on natural persons, legal personalities or economic entities to any person or institution, legal institutions and law-enforcement agencies when a criminal prosecution has been brought against such persons (or when a suit has been filed).

Information published in publications of the Department of Statistics or provided to state authorities and executive institutions may not be published by other agencies, organisations or mass media without reference to the statistical service which provided it.

Legal entities and natural persons of the Republic of Lithuania may use only the statistical information published in summary reports, except in cases specified in the Law on the Population Register of the Republic of Lithuania or other laws".

As has already been mentioned, state institutions may also collect secret personal information.

The secret collection of information may, in fact, be related to all the rights enshrined in this Article of the Convention. On the basis of various cases it has considered, the European Court of Human Rights has formulated certain basic rules concerning methods of collecting information secretly. It should be taken into consideration that Article 8 paragraph 2 of the Convention permits restrictions on a person's rights "when it is necessary in a democratic society in the interests of state security, public order..., for the prevention of disorder or crime,... to protect the rights and freedoms of others". These provisions first of all relate to laws on national security which may include provisions concerning the basis of and procedure for the introduction of constraints. In the opinion of the Court, the basis for the use of methods for the secret collection of information in a democratic society (inspection, search, screening, entry into a person's home etc.) should be the fight against dangerous crime (terrorism, narcotics etc.) and other legal objectives. A good example in this respect is the case of *A. v. France, 1993*. In July-August 1980, in Paris, Mr Gehrling informed Mr Aime-Blanc, director of the Central Office for the Prevention of Serious Crime, about an alleged plan, the existence of which was suspected by an informer, to murder Mr De Varga, who was at the time in prison. Mr Aime-Blanc agreed to allow Mr Gehrling to make a telephone call to the informer's home from his office. The conversation was tape recorded and filed in the data office of the police.

In November 1981, the informer filed a criminal complaint and requested the initiation of civil proceedings against Mr Gehrling and Mr Aime-Blanc. She claimed that the recording of the telephone conversation had been made in a private place without permission and, consequently, had been a violation of Articles 368 and 369 of the Criminal Code. The French judicial institutions dismissed the complaint.

On November 23, 1993, the Court of Human Rights ruled that the recording of the plaintiff's telephone conversation had violated her right to confidentiality of her

correspondence, i.e. Article 8 of the Convention. The Court held that the recording of the telephone conversation was the result of Mr Gehrling's and Mr Aime-Blanc's co-operation. Mr Aime-Blanc was an official representative of authorities who had contributed to the plan to make the recording by giving permission to use his office, telephone and tape recorder. He had not informed the authorities about their joint plan with Mr Gehrling and had acted without judicial sanction. However, he had participated in the process of recording the conversation in his capacity as a high-ranking police official, and the conclusion was that state authorities had been involved in this operation, which gave rise to the responsibility of the state under Article 8 of the Convention. A. had a right to confidentiality of her correspondence and in these circumstances it was not important to establish whether this had violated her "private life".

The aforementioned case demonstrated two other principles: national legislation must define the procedure of its application in legal proceedings. In this respect mention should be made of *Lüdi v. Switzerland, 1992.*

On March 15, 1984, a judge in Laufen, on receiving information from the German police that Mr Lüdi was planning to buy narcotics in Switzerland, began a pre-trial investigation and sanctioned the secret listening in on his telephone conversations. The police instructed one of the officials to establish contacts with Mr Lüdi. On August 1, 1984, after five meetings with Mr Lüdi, the latter was arrested and charged with drug trafficking, and sentenced to three years' imprisonment. To secure the anonymity of the policeman, the court "refused" to call him as a witness. The court argued that the policeman's reports and recordings of the telephone conversations were sufficient. Mr Lüdi appealed to the Court of Appeal in Berne against two charges brought against him. The Court of Appeal also refused to call the policeman to testify and dismissed the appeal. On April 8, 1986, the Federal Court also dismissed the appeal. However, the Court of Human Rights decided that Article 6 of the Convention had been violated, although the secret listening to telephone conversations and the actions of the secret agent did not contradict Article 8 because these investigative actions were provided for in legislation and were, in this case, necessary "in a democratic society... to prevent ...crime".

The last aspect concerns the independent supervision and control of the activities of such institutions (e.g. the courts, ombudsmen etc.).

It is necessary to analyse the laws of the Republic of Lithuania in the light of the aforementioned aspects. The Law on the State Security Department should be mentioned first. This Law defines the aims and objectives of this institution (i.e. to disclose activities that threaten the security, sovereignty, territorial inviolability and integrity of the State, the state system and government as referred to in the Constitution of the Republic of Lithuania and the defence and economic capacity of the State, as well as to prevent these activities, establish their causes and take measures to eliminate these activities according to the procedure specified by law). It also defines its functions, the principles of its activities and the rights and duties of its officials. Paragraph 1 of Article 19 of this Law provides that "in the course of their duties, officials of the Security Department have a right to conduct investigations, as set out in the Law on Pursuit Activities of the Republic of Lithuania, and exercise the rights granted to persons engaged in such investigations".

Article 3 of the Law on Pursuit Activities governs the legal bases of investigations:

> "The legal basis for commencing investigations is the initial information on a planned or committed crime, criminal activities or illegal income. Investigations, as they are provided for in this Law, are carried out:
>
> (1) when the persons who have committed the crime have not been identified;

(2) when initial verified information has been received on a person's criminal activity".

Article 6 of this law indicates measures which, when used, may lead to a violation of the rights laid down in Article 8 of the Convention, namely:

(a) secret inspection of premises;

(b) use of special means to check postal items and electric communications;

(c) the establishment of enterprises, offices or organisations in order to create guaranteed and favourable conditions for investigative action; making use of the registration and identification symbols of enterprises, offices and organisations;

(d) entry into the premises of enterprises, offices and organisations, making inspections, carrying out technological experiments, sampling materials, obtaining documentation, raw materials, finished goods and other objects for investigative purposes without saying this is done;

(e) use of expert services to ensure the success of investigations and to investigate processes, objects and documents;

(f) collection, accumulation, analysis and use of information relating to state security, crime and the state infrastructure.

The law also provides for procedures to permit the above measures (which are in conflict with the Constitution), for checks on the legality of activities to be carried out by the Prosecutor General, and for procedures to carry out a parliamentary review. It also lays down the principles and procedures for the use of secretly obtained information.

In connection with the assessment of whether the principles of these laws are in conformity with Article 8 of the Convention, it must be said that they must be first harmonised with the Constitution of the Republic of Lithuania. Otherwise there is, in our opinion, only one essential drawback - namely an excessively broad basis for the collection of secret information. In addition, the manner in which the information, obtained by these methods, can be used should be defined more precisely.

With regard to the security of personal information, it must be stressed that not only is the state obliged to ensure that this information is not disclosed and is kept safe by state institutions, but it must also guarantee that these obligations are not violated either by state institutions or private persons. A case in point is Article 14 of the Law on Notaries, which provides that:

"Notaries public must ensure the secrecy of notarial acts. Notarial certificates on notarial actions and documents shall be issued only to the legal entities or natural persons who commissioned them or for whose benefit the notarial acts were carried out or to their authorised representatives.

At the request of the courts, the prosecutor's office and interrogation and investigation bodies, only those notarial certificates and documents will be issued that relate to the criminal or civil action concerned.

Certificates relating to wills shall be issued only on the death of the testator.

The rule on the confidentiality of notarial acts also applies to persons who no longer work as notaries, and to persons who have become aware of the notarial acts in the course of their duties.

A party to a transaction, its legal successor and its legal representative may relieve the notary from the obligation to observe the confidentiality of notarial acts. If one of the parties has died, relief from the obligation to observe confidentiality may be granted by the Ministry of Justice of the Republic of Lithuania".

Article 25 of the Law on Lawyers obliges a lawyer "not to disclose information entrusted to him", while Article 28 of the same law provides guarantees for the security of his actions and information, for "no one is allowed to seize, appropriate or inspect a lawyer's documents that contain information on his professional activity, except in cases in which criminal proceedings have been brought against the lawyer". In a similar way, security of personal information is guaranteed by the Law on Commercial Banks:

"Banks and their employees are obliged to treat information on the accounts, deposits and transactions of their clients and correspondents as strictly confidential. On assuming their duties, bank employees give a written undertaking to this effect.

Information on the accounts and transactions of a bank's clients may be disclosed to courts, interrogation bodies, financial institutions and the Department of State Control according to the procedure specified in legislation.

The Bank of Lithuania is entitled to receive, on request, all documents and any information on the transactions concluded by a commercial bank.

On the death of a depositor, information on his or her accounts and deposits may be disclosed only to persons indicated in the will of the owner of an account or a deposit which has been left with the bank, as well as notaries' offices in connection with questions relating to inheritance".

Article 6 of the Law on the Press and Other Mass Media prohibits "the publishing of information on a person's personal life without his or her consent, with the exception of information specified by the court. Information relating to investigations may not be published without the written permission of the prosecutor, interrogator or investigator. When the media cover a trial, no materials may be published which violate the presumption of innocence and influence the decision of the court." Article 30 requires that "in order to publish information on a person's personal life a journalist should obtain the consent of the person or his or her legal representatives".

There is no provision for direct liability for the unlawful publication of personal information, but the legislation of the Republic of Lithuania mentions the issue of liability in the following cases:

(a) civil - Article 7 and $7^{(1)}$ of the Civil Code, and Articles 32-34 of the Law on the Press and Other Mass Media;

(b) criminal - for insult, libel and the disclosure of confidential information on adoption;

(c) administrative - for breaches of the procedure for disclosing statistical data.

Certain procedural guarantees are provided by Article 16 of the Code of Criminal Procedure, which states that "... in order to prevent the disclosure of information on intimate aspects of the lives of persons participating in lawsuits..." closed judicial hearings shall be allowed. A similar rule is established by Article 10 of the Code of Civil Procedure.

In addition, Article 198 of the Code of Civil Procedure provides that in order to ensure the confidentiality of correspondence and wire communications, citizens' personal correspondence and wire communications may be read out in an open court hearing only with their consent. Otherwise, the case is heard in closed judicial proceedings.

Protection of personal information is closely related to the right to inviolability of one's home and the secrecy of one's correspondence which is enshrined in Article 8 of the Convention. It must be emphasised that the European Commission of Human Rights and the Court interpret the term 'home' very widely and even include a person's place of work. Let us take *Niemietz v. Germany, 1992* as an illustration.

In December 1985, a letter with a criminal content was sent by fax to the judge of the Freising District Court. It bore the signature "Klaus Wegner" - possibly a fictitious person - followed by the words "on behalf of the anti-clerical working group of the Bunte Liste, a local political party chaired at the time by the plaintiff.

In view of the contents of the letter, criminal proceedings were subsequently instituted against "Klaus Wegner" for insulting behaviour. The District Court issued a warrant to inspect the Bunte Liste documents in order to establish the identity of "Klaus Wegner". After inspecting the documents including six individual files no relevant documents were found.

German judicial institutions dismissed all the appeals. The European Court of Human Rights ruled that the search of the applicant's office had given rise to a violation of Article 8 of the Convention, i.e. his right to respect for private and family life and the inviolability of his correspondence. In the opinion of the Court, respect for private life is related to a certain extent to the right to establish and develop relationships with other persons. There was no essential reason why the concept of 'private life' should not include professional or business activities, for it is on the basis of their professional and business activities that the majority of people establish new contacts with people.

Article 24 of the Constitution of the Republic of Lithuania provides that a person's home is inviolable. Article $10^{(1)}$ of the Code of Criminal Procedure declares that citizens are guaranteed the inviolability of their home. No one has the right to enter a home against the will of the persons who live in it without a legal warrant. Article 136 of the Criminal Code lays down that anyone carrying out an unlawful search, eviction, or other acts infringing the inviolability of a citizen's home is criminally liable.

Article 24 of the Constitution of the Republic of Lithuania provides that no entry is allowed without the resident's consent except on the basis of a court order or according to the procedure established by law when it is necessary to guarantee public order, detain an offender or save a person's life, health or property.

Article 34 of the Law on Police grants the police the right of entry at any time of day in the following circumstances: in pursuit of a person who has committed a crime; in pursuit of criminals hiding from law enforcement bodies; in order to prevent a crime; and in cases of natural disasters. If a person does not comply with the demands of the police, they may enter by force.

Article 7 of the Provisional Law on Social and Psychological Rehabilitation entitles police officers to visit a person whose name is on the rehabilitation list at his or her home from 6am to 10pm. However, such cases are mostly governed by the Code of Criminal Procedure of the Republic of Lithuania.

Article 188 of the Code of Criminal Procedure provides the legal basis for a search, i.e. when there is sufficient reason to believe that the tools of a crime, objects and valuables acquired by criminal means and other objects or documents which might be important to the case, then the investigator may carry out a search, but only with the warrant of a prosecutor or his deputy. A search without a warrant, which is possible in urgent cases, must be reported to the prosecutor within 24 hours.

Article 191 of the Code of Criminal Procedure provides that the investigator shall take measures to ensure that the circumstances of a person's personal life which are not related to the case and which have become known during the search, as well as the circumstances of the personal lives of other persons who live on the same premises are not disclosed. Under Article 194 of the Code of Criminal Procedure, the homes of the members of diplomatic missions and their families may be searched only at the request of the diplomatic mission's representative or with his consent, which can be obtained through the Ministry of Foreign Affairs of the Republic of Lithuania.

Article 199 of the Code of Criminal Procedure provides that in order to find evidence of a crime, to understand the situation of the event and any other circumstances significant for the case, the investigator may inspect premises. During the inspection he may photograph or film and draw plans and layouts if he finds it necessary.

Article 205 of the Code of Criminal Procedure provides for the verification of testimony by photographing, filming, drawing plans and diagrams. (No actions detrimental to a person's dignity or dangerous to his or her health are permitted).

Article 22 of the Constitution of the Republic of Lithuania guarantees for the inviolability of personal correspondence, telephone conversations and telegraphic and other communications. Article 137 of the Criminal Code lays down that anyone who violates the principles relating to personal correspondence, telephone conversations and telegraphic and other communications is criminally liable. Article $10^{(1)}$ of the Code of Criminal Procedure provides that any seizure of correspondence or interception at a post or telegraph office may be conducted only in conformity with the principles and procedure prescribed by the Code of Criminal Procedure. Article 196 of the Code of Criminal Procedure provides that a seizure of correspondence or its interception at a post or telegraph office may be carried out by the investigator when he has grounds for doing so, but only with the warrant of the prosecutor or a court decision, if, under Article 187 of the Code of Criminal Procedure, it is necessary to obtain documents important for the case and it is known where they are precisely located. (The same procedure must be applied to carry out an inspection of postal or telegraphic correspondence).

The seizure or reading of postal or telegraphic correspondence and its interception at post or telegraph offices and any monitoring of telephone conversations may be conducted by the investigator when he has grounds for doing so, but only with the warrant of the prosecutor or a court decision.

The tapping of telephone conversations is regulated by Article $198^{(2)}$ of the Code of Criminal Procedure: tapping is permissible when there is a ground for believing that in this way it will be possible to obtain information about the preparation of a serious criminal offence, or a grave criminal offence which is in the process of being committed or has been committed

or when there is danger that violence, coercion or other unlawful acts will be committed against the victims, witnesses or other participants in the proceedings or their relatives.

Telephone conversations of persons suspected of or charged with a serious crime are tapped and recorded only on the basis of a decision of the interrogator or the officer of the investigative body and only with the warrant of the chairman of the Supreme Court, or his deputy or a judge or the chairman of a local district court. This can also be done without this decision being taken or this warrant being given, at the request of the victim, a witness or another participant in the proceedings.

Article 11 of the Law on the Communications provides that employees of communications undertakings have no right to read the correspondence of persons who use the services of communications offices, to listen to their telephone conversations, to violate the principle of the inviolability of the confidentiality of telegraphic communications, or to allow others to do so.

In our opinion, the aforementioned laws which govern searches, inspections, seizures, the right of entry, the tapping of telephone conversations etc. do not conflict with Article 8 of the Convention. However, Article 137 of the Criminal Code, for example, must be made more precise. A number of the laws of the Republic of Lithuania permit state institutions to make inspections (State Control Department, State Tax Inspectorate, Hygiene Department etc.), to intercept mail and to carry out inspections of premises and search persons and buildings (State Border Security Service, Customs, etc.), but they do not govern the grounds and procedure for these actions, and this may in itself lead to a violation of Article 8 of the Convention.

A suitable example of this problem might be the case of *Funke, Crémieux and Miailhe v. France, 1993.* On January 14, 1980, a search was conducted in Mr Funke's home and several documents were seized. The grounds for the search were possible violations of laws governing financial transactions. Customs officers also demanded that information be produced on certain accounts in foreign banks. In April 1982 the customs officers obtained the permission of the Strasbourg district court to freeze FRF 100,200 to guarantee the enforcement of fines imposed by the Customs Office.

The *Crémieux* case was similar. From 1977 to 1980, several searches were conducted in the applicant's home and a large number of documents were seized. The ground for these actions was the suspicion he had violated laws governing financial transactions. In 1982 charges were brought against him. Later, however, the customs officers agreed to the judge dropping the charges. During the investigations Mr Crémieux had made several unsuccessful attempts to dispute the legality of the searches and seizures, as well as the conformity of certain sections of the Customs Code with the Convention. In 1985 the Court of Cassation dismissed his appeal (The *Miailhe* case is, in fact, also very similar). The Court of Human Rights argued that all the aforementioned measures could be applied only in cases in which "it is necessary in a democratic society" (Article 8). The Court also recognised that these measures were necessary to protect the economic well-being of the country, to stop the flight of capital etc. However, that said, at the same time citizens must be protected against officials' abuse of their power, French legislation allowing customs officers considerable freedom of action (they had a right to establish the necessity, scope and number of inspections). In addition, the legal requirements for such measures were insufficient and contained a number of loopholes, so that they failed to safeguard the security of citizens and their personal inviolability.

Thus, having regard to the imperfections of French legislation, the Court established that Article 8 of the Conventions had been violated.

Article 8 Paragraph 2

As has already been mentioned, Article 8 of the Convention can be interpreted very broadly, so that in the analysis of its content attention should also be paid to the complaints considered by the European Commission and Court of Human Rights. It frequently happens that complaints concern restrictions of the rights of imprisoned persons: denial of correspondence or meetings with family members or their lawyers; searches; inspections; censorship of letters; control of family visits etc.

In the 1960s and 1970s the Commission usually dismissed such complaints on the ground that the aforementioned restrictions were a natural consequence of being in prison. In the 1980s, however, the decisions of the Court of Human Rights indicated that in such cases the guiding principle should be that "only the minimum necessary constraints can be justified." Here we might give a few examples.

First, *Messina v. Italy , 1993*: in 1985, a warrant was issued to arrest Mr Messina on charges connected with the violation of laws on narcotics. During his detention the applicant had problems sending and receiving correspondence. The Court of Human Rights held that Article 8 of the Convention had been violated, basing its decision on the evidence that during the detention the applicant had had problems sending and receiving letters: not all his letters reached the addressees, and he did not receive all the letters sent to him.

Second, *Herczegefalvy v. Austria, 1992:* the Court established that the practice of a psychiatric hospital of forwarding its patients' letters to their doctors was a violation of Article 8 of the Convention, which guarantees confidentiality of personal life.

Analysis should be made in this respect of the Corrective Labour Code of the Republic of Lithuania and the Provisional Law on Social and Psychological Rehabilitation. These rules stipulate that prisoners shall be permitted to send and receive letters without any restriction on their number. Correspondence shall be censored, postal packets, parcels delivered by hand and parcels with printed matter shall be inspected. Correspondence of prisoners, if they are not relatives, shall be prohibited.

The administration of the institution must pass to the prisoners any letters received on their behalf and send their letters to the addressees within three days after the letter has been received or the prisoner has handed it to the administration to be posted.

The postage must be paid by the prisoner.

Prisoners have the right to send proposals, applications and complaints to state authorities, non-governmental organisations and officials. The administration of the institution may attach comments to the prisoners' proposals, applications or complaints.

Proposals, applications or complaints to the prosecutor shall not be censored and must be posted within one day after they have been received.

Replies to prisoners' proposals, applications and complaints are signed and made public within three days after they have been received.

Prisoners are prohibited from sending collective complaints or applications.

Prisoners are prohibited from contacting state authorities, non-governmental organisations and officials with proposals, applications or complaints on behalf of other prisoners or in any other way than through the administration of the institution.

The postage for the letters with proposals, applications or complaints must be paid by the prisoners themselves.

In addition, prisoners are entitled to receive visits, which may be of short duration (up to 4 hours) or long duration (up to three days).

Meetings of short duration are allowed with relatives and other persons in the presence of a representative of the institution. At the request of the prisoner, a meeting of short duration may be substituted by a telephone call.

Meetings of long duration with the right to live together are permitted only with close relatives, as provided by Article 25 of the Code of the Criminal Procedure of the Republic of Lithuania.

If a prisoner is seriously ill and his life is in danger, the director of the institution is obliged to allow the prisoner's relatives to visit him. Such visits shall not be included in the number of permitted regular meetings.

Prisoners of institutions with a general regime, all types of reformatory and penal settlements, and the prisoners of institutions with a strict regime (except those sentenced for violent crimes) may be allowed to leave the place of detention for no longer than ten days in connection with the death of a close relative or a serious illness which endangers the patient's life, as well as in connection with a disaster which has caused great material damage to the prisoner or his family.

Permission to leave is given by the director of the institution with the prosecutor's knowledge, having regard to the personality and behaviour of the prisoner. Time spent outside the establishment of deprivation of liberty on the basis of such permission is included in the time serving the sentence. Travel expenses must be paid by the prisoner himself/herself or his/her relatives.

Women prisoners with children, who live in the children's (infants') unit of the institution, are entitled to see their children for no less than two hours a day.

Time allocated to breast-feeding mothers for feeding their babies is not included in the time allowed for their regular visits.

Visits of lawyers to their prisoners must not be restricted. Such visits are not counted as regular visits. Meetings with lawyers may not be attended by a representative of the institution's administration.

Inmates of social and psychological rehabilitation institutions are entitled to similar rights. It is necessary to mention that under Article 83(1) of the Corrective Labour Code "in cases of unlawful collective actions of prisoners constituting a grave violation of the internal

order of the institution, the director of the institution shall have the right to suspend:

- the right of the prisoners to send letters and receive letters, postal packets, hand-delivered parcels and parcels with printed matter;
- the right to meet visitors;
- the right to purchase food and basic necessities;
- incentives and privileges".

In our opinion, the Corrective Labour Code does not, in principle, conflict with Article 8 of the Convention. However, some of the restrictions (e.g. censorship and inspection of letters etc.) are worded too categorically, and their application may give rise to a violation. More problematic is the situation of those detained under Article 105 of the Code of Criminal Procedure because their rights are not regulated by legislation. The draft law on pre-trial detention provides for the right of detainees to correspondence and to meetings with their counsel and family members. These rights are to be implemented as follows:

> Detainees will have the right to correspond with members of their family and other persons. The administration of pre-trial detention institutions must pass to the detainees letters addressed to them and send the prisoners' letters within three days of receiving them.
>
> Proposals, applications, appeals and complaints addressed to the investigator and the court dealing with the case, the Ombudsman of the Seimas of the Republic of Lithuania or the Minister of Internal Affairs (Justice) must be sent within one day after they have been received from the prisoner.
>
> After a legal counsel has been granted permission to participate in the case, the detainee will have a right to meet his lawyer without the presence of third parties. The duration and number of such meetings will not be limited.
>
> If there is a ground for believing that the lawyer may violate legal requirements, the investigator of the case or a representative of the administration of the detention institution may, with the permission of the judge, be allowed to observe the meeting between the detainee and his/her lawyer, without being able to hear the essence of the conversation. The detainee and his counsel must be notified about the presence of the observer in advance.
>
> Permission for meetings with relatives and other persons can be given to detainees by the pre-trial detention institution's administration only with the consent of the investigator or the court dealing with the case. The duration of such meetings may be up to two hours.

Article $50^{(1)}$ of the Code of Criminal Procedure of the Republic of Lithuania provides for "preventive detention". The procedure for the implementation of preventive detention, however, is not fixed, and a person may be held in detention and kept apart from the outside world (family, relatives, legal counsel) for up to two months, which doubtless may be considered to be a violation of Articles 8 and 13 of the Convention.

The legislation of the Republic of Lithuania contains no provisions at all on the application of the procedure for administrative detention, the activities of psychiatric hospitals, special schools for juveniles and special guardianship homes, nor does it regulate the rights and duties of inmates.

Cases considered by the European Commission and Court of Human Rights make it possible to identify several aspects of the right to family life, namely: abortion (this problem has been considered in relation to Article 2 of the Convention), transsexualism, homosexuality, adoption, marriage to a foreigner, the imprisonment of juveniles.

At present transsexuals (persons who have had a sex-change operation) are not covered by Lithuanian legislation.

Problems concerning homosexuals would arise in the countries whose legislation makes voluntary pederasty a criminal offence. Since such a provision (Article 122[1] of the Criminal Code) has already been revoked in the Republic of Lithuania, we do not think deeper analysis of the problem is necessary.

The problem of marriage to a foreign citizen is related to the union of the family. Under the Law on Immigration of the Republic of Lithuania, the foreign spouse of a citizen is granted a priority right to immigrate to Lithuania.

The adoption of children is related to the possibility for the parents to meet their children, participate in their education etc. In this respect we could consider the case of *Olsson v. Sweden, 1988.*

The applicants have three children, born in 1971, 1976 and 1979. In 1980, all three children were placed in different children's homes. In 1987 the Administrative Court of Appeal annulled the guardianship for one of the children and sent him back to his parents. The guardianship for the other two children was terminated by the Supreme Court of Appeal in 1987. The Court of Human Rights considered this case in 1988 and decided that the termination of the guardianship was lawful, but the procedure employed in carrying it out constituted a violation of Article 8 of the Convention.

Following the decisions of the Supreme Administrative Court and other courts the Olssons were not allowed to have their children at home in order to protect the children's psychological and physical well-being, and were also given a limited possibility of seeing them. Having considered the circumstances of the case, the Court established that the actions of Sweden relating to the movement of the children to children's homes did not violate Article 8 of the Convention because they had a legal basis and were necessary to ensure the normal development of the children. However, prohibiting the parents from seeing their children, had no legal basis, and conflicted with Article 8 of the Convention.

It is not possible to interpret the human rights provided for in Article 8 of the Convention in very concrete terms, and in concluding our analysis we would like to draw attention to certain aspects which may have significance in the harmonisation of Article 8 of the Convention with the legislation of the Republic of Lithuania and its application procedures.

Firstly, forced medical treatment provided for in Article 60 of the Criminal Code. This Article stipulates "If an offence is committed by an alcoholic or a drug addict, the court may, in addition to the sentence for the crime committed, decide to subject the offender to forced medical treatment. If such offenders are given non-custodial sentences, they must undergo compulsory specialised treatment in medical institutions with a working regime. If such offenders are sentenced to imprisonment, they must be forced to undergo treatment in the institution in which they are detained and, after the release from detention, in institutions with specialised medical treatment and a working regime".

In our opinion, this section must be repealed.

Secondly, the practical implementation of pre-trial detention involving persons, in particular juveniles, being kept in a pre-trial establishment for a long time.

Thirdly, the practice of prohibiting a marriage to a person serving a prison sentence (the Marriage and Family Code does not provide for such a prohibition). In this case problems may also arise in relation to Article 12 of the Convention, which provides for a person's right to marriage.

Fourthly, there is the problem of drying out centres, the activities of which are not, at present, governed by legislation.

Conclusions and proposals

An analysis of the legislation of the Republic of Lithuania reveals that the ratification of the Convention would present a number of problems from the point of view of Article 8. In order to resolve these problems, it is necessary:

1. To harmonise the Law on Pursuit Activities and the Code of Criminal Procedure with the provisions of the Constitution of the Republic of Lithuania.

2. To draw up and enact a law on the protection of personal data, which would regulate the general principles and rules concerning the collection, accumulation, systematisation, use and publication of data on individuals. To form a working group for carrying out this draft because the task is very time-consuming and complicated.

3. To amend the Law on Pursuit Activities by imposing more stringent conditions on the secret collection of information.

4. To amend the provisions of the Code of Criminal Procedure governing the principles and procedures relating to searches, inspections and verification work. In addition, it is necessary to decide on what grounds these actions can be carried out by other state institutions, what procedure shall be employed and how it should be regulated, ie. by a single law or separate laws for specific cases.

5. To reach a decision on preventive detention (Article $50^{(1)}$ of the Code of Criminal Procedure), because at present this is governed by rules which are directly in conflict with the provisions of Article 8 of the Convention.

6. To enact a law on pre-trial detention.

7. To continue work on the Code on Enforcement of Sentences, which has already been submitted to the Seimas for deliberation.

8. To enact a law on institutions of health care, to regulate the rights of the doctor (e.g. the right to enter the room of a patient etc.), and the particularities of the use and protection of medical personal data.

9. To repeal Article 60 of the Criminal Code and amend Article 137.

10. To supplement the provisions of the Code of Administrative Offenses on the legal situation of imprisoned persons by provisions in the Criminal Code.

11. To draw up a law regulating the legal situation of the inmates of psychiatric hospitals.

ARTICLE 9 OF THE CONVENTION

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

This Article of the Convention affirms the right to freedom of thought, conscience and religion. It establishes the content of this right and when and in what way the freedom to manifest one's religion or belief can be restricted.

Article 9 Paragraph 1

Freedom of thought, belief and conscience is regulated by Article 26 of the Constitution. Paragraph 1 of this Article lays down the general principles that 'freedom of thought, conscience and religion shall not be restricted'. Paragraph 2 points out that 'every person shall have the right to freely choose any religion or faith and, either individually or jointly with others, in public or in private, to manifest his or her religion or faith in worship, observance, practice and teaching'. Paragraph 4 provides for the possibility of limiting a person's freedom to manifest and propagate his or her religion or belief. He or she may be subject only to those limitations 'prescribed by law and only when such restrictions are necessary to protect the safety of society, public order, health or morals, and the fundamental rights and freedoms of others'. The provision of Article 43 of the Constitution that 'there shall not be a State religion in Lithuania' is an important guarantee of freedom of thought, conscience and religion.

It is evident from the comparison of Article 9 of the Convention with Article 26 of the Constitution of the Republic of Lithuania that the latter practically reiterates verbatim the contents of Article 9 of the Convention.

At the same time, Article 26 of the Constitution specifies some of the provisions of Article 9 of the Convention, thus reinforcing the guarantees of the above rights.

Article 29 paragraph 3 of the Constitution states that 'no person shall coerce another person or be subject to coercion to adopt or profess any religion or faith'. The existing laws do not specify what is meant by coercing somebody to adopt or profess a religion or belief. The judgment of the European Court of Human Rights in the case of *Kokkinakis v Greece, 1993* is very important in this respect. The point of the case is as follows.

On March 2, 1986, Mr and Mrs Kokkinakis, both members of the sect of Jehovah's Witnesses paid a visit to Mrs Kyriakaki, an adherent of the Orthodox Church. As the Court established, by reading and pressing various books upon the plaintiff, they sought 'to convert Mrs Kyriakaki to the true faith'. The police were called and the visitors were arrested. They were later charged with proselytism (attempt to convert others from one religion to another), which, according to law No. 1363, is an indictable offence. On March 20, the Court of Lasithi sentenced them to four months' imprisonment and a fine of 10,000 drachmas. Imprisonment was commuted to a fine of 400 drachmas for one day in prison. The defendants appealed to

the Crete Court of Appeal, which acquitted Mrs Kokkinakis and reduced her husband's sentence to three months' imprisonment. Mr Kokkinakis appealed to the Court of Cassation, which dismissed the appeal.

In 1988, the appellant made an application to the Commission. The European Court of Human Rights, after considering the case, held unanimously that Article 9 of the Convention had been violated. The Court argued that freedom of conscience and faith was inseparable from the right to manifest it in public and in communication with other persons. Freedom to manifest religion in teaching and to propagate it cannot be restricted. The Court also held that Greek law did not provide a precise definition of proselytism, nor did it specify to what extent proselytism was not punishable. Only excessive attempts and attempts by unlawful means to convert someone to another faith could be punishable.

Article 9 of the Convention provides for a possibility of manifesting one's religion or belief 'either alone or in community with others', and indicates the ways of manifesting religion and faith, i.e. 'in worship, teaching, practice and observance'. In order to ensure a real possibility of exercising the right to proclaim one's religion and faith in community with others, it is essential to permit the church and other religious organisations (communities) to exercise freely the right to organise themselves and carry out their work. The status of the church and other religious organisations (communities) is defined by Article 43 of the Constitution, which states that 'churches and religious organisations shall freely proclaim the teaching of their faith, perform the rituals of their belief, and have houses of worship, charity institutions, and educational institutions for the training of priests of their faith. Churches and religious organisations shall function freely according to their canons and statutes'. These constitutional provisions allow churches and other religious organisations (communities) to establish their own common internal regulations. They may, therefore, lay down certain requirements for the members of their religious community, priests and other servants of the church. These persons exercise their freedom of conscience and religion by freely joining a religious community or church service, and by freely leaving. It is not regarded as a violation of human rights if a church or a religious organisation (community) requests that its members profess, practise or observe only the faith of this confession. If a person disagrees with the requirements made upon him/her, he/she must have an opportunity to freely leave any confession at any time and not be persecuted for it.

On the other hand, no person or confession professing a certain religion or faith can request the state or other institutions to protect them from the criticism of persons and other religious communities professing another religion or faith. However, it is fully lawful for the state to prohibit persons and religious communities from inciting religious strife. Crime or non-compliance with the law of the land may not be justified by a person's convictions, his/her religion or faith.

If holidays or the times of obligatory services for adherents to a religion or faith do not coincide with the holidays or free time established by law, the state is not obliged to ensure that these persons are given special spare holidays or time off. A foreigner may not demand from the state to be issued a permit to enter that state or to prolong his/her residence permit on the grounds of propagating his/her faith or receiving teaching in it, observing its rites, participating in the latter etc. in that state.

Neither is it a violation of the said freedom if, under the existing tax system, taxes collected from a payer who does not profess a certain religion or faith are allocated by the state to support that particular church (religious confession, community etc.).

A consideration of the possibility of implementing freedom of religion in places of deprivation of liberty, which is provided for by the Convention, should be based on Rule 41

of the Standard Minimum Rules for the Treatment of Prisoners, which states that "So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination." The Commission has considered a number of complaints from prisoners alleging a violation of their rights enshrined in Article 9 of the Convention by the prison administration. Having considered the complaint of a Buddhist believer of Jewish origin that his right to profess his religion had been violated by the prison administration, the Commission established that:

(1) a prisoner may be prohibited from growing a beard in spite of his request for permission to do so on the grounds that his denomination requires it;

(2) a prisoner may be prohibited from wearing a pilgrim's chain if this is necessary to maintain order in the prison and ensure the safety of others;

(3) Article 9 of the Convention does not require the Contracting States to provide a prisoner with books which, in the opinion of the prisoner, are necessary for him to profess his religion and foster his philosophy of life (see Application No. 1453/63, partial decision of 15 February 1965, Coll. December 16, p. 20.)

Having considered the complaint of a Buddhist believer that the administration of the prison had violated the right enshrined in Article 9 of the Convention by prohibiting him from sending articles to a Buddhist journal, the Commission stated that the Convention had not been violated because writing and publishing articles in a religious journal was not part of religious rites (see *Appl. No. 5442/72*, decision of 20 December 1974, D.R. 1, p. 41).

Having considered the complaint of a prisoner that he was forced to wear prisoner's clothing and to participate in prison work incompatible with his religion and freedom of conscience, the Commission indicated that Article 9 of the Convention did not provide for a special exceptional category of prison inmates who could demand to be allowed to wear their own clothing or be excused from prison work. In addition, the Commission stated that the right to manifest and practise religion does not cover the right of a prison inmate to wear his/her clothing (see *Appl. No. 8317/78*, decision of 15 May 1980, D.R. 20, p.44).

The above and similar cases indicate that it is not mandatory to provide prison inmates with religious literature; for reasons of order, security and the safety of other inmates, prisoners may not be allowed to wear religious robes or possess other objects connected with their faith or religion; a prisoner may be forced to engage in work which he or she views as unacceptable because of his or her religion or faith.

Under Article 9 of the Convention, if a church or a religious organisation (community) is refused registration and deprived of the rights of a legal entity, and if, in conformity with Article 9 paragraph 2 of the Convention, this is not based on doubts - which are established by law - that this is necessary for public safety in a democratic society, for public order, health, morality or the protection of the rights and freedoms of other persons, all the above are viewed as violations of human rights. A ban imposed by the state on spreading political propaganda in a house of prayer should also be regarded as a violation of human rights.

In discussing the conformity of existing laws with the Convention, it is first necessary to analyse the provisions of Article 43 of the Constitution. According to this Article, all the churches and religious organisations of Lithuania are divided into two groups: 'traditional churches and organisations' and 'other churches and organisations'. 'Traditional churches and organisations' are automatically recognised by the state and have the rights of legal personalities, whereas 'other churches and religious organisations' are only recognised by

the state only under certain conditions, i.e. when they enjoy support in society and their teaching and rituals do not conflict with moral standards or the law.

The division of churches and religious organisations into 'traditional' and 'other churches and religious organisations' found in the Constitution of the Republic of Lithuania should not be regarded as a non-conformity with the provisions of the Convention because such a division does not restrict the rights and freedoms of actual individuals enshrined in the Convention. The importance of this division manifests itself when it comes to deciding property and other rights, liabilities and other obligations of an organisation rather than those of an individual (see Civil Code, Article 23).

At the same time it should be noted that existing laws do not specify the characteristics of 'traditional churches and religious organisations' and do not list them. Neither do they explain what is meant by the expressions of 'support in society', 'non-conformity of rituals with morality', and 'non-conformity of rituals with the law'. In order to implement the provisions of Article 43 of the Constitution, the above expressions must be defined. This can be done by enacting a law on religious communities (or some other legal act). In drafting this law the legislators should proceed from the premise that all churches and religious organisations (communities) in Lithuania must have a possibility of organising and functioning freely and to acquire the status of a legal entity, provided that their activities do not threaten public safety, public order, people's health and morals or the rights and freedoms of other persons. It shall not be regarded as a contravention of the Convention if the state establishes by law conditions and a procedure for granting the rights of a legal entity to non-traditional churches and religious organisations.

Freedom of thought, conscience and religion also embraces the right of parents (and guardians and trustees) to choose education freely for their children (charges) according to their own religious convictions. The right of parents to choose education freely for their children in conformity with their own convictions is laid down in Article 26 paragraph 5 of the Constitution, which stipulates that parents and guardians are free to ensure the religious and moral education of their children in conformity with their own convictions, and in Article 17 paragraph 1 of the Law on Education, which establishes that 'in state educational institutions, at the request of parents (guardians, trustees), persons authorised by the church authorities shall provide religious instruction (in the requested confessions). Should parents object to the religious instruction of their children at school, in accordance with the provisions of the Convention, laws may still stipulate that a knowledge of religious teachings shall be provided within the framework of another compulsory discipline - a history of religions and ethics. However, in this case, instruction must be neutral and should respect the convictions or beliefs of the parents. The Law on Education does not specify which school subjects should include religious instruction and points out that 'for those who do not attend classes of religious instruction other subjects involving moral and civic education shall be taught at the same time' (Article 17 paragraph 3).

In its judgment in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark, 1976* the European Court of Human Rights established that the introduction of compulsory sex education classes in secondary schools was not a violation of Article 9 of the Convention, despite the claims of the pupils' parents that those lessons were against their Christian beliefs.

The right to propagate pacifism is also an aspect of freedom of worship. If there is no provision for the right of conscientious objection (Article 4 paragraph 3 (b) of the Convention), persons guilty of such an objection can be prosecuted. Article 1 paragraph 8 of the Provisional Law on the National Defence Service stipulates that 'citizens who are unable according to their beliefs to complete national defence service, may do alternative (community) work in national labour detachments and humanitarian and communal organisations'. The nature and

duration of this work is laid down in the Law on Compulsory Alternative Service (Community Work). Article 12 of this law states that alternative (community) work shall be performed by citizens in places established by the Government of the Republic of Lithuania. According to the Law, the Ministry of National Defence must conclude community work contracts with local authorities, enterprises and organisations. It should be pointed out, however, that the Ministry of National Defence has not concluded any such contracts with local authorities, enterprises and organisations. This is explained by the fact that enterprises and organisations themselves avoid such contracts, as they cannot make persons perform alternative (community) work in a satisfactory manner. Arguments like the above cannot be considered acceptable. Without the appropriate contracts, persons have no practical possibility of exercising the right to choose community work. This, in turn, may raise the problem of the exercise of the above right and pose the question of whether there is a violation of a person's right to freedom of conscience and religion.

Article 9 Paragraph 2

According to Article 9 paragraph 2 of the Convention, freedom to proclaim one's religion or faith may be subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, public order, health or morals, or for the protection of the rights and freedoms of others. Article 26 paragraph 4 of the Constitution of the Republic of Lithuania also points out that a person's freedom to profess and propagate his or her religion or faith may be subject only to the limitations prescribed by law. However, this can be done 'only when such restrictions are necessary to guarantee...'. Thus, the words 'such limitations as are necessary' in the Convention refer to the scope of the limitations, whereas in the Constitution the formulation 'only when such restrictions are necessary' indicates under what circumstances such restrictions are possible. These discrepancies lead to others: the Convention stipulates that such limitations 'as are necessary' may be applied, whereas the Constitution states 'when such restrictions are necessary', i.e. it does not define the scope of the limitations. One may argue that, theoretically, the provisions of Article 26 paragraph 4 of the Constitution provide a possibility for the state to impose greater restrictions on manifesting religion or faith than those laid down in Article 9 of the Convention. However, this alone should not lead one to the conclusion that the provisions of Article 26 paragraph 4 of the Constitution do not conform to Article 9 of the Convention. Firstly, Article 26 of the Constitution establishes greater restrictions on the freedom to manifest one's religion or faith than the Convention, because under the Convention freedom to manifest one's religion or beliefs shall be subject only to such limitations as are necessary for the protection of all the rights and freedoms of other persons, whereas Article 26 of the Constitution speaks about the possibility of restricting this freedom when such restrictions are necessary to protect only the fundamental rights and freedoms rather than all the rights and freedoms of other persons. On the other hand, concrete restrictions will be specified by legislation, and it is essential that the laws specify any restrictions on the manifestation of religion or faith that go beyond those needed in a democratic society.

Conclusions and proposals

1. Provisions of the Constitution of the Republic of Lithuania and of other existing laws do not conflict with the requirements of Article 9 of the Convention.

2. It is necessary to adopt a law establishing which are the traditional churches and religious organisations in Lithuania, and to lay down in legislation the conditions and procedures for granting the status of a legal personality to other churches and religious organisations. It is also necessary to establish the conditions under which churches and religious organisations could seek to be recognised as traditional in Lithuania and the procedures for doing this.

3. It is necessary to establish by law that it is an offence to force another person to choose or profess a religion or faith.

4. The Government should be encouraged to take steps to ensure that the Ministry of National Defence concludes contracts on alternative (community) work with local authorities, enterprises and organisations. Draft amendments to the Law on Alternative Service (Community Work) should be prepared, specifying more precisely the procedure for doing alternative community work. In addition, amendments to the Code of Administrative Offenses that make it an offence to violate this procedure should be drawn up.

ARTICLE 10 OF THE CONVENTION

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

The right to freedom of expression guaranteed in Article 10 of the Convention is one of the most important achievements of pluralist democracy and ensures the normal development of a multi-faceted society. Before beginning to analyse this Article, a few observations of a more general character might be appropriate. Firstly, this Article has to be assessed within the framework of the entire Convention, because some of its provisions are covered by other articles, e.g. respect for one's private life and correspondence (Article 8), freedom of peaceful assembly and association (Article 11) and, particularly, freedom of religion or belief (Article 9). Secondly, the scope of the restrictions prescribed by Article 10 is broadened by Article 16 (restrictions on aliens) and Article 17 (the proclamation of unpopular or 'harmful' ideas). Thirdly, this Article is worded in very general terms and does not have a provision on prohibiting military propaganda or propaganda on racial inequality. In this respect, the interpretation of Article 10 is much narrower.

Article 10 Paragraph 1

Article 10 of the Convention is applicable to both physical and legal persons. It covers not only the press, radio and television but also creative artists (painters, actors, poets, writers etc.), publishers, cinema owners etc. Paragraph 1 of this Article points out that freedom of expression embraces the right to freedom to hold opinions and to receive and impart information and ideas.

The nature of this right has received a very wide interpretation in the case law of the Strasbourg institutions. For example, in the case of *Müller et al. v Switzerland, 1988* the Commission found that Switzerland had violated Article 10 of the Convention because a Swiss court had ordered the seizure of several pictures which were displayed at an exhibition and depicted sexual intercourse between a human being and an animal. Another instance of such a broad interpretation was the case of *Handyside v. the UK, 1976*, concerning the confiscation of a book which described sexual intercourse. In the latter case, the Court of Human Rights explained that freedom of expression covered not only freedom to disseminate harmless information or ideas but also such information and ideas that hurt, shocked or disturbed the state or a section of its population. Such a broad interpretation has been justified on the grounds that pluralism is a fundamental condition of a democratic society.

It should be noted that the Court of Human Rights recently went one step further in the case of *Jersild v. Denmark, 1994*. A Danish TV journalist was convicted under the criminal laws of Denmark for racist propaganda: in a TV broadcast a racist group of youths made 'savage' remarks about the immigrants and ethnic minorities in Denmark. The Court of Human Rights noted that the journalist himself had not voiced any views and therefore had not violated the code of journalistic ethics. The footage was included in a serious news

programme meant for a well-informed audience, and news programmes usually feature interviews in which journalists assume the role of 'public watchdog'. The Court decided that the principle that the state needs to strike a balance between protecting the rights of citizens and imposing sanctions, and Article 10 of the Convention had been violated.

Let us first look at the right of the press to freedom of expression and the restrictions that may be imposed on it by the state. Here the point of departure is the function of the press to spread ideas and information of interest to the public.

An analysis of the practice of the Strasbourg institutions shows that the Court and the Commission strike a very careful balance between the interests of the press and the restrictions applied by the state. As an illustration let us take the case of the *Sunday Times v. the UK, 1979.* The newspaper started a series of stories about several women who, after using a certain medicine produced by a British pharmaceutical company, had given birth to babies with serious deformities. The Sunday Times used harsh words to point its finger at the culprit, the pharmaceutical company. The children's parents sued the company for damages and the company sought to suppress the publication of the articles subsequently written. With reference to English contempt of court legislation (the court has the right to order the suspension of the allegedly illegal action which is the subject of litigation), the judge granted an injunction against the publication of the articles. The Court of Human Rights held that the United Kingdom had violated Article 10 of the Convention, and pointed out that the press was a vital institution in a democratic society, whose purpose was to reveal all sides of an issue. (The cases of the *Sunday Times*, the *Observer and Guardian v. the UK, 1991* and *Lingens v. Austria, 1986* were very similar.) Lingens published several articles in a Vienna newspaper alleging in rather 'strong' language that the Austrian Chancellor Bruno Kreisky had been on very close terms with the former SS quislings. The Chancellor brought an action for defamation against the author and Lingens was convicted. The Court of Human Rights dismissed Austria's argument that Lingens had violated Article 8 of the Convention (on the principle that a politician cannot seek protection against criticism on the grounds of respect for private life, if only because of the importance of his public office) and found that Article 10 had been violated. In the above cases, the Commission and the Court, on the basis of Article 10 of the Convention, demonstrated great commitment to the defence of the press and emphasised the importance of its role in promoting political and other public debate. However, in case of the *Barfod v. Denmark, 1989* the Court of Human Rights pointed out some of the essential exceptions in the application of the above rule. In a magazine article a journalist had expressed his opinion about two lay judges, casting doubt on their impartiality in a case against an employer contesting the legality of taxes. The journalist was tried and fined for libel. The Court of Human Rights affirmed the importance of 'the principle of impartiality' of the court but libelling the judges could not be regarded as a balancing criterion because criticism must always be based on arguments which can be proved, and there had been no violation of Article 10 of the Convention.

It has already been mentioned that freedom of expression is also applied to other mass media. Here we are interested in the provision of Article 10 paragraph 1 of the Convention, which states that 'this article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. Since this sentence is contained in paragraph 1 of Article 10, states are deprived of the possibility of justifying their licensing practice by reference to the provisions of Article 10 paragraph 2.

The case of *Autronic AG v. Switzerland, 1990* illustrates this point. A Swiss television company made a complaint that when it wanted to receive television programmes via a Soviet satellite without Soviet consent, the government refused to issue a licence to broadcast these programmes. The Court of Human Rights noted that the right to receive information also included the right to receive television programmes, and since in this case there was no risk

of obtaining secret information, the authorisation of the Government was not necessary in a democratic society.

The 'licensing' procedure was revealed in the case of *Groppera Radio AG v. Switzerland, 1990.* The owner of a cable television company made a complaint against a ban on broadcasting programmes for Switzerland via the transmitters located in Italy. The Swiss government explained that the state prohibited the use of stations that did not conform to international agreements on radio and TV standards. The Court of Human Rights held that the actions of the government were lawful and pointed out that state licensing was admissible only 'in pursuit of organising and maintaining the order of radio (TV) programmes on the most adequate technical basis' (e.g. better frequency monitoring). Otherwise, there was a danger that the state would abuse its power, which would be a violation of Article 18 of the Convention.

Article 10 Paragraph 2

Paragraph 2 of Article 10 of the Convention provides for the possibility of restrictions on the rights established in paragraph 1, provided three conditions are observed: firstly, that 'they are necessary in a democratic society', secondly, that they are provided for in national legislation, and thirdly, that they seek to protect certain values. In considering restrictions, the Strasbourg institutions seek to interpret the possibility of their application as narrowly as possible. In this regard, the principle of being 'necessary in a democratic society' is very important. In view of the fact that European states have not yet reached identical moral, religious or legal standards, the Court of Human Rights always considers whether the restriction was necessary in a concrete case and whether it did not violate the principle of striking a balance between conflicting interests. It follows from this that identical situations in different states may be given a different interpretation in case hearings. Such a situation could result in serious problems after Lithuania has ratified the Convention, because the institutions in Strasbourg have not yet defined basic rules (which is an obstacle to the precise formulation of national legislation). However, several general principles have been established in Strasbourg.

In considering *Appl. Nos. 8010/77, 9940/81, 10414/83, 10279/83*, the Commission established that states may restrict the freedom of expression of employees, taking into consideration their duties and functions. In the case of *Engel v. Holland, 1976* the Court justified the state ban on the publication and dissemination by soldiers of materials criticising senior officers because 'public order in certain social groups (the army in particular, in the opinion of the author) plays a significant role'. In the case of *Appl. No. 8010/77* the Commission found that the United Kingdom had acted legally in prohibiting a teacher of a non-religious school to use and demonstrate cult objects in lessons. After considering *Appl. No. 10293/83* the Commission pointed out that the authorities were justified in denying a public official permission to take part in a TV broadcast if the official held a 'politically restricted office', which did not grant him the right to voice criticism of the Government. A similar position was adopted by the Court in the case of *Kosiek v. Germany, 1986*. The applicant complained that on becoming a civil servant he had been forced to hide his extreme right views because of the national legislation, which was a violation of Article 10 of the Convention. The Court of Human Rights dismissed the complaint and noted that the problem here lay not in freedom of expression but in the requirements to be met by a public servant. (A similar instance could be found in the case of *Glasenapp v. Germany, 1986*, where a teacher was dismissed from her position because of her communist views.) With regard to the application of paragraph 2 of Article 10 of the Convention, the case of *the Otto-Preminger Institut v. Austria, 1994* should be mentioned. At the request of the Roman Catholic Church in Innsbruck, a prosecutor applied to a court requesting permission to seize the film 'Council in Paradise'. The permission was

granted, and the court later ordered the confiscation of the film. In reply to the question of whether the principle that it is necessary to strike a balance between conflicting interests, (the right of OPI to disseminate information and a right to respect for his or her belief) had been violated, the Court of Human Rights argued that since the vast majority of residents in Tyrol were Roman Catholics, the decision of the authorities had preserved 'religious peace and morals, which cannot be understood in one and the same way in all Europe'.

It is necessary to point out that Article 10 of the Convention also covers commercial information. In the case of *Barthold v. Germany, 1985* a veterinary surgeon, in an interview with a Hamburg newspaper, disclosed information he was prohibited from disclosing under the rules of his profession.

Let us now consider the legislation of the Republic of Lithuania. Article 25 of the Constitution states:

"Individuals shall have the right to have their own convictions and freely express them. Individuals must not be hindered from seeking, obtaining, or disseminating information or ideas (...) Citizens shall have the right to obtain from state agencies in the manner established by law any available information which concerns them".

Article 44 provides that:

"censorship of mass media shall be prohibited. The State, political parties, political and public organisations and other institutions or persons may not monopolise means of mass media".

Article 1 of the Law on the Press and Other Mass Media of the Republic of Lithuania establishes that:

"Citizens of the Republic of Lithuania shall enjoy the right to express their opinions freely and without hindrance, to disseminate news in the press and by other mass media and to receive from the latter, objective information on every issue of state and public life. The mass media shall be free and uncensored. Intervention in their activities in preparing and disseminating information is prohibited".

Article 4 of this Law provides for the right to receive information, and the Code of Administrative Offenses stipulates that the refusal by senior officers of a state institution to provide information to a representative of the mass media, with the exception of information which may, in conformity with Lithuanian laws, not be made public, without giving a reason for such refusal, or an obstruction for a journalist in the exercise of his professional duty, shall be regarded as an administrative offence. State, political and public organisations and public movements, as well as individuals, have the right to correct the information disseminated by the mass media if it does not conform to the facts and if it is injurious to their honour and dignity.

According to the Statute of the Radio and Television of the Republic of Lithuania, the Lithuanian Broadcasting Corporation is a state institution accountable to the Seimas. The key objectives of radio and television are to collect and disseminate information about Lithuania and the world; to create, spread and protect cultural values; to mould a tolerant and humane society; and to develop communications and the technical facilities of radio and television. People of different views and convictions, representatives of various parties, political and public movements, organisations, and ethnic and religious communities have the right to participate in radio and television programmes. No parties or political movements can engage in their activities at the Lithuanian Broadcasting Corporation. The Lithuanian Broadcasting

Corporation runs the programme-making facilities, and enjoys priority in the use of transmission equipment and the radio relay network.

Article 16 of the Law on Political Parties of the Republic of Lithuania states that political parties have the right freely to disseminate in writing, orally or in any other manner, information about their activities, and to propagate their ideas, goals and programmes.

It should be noted that Article 33 paragraph 2 of the Constitution of the Republic of Lithuania guarantees citizens the right to criticise the work of public servants and officers, and Article 140(1) of the Criminal Code makes persecution of criticism a criminal offence.

In the Republic of Lithuania all publications are registered, and licences for publishing activities are issued by the Press Control Board under the Ministry of Justice. Licences to equip and use television and radio stations are issued by the State Electronic Communications Inspectorate under the Ministry of Communications and Informatics.

It should be noted that the Law on Communications of the Republic of Lithuania provides that local city and rural radio and television networks and radio stations may be owned by local authorities, enterprises, institutions, organisations and natural persons. The Lithuanian Ministry of Communications and Informatics distributes radio frequencies allocated to Lithuania under international agreements, giving priority to joint state and municipal companies. It also issues licences in the Republic of Lithuania for enterprises, institutions, organisations and natural persons to acquire, build and operate devices generating electromagnetic waves, and controls the work of these facilities.

The Lithuanian Law on the Press and Other Mass Media provides a list of reasons why the mass media may be denied registration, namely: if the filing of the application does not conform to the legal requirements, if the application contains incorrect information, if the applicant has a record of imprisonment for a grave offence, or if the applicant has been declared incapable, or if the filing fee has not been paid. The applicant must be informed about the reasons for dismissing the application.

Article 25 of the Constitution states that freedom to express convictions and obtain and disseminate information may not be restricted in any other way than that established by law, provided it is necessary for the safeguard of the health, honour, dignity or private life of a person, to protect morality or to protect the constitutional order. Freedom to express convictions and disseminate information is incompatible with criminal actions - incitement of national, religious or social hatred, violence, discrimination, dissemination of slander and misinformation. A similar prohibition is laid down in the Lithuanian Law on Education, which prohibits the propagation of racial, national, religious and social hostility and exclusiveness and the spread of militarist and other ideas that conflict with the principles of international law and humane education in schools.

It should be pointed out that Article 62 paragraph 3 of the Constitution states that 'a member of the Seimas may not be prosecuted for ... his or her speeches in the Seimas', except for personal insult or slander.

The above constitutional provision is given wider treatment in Article 6 of the Law on the Press and Other Mass Media. The mass media are not allowed to disclose state secrets, the list of which is to be determined by the Government. The Government may also establish other restrictions necessary for the protection of the interests of the Republic and the rights of its citizens. Some of these prohibitions are laid down in criminal laws of the Republic of Lithuania. It is forbidden to disseminate material inciting war, violence and religious strife, and it is also forbidden to make, distribute and display pornographic works (Articles 242 and 242(2)

of the Criminal Code.) It is not allowed to disclose information about a person's private life without his or her consent, except for the information specified by a court. It is not allowed to make public the findings of a pre-trial investigation without the written consent of the prosecutor, the investigator or the person who has been carrying out the interrogation (Article 193 of the Criminal Code). A person covering a trial is not allowed to publish articles which violate the principle of the presumption of innocence or might prejudice the court judgment. The procedure for the dissemination of erotic or violent publications, the showing of films and video programmes and other public showings is established by the Government of the Republic of Lithuania. The Press Control Board is authorised to ensure compliance with the law. In the event of the dissemination of prohibited information, the activities of the mass media enterprise may be suspended or discontinued. The organisation which has registered the mass media enterprise has the right to suspend its activities for a period of up to one month. The activities must be suspended within three days after the information has been made public. The mass medium has a right to appeal to a court within 10 days after the decision has been taken to suspend its activities.

Before this analysis is concluded, it is necessary to consider one more problem that arises from Article 10 of the Convention, i.e. the problem concerning the possibility of making public information classified as a commercial or professional secret. It should be mentioned that Lithuania's laws do not provide a definition of a commercial or professional secret. Only separate specific laws provide for instances of its protection, e.g. Article $25^{(3)}$ of the Law on Lawyers of the Republic of Lithuania and Article 6 of the Law on Notaries provide that lawyers and public notaries shall ensure the secrecy of information entrusted to them (similar provisions are made in the Law on Commercial Banks, etc.)

It must also be noted that since Article 10 of the Convention may also be violated by private persons or non-state institutions, states are authorised not to tolerate such violations. The Criminal Code of the Republic of Lithuania makes libel (Article 132), insult (Article 133), the disclosure of a state secret (Articles 73, 74, $74^{(1)}$), a violation of the principle of ethnic and racial equality (Article 72), war propaganda (Article 69), criminal offences etc. The laws also provide for an array of administrative remedies - from a warning to the withdrawal of a licence. In addition, Articles 7 and 7(1) of the Civil Code establish the amounts of and the procedure to obtain compensation for non-pecuniary damage.

It should also be mentioned that on October 31, 1990, by Government Resolution No. 332, Lithuania approved the regulations of the activities of foreign journalists in the Republic of Lithuania, under which regulations foreign news agencies, television and radio companies and editorial boards of newspapers and magazines may set up offices in Lithuania only after obtaining a permit from the Ministry of Foreign Affairs. Foreign journalists who reside and work in Lithuania are obliged to comply with the Lithuanian Constitution, the rules pertaining to the legal status of aliens in Lithuania and other Lithuanian laws. The work of foreign journalists is governed by the Law on the Press and Other Mass Media of the Republic of Lithuania.

Conclusions and Proposals

It is our view that in the event of the ratification of the Convention, Article 10 should not cause any serious difficulties for Lithuania because, in principle, existing laws are in line with its provisions. The exception is the necessity to enact a law on state secrets. On the other hand, it should be mentioned that the provisions of Article 10 of the Convention lend themselves to a fairly broad interpretation which, in the practice of the Strasbourg institutions, means that the facts of each alleged violation are considered and a 'balance of interests' established. There is a possibility that Lithuanian laws, which define the permissible limits very strictly and formally, may create conditions for a *de facto* violation of the provisions of Article

10 of the Convention. Special attention should also be given to Article 18 of the Convention, which prohibits in this case the use of state power for any purpose other than those prescribed in Article 10.

ARTICLE 11 OF THE CONVENTION

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

Article 11 Paragraph 1

Paragraph 1 of Article 11 of the Convention provides for two different rights of the individual - the right to freedom of peaceful assembly and the right to freedom of association with others. The differences between these rights allows them to be analysed separately. In the opinion of the European Commission of Human Rights, the right to peaceful assembly is one of the fundamental rights of a democratic society; it embraces both private and public assembly. The 'assembly' is defined by the Strasbourg institutions as an informal category.

In particular, the Convention only guarantees the right to peaceful assembly (our emphasis). An identical provision is laid down in Paragraph 1 of Article 36 of the Constitution of the Republic of Lithuania: "Citizens may not be prohibited or hindered from assembling in unarmed peaceful meetings" and in Article 1 of the Law on Assemblies, which lays down the conditions safeguarding the constitutional right of peaceful assembly for the citizens of Lithuania. The Commission has noted that the state cannot impose any restrictions on this right, apart from the measures necessary to ensure the peaceful character of an assembly. Therefore, it can be stated that the requirement of Article 9 of the Law on Assemblies that organisers of a meeting should, no later than five working days before it is intended to hold it, notify the head of the executive body of the local council or a person authorised by him or her in a letter stating the form and subject, date and place of the meeting, the planned number of participants and the organisers, does not contradict the provisions of paragraph 1 of Article 11 of the Convention. The decision to refuse to issue permission to hold a meeting at the stated place and time and in the stated form should be in writing and indicate the grounds for the refusal. The organisers of the meeting can appeal against the refusal to a local court within 10 days from the date of the decision. Article 8 of this law states that meetings are prohibited if their participants are armed; if they drive vehicles in a way that endangers traffic; if they endanger the safety and health of the participants of the meeting or other persons; if they cause a breach of the peace; break public order and peace; if the participants are naked or either in their appearance or as a result of the objects they possess or demonstrate present a cynical offence to public morals; if the speeches they make at the meeting, posters, appeals to participants, audio-visual aids or other actions incite violence or they themselves violate the Constitution or the laws of the Republic of Lithuania. The above grounds should not, in our opinion, be objectionable in the eyes of the Strasbourg institutions.

At this point we might mention the petition of *Christians against Racism and Fascism v. the UK, 1980, Appl. No. 8840/78* (D.R. 21 p.138) which was declared inadmissible by the Commission in 1980. In considering its acceptability, several principles were referred to. The association wanted to organise a march from St Paul's to Westminster seeking to call attention to the threat of racism and fascism to England. The chief of the London Metropolitan Police refused to issue a permit for the march on the grounds that during a recent march there had been instances of violence and a breach of public order. The Commission did not refuse to

accept the application because it questioned the peaceful character of the march but because restrictions on freedom of assembly were based on the provisions of Article 11 paragraph 2: the protection of public safety and the prevention of disorder and crime.

There are cases in which the grounds mentioned by the officials for refusing to issue a permit serve as a cover for other motives, and if this is proved, it constitutes a breach of Article 18 of the Convention.

The case of *Ärzte für das Leben v. Austria, 1988* is an illustration of one more important interpretation of Article 11. The Austrian Association of the Medical Profession against Abortions staged a march and a joint prayer in a church in support of strict measures against abortions. Their opponents expressed their indignation by holding at the same time a counter-demonstration during which they threw eggs at the doctors and, with the help of loudspeakers, shouted the demonstrators down. The police tried to re-establish order but did not drive the counter-demonstrators from the platform. They interfered only when a real danger of a riot arose. The applicants claimed that Austria had violated the Convention because Article 11 prescribes not only passive tolerance of the right to assembly but also active interference in implementing this right in practice. The Court pointed out that the provisions of Austrian laws were fully in compliance with the provisions of Article 11: the criminal law makes it a punishable offence to obstruct a legal demonstration, while the Assemblies Act lays down the duty of the police to protect the participants of a legal demonstration in the event of a counter-demonstration. The police did everything within their power under such circumstances, and Austria had not violated the Convention.

The Lithuanian Law on Assemblies provides for the active participation of the police in securing the implementation of the right to assembly. Article 9 provides for the right of the organisers of a meeting to submit their requests to the police with regard to maintaining public order, while Chapter V lays down the duties, rights and responsibilities of police officers in ensuring the legality and order of public meetings. Public and police officers are obliged to ensure that the organisational and other possibilities provided by law are available for conducting legal meetings, the protection of the rights and freedoms of the organisers, participants and other persons, the safety of the state and society, and public order, health and morals. A special report must be made about all violations. Officers who obstruct the holding of legal meetings are prosecuted in accordance with Lithuanian laws. The function of the police to protect public order during public events is provided for by Article 21 paragraph 3 of the Law on Police of the Republic of Lithuania. It should be noted that the blanket provision concerning liability contained in the Law on Assemblies is to be found either in the Criminal Code or the Code of Administrative Offenses, which might create conditions for violations of Article 11 of the Convention.

Let us now consider a person's right to freedom of association. The Court and the Commission have explained that the term association refers to something more formal and better organised than an assembly. In the case of *Young, James and Webster v. the UK, 1981*, the Commission found that relations between workers employed by the same employer could not be understood as an association in the sense of Article 11 because they depended only on the contractual relationships between the employee and the employer. The Commission explained that association was a 'group formed on a voluntary basis pursuing a common goal'. In this way two distinctive features of association have been established by the Commission and the Court, i.e. 'voluntariness' and a 'common goal'.

Cases asserting violations of Article 11 that have been reviewed by the Court and the Commission have mostly been concerned with persons' right to form and join trade unions for the protection of their interests. The most important among these were the *National Union of the Belgian Police v. Belgium, 1975* case, the *Swedish Engine-Drivers' Union v. Sweden, 1976*

case, the *Schmidt and Dahlström v. Sweden, 1976* case and the aforementioned case of *Young, James and Webster v. UK* Let us consider a few points raised in those cases.

In the cases of the National Union of the Belgian Police and of the Swedish Engine-Drivers' Union, the major claim against the government was that in drawing up the statutes of the police and the collective agreement relating to the engine-drivers, negotiations were held only with the largest and most representative trade unions, without consulting the smaller trade unions. The Court held that there was no violation of Article 11. The aim of this Article is to guarantee the right of trade unions to protect the interests of their members rather than to oblige public or employers' organisations when they are making decisions to consult with all the trade unions and other organisations which represent the employees' interests. Trade union members have considerable opportunities to protect their interests, including, (with the exception of certain groups of employees), the calling of strikes.

Article 35 of the Constitution of the Republic of Lithuania guarantees citizens the right to freely form societies, political parties, and associations. Article 1 of the Lithuanian Law on Trade Unions guarantees citizens of the Republic of Lithuania and other persons in permanent residence in Lithuania who are not younger than 14 years old the right freely to join trade unions and to take part in their activities. Trade unions function freely and independently in the Republic of Lithuania. All trade unions enjoy equal rights. Article 23 of this law provides for the right of trade unions to hold meetings and to organise meetings, demonstrations and other mass events in the manner prescribed by law with the aim of protecting the rights of their members. In exercising this right, trade unions have the right to stage a strike as prescribed by law. The circumstances under which a strike can be called and the procedure for carrying it out are mentioned in the provisions of the Lithuanian Law on Collective Bargaining.

The right enshrined in Article 11 to form associations could be interpreted as the right to form political parties and public organisations. Article 1 of the Lithuanian Law on Political Parties provides that citizens of the Republic of Lithuania have a right to form political parties and participate in their activities. Only a citizen of the Republic of Lithuania, with the right to vote, can be a member of a political party. The right of citizens to form public organisations is also provided by the 1989 Decree of the then Presidium of the Supreme Council of the Lithuanian SSR (a new draft law has been recently submitted to the Seimas).

Another important provision formulated in the practice of the case-law of the Strasbourg institutions is that no one can be forced to belong to a trade union. The Commission used to be of the opinion that the requirement of some associations for people to join them was not in breach of Article 11. For example, in 1978, in considering one of its cases the Commission found that the obligation to join a students' union during one's course of study was not in contravention of the Convention because a students' union was an institutional part of the university. However, in the *Young, James and Webster* case the conclusion was reached that an 'obligation' to belong to a trade union was in contravention of the provisions of Article 11.

An extension to this provision can be found in paragraph 2 of Article 35 of the Constitution: "No person shall be forced to belong to any society, political party, or association". Such a provision should also be included in the Lithuanian Law on Trade Unions and the Law on Political Parties.

Article 11 Paragraph 2

Paragraph 2 of Article 11 of the Convention provides for the possibility of placing restrictions on the exercise of the right to freedom of assembly and of association, when this

is necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others. Article 2 paragraph 3 of the Law on Political Parties states that:

"The establishment or activity of political parties whose programmes propagate and whose activities practise racial, religious, or social inequality and hatred, methods of authoritarian or totalitarian rule, methods leading to the (violent) seizure of power, propaganda calling for war and violence, violations of human rights and freedoms, or other ideas or actions, which conflict with the constitutional order of the Republic of Lithuania or with ordinary laws, are strictly forbidden".

This provision is closely linked with that contained in the last sentence of paragraph 2 of Article 11, i.e. the possibility of imposing, restrictions on the exercise of these rights by members of the armed forces, the police or the administration of the State'. Article 2 of the Law on Police, Article 24 of the Law on the Department of State Security and Article 3 of the Provisional Law on the Interior Service prohibits the activities of political parties in these state institutions. The Law on Trade Unions provides that rules relating to the application of this Law in the institutions of national defence, the police, the organs of state security and other organisations may be established by legislation governing the activities of these institutions. Article 8 of the Law on Police provides for the possibility of police officers establishing trade unions and other associations in order to meet their professional, cultural and social needs. However, police officers cannot be members of a political party. In addition, the same article of the Law on Police prohibits police officers from going on strike. Identical provisions can be found in Article 24 of the Law on the Department of State Security, and in Article 7 of the Provisional Law on Interior Service. Strikes are also prohibited by Article 9 of the Law on Collective Bargaining, which states that strikes are banned in the areas of home affairs, national defence and state security, as well as in the electricity supply, centralised heating and ambulance services. The demands of the employees of the above services and enterprises are considered by the Government of the Republic of Lithuania. A ban on strikes can also be found in the regulations of other services (institutions). Some of these services are subject to supplementary regulations with regard to strikes (e.g. a longer term of prior notice etc.) A more precise interpretation of Article 11 paragraph 2 of the Convention (as well as an assessment of Lithuanian legislation) is complicated by the fact that Strasbourg has not yet precisely formulated the principles of its legal practice.

Conclusions and Proposals

In the event of the ratification of the Convention, Article 11 should not cause major problems for the Republic of Lithuania because its domestic legislation conforms to the provisions of that article. However the following laws should be amended:

1. The Criminal Code should have a provision on liability for a violation of the right to assembly;

2. The Code of Administrative Offenses should have a provision making it an offence to:

a) violate the right of assembly
b) force people to join a trade union.

3. A law on non-governmental organisations should be adopted.

ARTICLE 12 OF THE CONVENTION

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

The analysis of Article 12 of the Convention is possible only alongside Article 5 of Protocol No.7:

"Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children".

These provisions of the Convention and the Additional Protocol relate to several issues - i.e. the possibility for a person serving a prison sentence to marry and have a family, marriages to foreigners and the protection of the child's rights.

The position of the Strasbourg institutions in respect of the first aspect was clearly expressed when they were investigating a complaint made by a convicted person. The applicant had, at the time he was serving a prison sentence, applied to the Ministry of Internal Affairs for temporary release from prison in order to marry. He was informed that under the law he could not be granted permission to be temporarily released from prison in order to marry as such permission may only be granted for the adoption of a child born out of wedlock. The applicant applied with a similar request on a number of occasions, but he was refused permission. He stated to the Commission that his right as set out in Article 12 of the Convention, had been violated.

The respondent Government justified its refusal by stating that the right to marry guaranteed by Article 12 of the Convention is not an absolute right. However, the right of the applicant to marry was not infringed, as owing to his status (which is equivalent to the status of a soldier on active military service, a sailor during a long voyage or that of a clergyman) he was not entitled to exercise this right. Later the Government presented additional grounds for its refusal: the time and place of the wedding ceremony are laid down in domestic law. Moreover, the behaviour of the applicant had created the conditions under which he was not able to marry in accordance with legal requirements, namely that a marriage must be concluded at an appropriate public place.

The Commission rejected the reasons presented by the Government on the ground that the status of a convicted person could not be equated with that of a person who voluntarily or otherwise found himself or herself in a situation in which he or she could not marry.

The Commission indicated that in such a case the situation was not analogous with that of a clergyman who waived the right to marry on religious or other grounds. The prisoner, the applicant, wanted to marry in spite of the restrictions imposed on his freedom. The Government authorities could have granted him permission to temporary leave from prison under escort in order to marry or have established a procedure for marrying in prison, taking into account the experience of other countries.

The way in which the prisoner is provided with the possibility of marrying may be controlled by the state, but it does not depend upon the actual status of the prisoner.

Article 12 of the Convention guarantees the right to marry "according to the national laws governing the exercise of this right". This right may not be interpreted by extending or restricting it.

Under the domestic law of the State in question, there were no restrictions on or obstacles to the applicant getting married. The marriage and other laws of that state do not clearly specify how this right can be exercised by prisoners. The question of whether the conditions for the exercise of this right should be created in prisons must be decided by the Minister of Internal Affairs and the prison administration within the scope of administrative functions assigned to them.

Given that the respondent Government, but not the applicant, was responsible for the impossibility of exercising the right to marry, the question also needs to be answered whether the refusal to provide conditions for the exercise of the prisoner's right is permissible under the Convention, on the grounds that the breach of this right is justified by valid laws within the meaning of Article 12 of the Convention (national laws governing the exercise of the right to marry), or as a result of other restrictions relating to the contraction of marriage.

It is obvious that in this case there were no obstacles to contracting the marriage. It was simply the prisoner's right to marry that was ignored. However, this does not mean that there was no violation of that person's right to marry.

Thus, according to Article 12 of the Convention, the right of a man and woman to marry may not be restricted due to the actual situation in which a person finds himself or herself. The right depends only on the will of a person contemplating marriage, and it is forbidden to prevent him or her from exercising it.

Article 38, paragraph 3 of the Constitution of the Republic of Lithuania states that "marriage may be entered into if a man and woman freely decide to do so". The Constitution, the Marriage and Family Code and the Corrective Labour Code contain no provision to the effect that serving a prison sentence is an obstacle to the exercise of this right. Such a prohibition is provided for in the Provisional Rules of the Interior Order in corrective labour institutions. It is evident that paragraphs 7, 9 and 16 of the rules, which prohibit marriage among persons serving prison sentences, are not in conformity with the provisions of the Constitution and the Marriage and Family Code and, at the same time, Article 12 of the Convention.

Persons serving prison sentences are only permitted to marry persons not deprived of their liberty. Marriage must be contracted according to the following procedure (established by the above rules):

1) a person, who has received confirmation of the completion of an appropriate form by a convict and who agrees to marry the convict, must complete a form issued by an institution of civil registration and file this document with the civil registration office located at his or her place of residence or the place in which the correctional labour institution is located;

2) the civil registration office, having received the documents completed by both persons, shall set a time for the contraction of marriage and give advance notice to the applicants;

3) the administration of the correctional labour institution shall provide premises for the contraction of the marriage with the convict. During the marriage

registration procedure, there will be present the person marrying the convict and other persons necessary for the procedure;

4) during the registration of the marriage convicts may wear their own clothes. The director of the correctional labour colony shall have the right to grant a long meeting to the convict who has registered his marriage;

5) a state charge of the established amount shall be collected for the registration of the marriage;

6) the convict who has been punished by being placed in a solitary confinement, disciplinary detention cell or locked-up or transferred to cell-type premises may register his/her marriage only after serving the punishment.

The situation with respect to persons placed in social and psychological rehabilitation institutions should be decided in a similar way. In addition, other possible cases of the deprivation of liberty should be taken into account. However in such cases the general rule should be observed that "the right to enter into marriage may not be restricted, but a specific procedure for the exercise of this right may be established".

Under the laws of the Republic of Lithuania, a marriage of a citizen of the Republic of Lithuania with a foreigner is concluded under the laws of the Republic of Lithuania, which do not provide for any restrictions.

The provisions of Article 38 of the Constitution are in compliance with Article 5 of Protocol No. 7, i.e. the equality of rights of spouses, the right and responsibility to bring up their children and to support them until they come of age.

It should be noted that Article 5 of the Protocol is more detailed and extensive, so that in this case the Marriage and Family Code and the Civil Code of the Republic of Lithuania should be analysed in more detail.

The provisions of the Marriage and Family Code of the Republic of Lithuania govern property issues and the personal relations of spouses and establish their equal rights and duties. The problem is that existing economic relations between spouses are not duly regulated by law; however, the principle of equality between spouses is not violated.

The Marriage and Family Code provides for special rights of spouses, the exercise of which is guaranteed by the state. Upon entering into marriage, the spouses may choose of their own will, the surname of one of the spouses as a common family name or may keep their original surname.

Upon contracting marriage, the spouses may, by a rule of exception, be permitted to have a double surname.

The spouses enjoy equal rights in bringing up children and deciding the questions of family life (Article 19 of the Marriage and Family Code). If spouses disagree on matters relating to the bringing up of children, this disagreement must be settled by an institution of social care and assistance. In case one of the spouses does not comply with the decision taken by that institution, the other spouse or the institution of social care and assistance has the right to ask a court to settle the conflict.

A spouse may freely choose his or her occupation, and place of residence. A spouse who disagrees with the occupation and place of residence chosen by the other spouse does not have any right to prevent the other spouse from exercising these rights.

The spouses' rights in respect of their property relations are established by the Marriage and Family Code and the Civil Code. The condition necessary to establish mutual relations of the spouses with regard to their common property is the contraction of marriage and its registration in accordance with the procedure established by law.

The spouses enjoy equal rights to hold, utilise and dispose of this property. The spouses have equal rights to property owned by them as a result of the right to joint private ownership, even if one of the spouses takes care of the household and children or owing to other important reasons has no income of his or her own. The property acquired during marriage is considered as belonging to both spouses even though it may be registered officially in the name of one of the spouses. In order to protect the property rights and interests of both spouses, the conclusion of transactions in respect of property for which a notary's confirmation or registration with appropriate institutions is required, as well as conveyance or mortgage transactions, the written consent of the other spouse must be obtained. It should to be noted that this legal situation in Lithuania causes a serious problem, namely the fact that it may lead to the child's rights being violated (e.g. when the parents sell an apartment regardless of the child's interests etc.). In our opinion, such gaps in the law should be eliminated - when joint property is being divided up, the share due to the child should be established by law.

When dividing joint property, the shares of the spouses are considered to be equal. In individual cases the court may establish that the spouses have unequal shares by taking into consideration the interests of minors or the important interests of one of the spouses. Joint private property of the spouses may be divided either in the event of the dissolution of the marriage or during the marriage at the request of one of the spouses. The present provision must be amended by a rule under which the child's share may be established by a court at the request of the Children's Rights Protection Service.

The father and mother have equal rights and responsibilities with respect to their children. The parents also have equal rights and responsibilities with respect to their children in the event of the dissolution of the marriage.

Parents must bring up their children, take care of their physical development and education and prepare them for socially oriented work.

The rights and interests of minors must be protected by their parents. The rights of parenthood must be exercised without prejudice to their children's interests.

If, for some reason, parents live separately, the place of residence of minors is decided by the mutual agreement of both parents. If parents fail to come to a mutual agreement, the conflict must be settled by a court, taking into consideration the interests of the child. When the child reaches 10 years of age, the court also takes into account his or her opinion.

A father or mother who has not been deprived of his or her parental rights and lives separately from his or her child who is still a minor, has the right to take part in bringing up that child and to communicate with him or her. The mother or father with whom the child lives has no right to interfere with the other parent's contacts with the child and his or her participation in the child's upbringing.

The parents have the right to demand the return of their children who are still minors

from any person who does not look after the child in accordance with the law or a court order. If the court decides that giving back the child to his or her parents is against his or her interests, it may reject the request.

The Marriage and Family Code provides for the possibility of a court depriving the parents of their parental rights. Either or both of the parents may be deprived of his or her parental rights when it is established that he or she is failing to discharge his or her obligations with regard to bringing up the children, abusing his or her parental rights, behaving cruelly towards the children or exerting a negative influence on them by engaging in immoral behaviour. This may also be done if the parents are alcoholics or drug addicts.

Parental rights are inborn and parents may not be deprived of them. Therefore, the court may only limit the scope of their exercise in accordance with the procedure established by law and with a view to protecting the child's interests. However, it cannot take these rights away.

If one of the parents is deprived of his or her parental rights, the custody of the child is usually awarded to the other parent.

When both parents are deprived of their parental rights, the child is placed in a child care institution. Child care institutions have the right to permit the child's father or mother, who has been deprived of his or her parental rights, to communicate with the child, if such communication does not exert a negative influence on the child and if the child has not been adopted.

The court may decide to place the child in care regardless of whether the parents have been deprived of their rights or not, if it would be dangerous for the child to stay with the persons in whose custody he or she is at present.

When the reasons for which the child has been taken away from his or her parents cease to exist, the court, on the basis of the parents' application, will decide to return him or her to his or her parents, if this is not prejudicial to the child's interests.

Depriving the parents of their rights does not release them from the obligation to provide for their children who are still minors.

The state institution in charge of the protection of children's rights is the Children's Rights Protection Service, which is attached to the Ministry of Social Security and Labour. One of the main objectives of this institution is to defend children's interests in various state and public institutions. The Service is also assigned the function of safeguarding children's rights in the family, eliminating the causes of child neglect, placing children who are without proper support or care in families or educational institutions and helping them to obtain employment and cope with life.

The parents are first of all responsible for the proper upbringing of their children. This duty renders parents liable for damage caused by their children under 15 years of age. In this case not only the father or mother with whom the child resides but also the father or mother who resides separately is liable under the law. The law does not provide for any exception with respect to the father or mother whose parental rights have been restricted. When a minor causes damage, the parents are presumed to be responsible, i.e. they are held accountable if they fail to prove that the damage has been caused through no fault of their own.

A minor between 15 and 18 years of age is liable for damage caused by him or her on general grounds provided by law. In cases where the minor between 15 and 18 years of

age has no property or income of his or her own that is sufficient to pay compensation for the damage caused, an appropriate proportion of the damage must be paid for by the parents if they fail to prove that the damage was caused through no fault of their own.

Existing laws do not specify directly how parents sentenced to a term of imprisonment may take part in the upbringing of their children. Under the Marriage and Family Code such persons, provided their parental rights are not restricted, have the right to take part in the upbringing of their children and to communicate with them. The Corrective Labour Code provides that during long-term meetings a prisoner is allowed to reside with his or her children who are still minors and his or her spouse. Convicted women who have children placed in the care of a child unit within a corrective labour institution, are entitled to communicate with their children for two hours a day during their free time. It is obvious that both convicted adults and convicted children should be provided with greater possibilities of communicating with their children or parents, as there is no connection between serving a sentence for a crime and restrictions on children's and parents' rights. In addition, the fact that the Corrective Labour Code contains provisions for imprisoning women with young children, is also questionable. (In this case a violation of both Article 5 of Protocol No. 7 and Article 3 of the Convention may be found.)

The Marriage and Family Code establishes the duty of parents to provide subsistence for their children who are still minors and for disabled children who are over 18 years of age. If this duty is not fulfilled, maintenance is payable on the basis of a court decision. When maintenance is demanded for the benefit of children who are still minors or disabled children who are 18 years of age or more, those involved may encounter difficulties when it is impossible to establish the income or property of the person who must pay maintenance on the basis of a court decision. This is a gap in the laws governing the procedure for the award and payment of maintenance.

In order to safeguard the legitimate property interests of children and to avoid the negative consequences of increased migration, agreements concluded between the Republic of Lithuania and other states concerning legal assistance in civil, family and criminal cases lay down the procedure for awarding and collecting maintenance from parents who reside in the territory of another state and are obliged to pay it.

Conclusions and proposals

In the event of the ratification of the Convention, Article 12 of the Convention and Article 5 of Protocol No. 7 would not cause serious problems for the Republic of Lithuania. In this respect, the following amendments to the laws are necessary:

1. The right of convicts to marry (including marrying a person serving a prison sentence), is a right that is not restricted by the laws of the Republic of Lithuania, and may only be subject to specific rules laid down in the Corrective Labour Code. This problem should be resolved in a manner similar to any other case in which a person is imprisoned.

2. The Corrective Labour Code should not limit the number of visits between parents and their children.

3. The law should regulate the activities of closed institutions for minors, as well as the possibility for parents to participate in the upbringing of children placed in the care of such institutions.

4. The Criminal Code should provide for a rule (with some exceptions) allowing women with children, who are still minors, to be given a suspended prison sentence.

5. It is necessary to abolish the practice of depriving men of their paternal rights and to provide for the restriction of paternal rights in the Marriage and Family Code. The law must define the grounds for this and the court procedure to be followed.

6. It is necessary to revise the Code of Civil Procedure by providing for a procedure for collecting maintenance when the property or income of the person required to pay have not been established (or when it is impossible to establish them).

7. It is necessary to provide for the following rules in the Marriage and Family Code designed to protect the property rights of a child:

a) when dividing up the matrimonial property, the share due to the child must be specified;

b) the Children's Rights Protection Service must also be entitled to demand that the compulsory share of matrimonial property due to a child be specified.

ARTICLE 13 OF THE CONVENTION

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

The essence of Article 13 is that every person whose rights set forth in this Convention have been violated must have an effective remedy against these violations, irrespective of whether these violations have been committed by an official or a private person. It is necessary to note that the Court of Human Rights has not yet adequately defined the main aspects of this Article, so that it is not possible to answer the question of whether Lithuanian legislation is in compliance with the requirements of this Article. Incidentally, this situation is also confirmed by experts from other countries (**T**. Ban, D. Gomien). As G. Hillestad Thune has noted, in most cases complaints concerning a violation of Article 13 have been dismissed.

On the other hand, some essential principles relating to Article 13 have already been formulated:

a) under this Article remedies are not guaranteed in the case of a violation of all rights or freedoms but only in respect of the violation of rights and freedoms set forth in the Convention. This means that, in addition to Article 13, an applicant has to indicate another Article in respect of the violation of which remedies were not available. Such a conclusion may be drawn on the basis of the case of *Murray v. the UK, 1994*. In 1982, Mrs Murray was arrested under the Northern Ireland (Emergency Provisions) Act on suspicion of involvement in the raising of money for the purchase of arms, and she was held in detention for two hours, although no charge was preferred. The Court of Human Rights found that there had been no violation of Article 5 of the Convention, and there was no reason to investigate a violation of Article 13;

b) it should be noted that in the practice of the Court of Human Rights the admissibility of a complaint under Article 13 is also possible when only a complainant himself or herself is convinced of the violation (the case of *Silver and others v. UK, 1983*, the case of *Klass v. Germany, 1978*).

c) a systematic analysis of the Convention and a comparison of Article 5 paragraph 4, Article 6 paragraph 1 and Article 13, enable us to draw the very important conclusion that the "remedy" provided for in Article 13 of the Convention need not necessarily be understood to be court proceedings (the above-mentioned case of *Klass v. Germany*). Furthermore, the term "effective" does not mean that an applicant's claims must always be satisfied. In this case the national system of remedies and the powers and responsibilities of certain institutions have to be assessed. It should be noted that within the meaning of Article 13, a court may be considered as an effective remedy only if there is no violation of Article 5 paragraph 4 or Article 6 paragraph 1 of the Convention. In the case of *B. v. Austria, 1990* the Court held that there had been a violation of Article 6, paragraph 1 and Article 13 because the hearing of the case had been unreasonably long and the applicant had no possibility of an effective remedy, as Austrian law does not provide for the possibility of making a complaint concerning the duration of court proceedings.

In the above-mentioned case of *Murray v. United Kingdom, 1994*, it was noted that the applicant had had the possibility under national law of appealing to the Court of Appeal concerning her complaint about unlawful deprivation of liberty, a complaint dismissed by the Court of Human Rights.

This Article establishes the right to lodge remedies before a state institution, i.e. there is no reference to public organisations and international institutions concerned with the protection of human rights. It is necessary to emphasise that the state has the right to choose a system of remedies. The Strasbourg institutions have therefore stated that the right to appeal to the Constitutional Court of a state is not a condition required under this Article.

Therefore the legislation of Lithuania needs to be analysed from this point of view, beginning with Article 30 paragraph 1 of the Constitution, which provides that "any person whose constitutional rights or freedoms have been violated shall have the right to appeal to a court". At first sight it would seem that this provision resolves all problems concerning the compliance of the Constitution with the Convention. However, this issue is more complicated because, as has been noted in the above analysis of Article 1 of the Convention, there are certain grammatical and structural differences between these two basic provisions. The problem becomes more complex when human rights and freedoms set forth in the Convention are not specifically guaranteed by the Constitution. Citizens have access to general remedies guaranteed by the Lithuanian legal system, the first of which is the Public Prosecutor's Office. In fact, the functions of this law-enforcement institution have been restricted by Article 118 of the Constitution and the Law on the Prosecutor's Office (1994). Prosecutors no longer exercise general supervisory functions. At the moment, the Prosecutor's Office performs supervisory functions in places of detention (and, at the same time, investigates the facts surrounding a violation of the rights of a convicted person). Another institution which is concerned with the protection of human rights is the Seimas Ombudsman's Office. Under Article 73 of the Constitution of the Republic of Lithuania, the Seimas ombudsmen shall examine complaints made by citizens about the abuse of powers by, and administrative malpractices of, state and local government officers (with the exception of judges). They have the right to submit proposals to the court and to dismiss guilty officers from their posts. Their functions are defined more precisely in the Law on the Seimas Ombudsmen (1994). Under Article 1 paragraph 3, the "responsibilities of the Ombudsmen shall not embrace the investigation of the activities of the President of the Republic of Lithuania, the members of the Seimas, the judges of the Constitutional Court, the Supreme Court and other courts, the procedural actions of prosecutors, investigators or persons conducting inquiries, the activities of the Prime Minister, the State Controller and the Government (as a collective institution), or municipal councils and their boards (as collective institutions)". It is therefore evident that Article 1 paragraph 3 of this law is not in conformity with Article 73 of the Constitution, according to which only the actions of judges do not fall within the scope of the responsibilities of the Seimas ombudsmen.

Under Article 23 paragraph 1 of the Law on the Seimas Ombudsmen, the ombudsmen shall, having completed an investigation, adopt one of the following decisions:

> 1) to refer the material to investigative bodies if the elements of a crime are found;
>
> 2) to bring an action recommending that the court dismiss from office officials guilty of abusing their official position or of misconduct in the exercise of their functions, with the exception of officers who have been appointed by the President or who have been appointed or elected by the Seimas, and to make proposals for the payment of compensation for pecuniary and non-pecuniary damage incurred by a person as a result of violations committed by officials;
>
> 3) to recommend that the department or head of the institution in which the investigation was conducted or a superior institution, impose disciplinary penalties on officials guilty of a violation;

4) to bring facts relating to negligence in the exercise of official functions, the non-observance of laws or violations of professional ethics or administrative malpractice to the attention of the officials concerned;

5) to reject the complaint if the violations alleged are not confirmed; or

6) to notify the Seimas of the Republic of Lithuania or the President of the Republic of the violations committed by Ministers or other officials accountable to the Seimas, or by the President (with the exception of officials specified in Article 1 paragraph 3).

Under paragraph 2 of this Article, in taking a decision on an official's abuse of his official position or on administrative acts, the ombudsman may not revise or revoke the official's decisions. After establishing that in taking the decision the officer abused his position, the ombudsman must apply measures necessary for the revocation of the decision in the manner established by law. The ombudsman's recommendation to revise the unlawful decision of the official must be examined by the institution to which the official is answerable.

The third institution concerned with citizens' rights is known as the Government Representatives. According to the Law on Government Representatives (1993) one of the activities of the Government Representatives is to carry out a systematic examination of complaints and applications filed by citizens, and to take decisions within their area of responsibility or refer the matter to the competent authorities (Article 2 (4)).

The Government Representative, upon determining that a citizen's or organisation's rights have been violated by a decision of the municipal council or board or by an ordinance of the county governor, city mayor or the elder of a rural district, must issue a written order addressed to the chief of the institution whose decision violates the rights concerned. The Government Representative must order the suspension of that decision or ordinance and consider whether to revise or revoke it, or else he must suspend its execution and issue an instruction, stating his reasons. This instruction has to be considered promptly at the relevant sitting or meeting and a decision taken (Article 3). Article 5 of this law provides that if a municipal council or board refuses to comply with the demand made by the Government Representative or notify him about the fulfilment of that demand in due time, and if the above institutions fail to revoke unlawful acts adopted by the bodies subordinate to them, the Government Representative shall appeal to a court against such acts or actions taken by the officers concerned.

The Seimas Committee on Human and Citizens' Rights and Matters pertaining to it is also concerned with the protection of human rights. Under Article 72 of the Seimas Statute (1994), this Committee not only "prepares and considers drafts of laws and other legal acts as well as proposals relating to guarantees of civil rights but also considers the material submitted by the Seimas ombudsmen concerning a breach of the law by ministers and other officers accountable to the Seimas and submits its findings to the Seimas for consideration". The Committee also considers complaints and proposals referred to the Seimas, concerning the work of the Seimas ombudsmen. Any citizens who are of the opinion that their rights and freedoms have been violated may apply directly to a member of the Seimas or municipal council. Under Article 12 of the Seimas Statute of the Republic of Lithuania, the Seimas member shall consider proposals, applications and complaints referred to him and, if necessary, refer them to an appropriate state institution for consideration.

After establishing that civil rights and laws have been violated, a Seimas member has the right to request in writing that the violation be redressed, or to appeal to appropriate institutions and officers. Violations shall be entered in the records drawn up by the

representatives of law enforcement or supervisory bodies. For non-compliance with legitimate requests of members of the Seimas, a disciplinary penalty may be imposed on a guilty officer in accordance with the procedure established by law, or he may be dismissed from office (Article 14).

Similar provisions are contained in Articles 10 and 17 of the Law on the Status of Members of the Supreme Council of the Republic of Lithuania and Articles 13 and 18 of the Law on the Status of Members of Municipal Councils. (These laws must be made to conform with the Constitution both in respect of their content and the terms used.)

The most important institution is the court. Article 4 of the Law on Courts of the Republic of Lithuania states:

"In the Republic of Lithuania all citizens shall have the right to a legal defence against any attack on their life and health, personal liberty, property, honour and dignity, other rights and freedoms set forth in the Constitution and laws of the Republic of Lithuania, as well as a legal defence against unlawful actions or the inaction of government authorities and officers".

Foreign nationals and stateless persons have the same right to a legal defence as the citizens of the Republic of Lithuania if laws and international agreements do not provide otherwise.

The procedure for an appeal against a court decision or sentence is laid down in the Code of Criminal Procedure and the Code of Civil Procedure. These matters are analysed in greater depth in the consideration of Protocol No. 7.

The jurisdiction of courts is dealt with by Chapter $24^{(1)}$ of the Code of Civil Procedure, headed "Appeals Against Unlawful Actions, or Inaction, of Government Institutions or Officers Infringing the Rights of Other Persons". According to this Chapter "a person who is of the opinion that his or her rights or freedoms have been violated by the acts, actions of state authorities or government institutions or officers, shall have the right to appeal. Where an actionable dispute about the infringement of a right arises, the person concerned must institute the appropriate court proceedings.

Legal proceedings may be instituted for collective or arbitrary acts, actions or inaction of state authorities and government institutions and officers when:

1) a person is unlawfully deprived of the possibility of exercising fully or in part the right conferred on him or her by laws or other legal acts;

2) a person is unlawfully induced to enter into an obligation.

No complaint may be made to a court concerning the acts, actions or inaction of state authorities or government institutions or officers if the laws of the Republic of Lithuania provide for a different procedure.

If a complaint is made to a court it must take one of the following decisions:

1) to allow the complaint and to oblige the relevant state authority or government institution or officer to redress the violation; or

2) to dismiss the complaint.

When the court judgment on the basis of which a complaint has been allowed comes into effect, a copy must be sent to the head of the state body, or government institution or officer whose actions or inaction have been complained about. If the state body, government institution or officer, whose actions or inaction have been complained about, fails to comply with the court judgment within the period fixed by the court, a writ of execution shall be issued at the request of the complainant.

It would seem at first sight that the Lithuanian legal system provides for a number of remedies against violations of rights. However, it should be noted, that these remedies do not embrace criminal proceedings.

Article 13 of the Convention provides that everyone (i.e. not only nationals but also foreign nationals and stateless persons) should have an effective remedy before a national authority.

Article 14 of the Law on the Legal Status of Foreigners in the Republic of Lithuania states that foreigners staying in the Republic of Lithuania (under this law, persons possessing the citizenship of any foreign state, as well as stateless persons are classed as foreigners) shall have the right to appeal to a court or any other national authority either in person or through their authorised representatives in the same manner as the citizens of the Republic of Lithuania.

Convicted persons are, of course, also entitled to a legal defence, subject to the restrictions resulting from the court judgement and the regime, established for serving the sentence concerned. Under Article 50 of the Corrective Labour Code, convicted persons have the right to apply to state authorities, public organisations and officers with proposals, applications, and complaints. Where necessary, explanatory notes from the administration of corrective labour institutions must be attached to the proposals, applications and complaints filed by convicts.

The proposals, applications and complaints addressed to the prosecutor may not be subject to censorship and must be dispatched within one day from the moment of their receipt.

Replies to proposals, applications, and complaints are made and signed within three days from the moment of their receipt.

Convicts have the right to apply directly to a deputy, a member of the Government, a representative of the Ministry of Internal Affairs or a prosecutor when they visit establishments of deprivation of liberty.

Convicts are prohibited from sending collective complaints and applications.

Convicts are prohibited from applying to state authorities, public organisations and officers with proposals, applications and complaints on behalf of other convicts or in any other manner than through the administration of the corrective labour institution.

Similar rights are granted to persons committed to social and psychological rehabilitation institutions as well as to persons detained on remand (hence it is necessary to adopt the Law on Detention on Remand).

Finally, it is necessary to draw attention to several issues that are very important in terms of this Article of the Convention:

1) the protection of the rights of persons of unsound mind (a more detailed analysis is provided in Article 5 of the Convention) is not in compliance with the requirements of the Convention;

2) the protection of a minor's rights is not in compliance with the requirements of the Convention;

3) the protection of the rights of refugees is not in compliance with the requirements of the Convention;

4) problems may also arise from the restoration of rights of ownership, especially in such cases where the officials concerned fail to take a decision.

Conclusions and Proposals

In the event of the Convention being ratified, the effects of this Article on the legal system of the Republic of Lithuania should be assessed with great caution, as the Strasbourg institutions have not yet fully defined the scope of its application. For this reason, it is very difficult to assess the effectiveness of remedies provided by the laws of the Republic of Lithuania.

In the opinion of the Hungarian experts, which is acceptable to Lithuania, in order to meet the requirements laid down in Article 13 of the Convention it is necessary:

1) to establish possibilities for the application of remedies in respect of the rights and freedoms set forth in the Convention;

2) to adopt the law on detention on remand;

3) to prepare and adopt a law on the protection of children's rights;

4) to adopt a law on mental health care;

5) to adopt a law on the status of refugees in the Republic of Lithuania;

6) the Code of Criminal Procedure must provide for the possibility (remedy) of appealing against the actions of the interrogator, investigator or prosecutor, to an independent institution, which in this case would be a court, whilst an appeal against the actions of the court or the judge would go to a higher court;

7) to follow closely the practice of the Strasbourg institutions in applying Article 13 of the Convention and, if necessary, to amend the laws of the Republic of Lithuania accordingly.

ARTICLE 14 OF THE CONVENTION

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

The Convention does not prescribe a general obligation for states to pursue a policy of non-discrimination. The Strasbourg institutions have noted on a number of occasions that Article 14 lays down the principles of non-discrimination only in respect of the enjoyment of the rights and freedoms set forth in the Convention (see the Belgian "Linguistics" Case,1968). If, in the opinion of the Commission and the Court, there is no violation of any other Article of the Convention that grants rights and freedoms, no violation of Article 14 of the Convention shall be established - an analogy with Article 13 of the Convention may be drawn concerning the application of the principle of *lex specialis*. In the practice of the Strasbourg institutions, however, there has been one exceptional case in which a breach of Article 14 of the Convention was found in respect of rights not set forth in the Convention. In the case of *East Africans and Asians v. UK, Appl. Nos. 4715/70, 4783/71 and 4827/71*, the United Kingdom of Great Britain and Northern Ireland denied entrance into the country for British citizens born in Tanzania, Uganda and Kenya and did not allow them to take up residence. These citizens stated in their applications that the U.K authority's refusal to allow their immigration had been based on racial grounds, thus violating Article 14 of the Convention. In addition, they had been treated in a degrading manner. It should be noted that the right to immigrate is not directly protected by the Convention. However the Commission, having found that there had been a breach of Article 14 of the Convention, stated that degrading treatment based on racial grounds may constitute a violation of Article 3.

One more issue should be discussed before considering laws of the Republic of Lithuania currently in force, namely how the Strasbourg institutions interpret the concept of discrimination. The answer can be found in the case of *Abdulaziz, Cabales and Balkandali v. UK, 1985*. The Court, having not found a breach of Article 14 of the Convention, pointed out that the notion of discrimination within the meaning of Article 14 means the unjustified derogatory treatment of a person or group of persons by other persons without justified reasons. Consequently, not every case of the different treatment of people on account of their sex, occupation etc. should be considered to be discrimination. The main principle underlying the assessment of such cases of different treatment is the possibility of justifying them.

Article 14 of the Convention prohibits discrimination on any ground such as:

1) sex,
2) race,
3) colour,
4) language,
5) religion,
6) political or other opinion,
7) national or social origin,
8) association with a national minority,
9) birth or other status.

A general provision on non-discrimination is also provided by Article 29 of the Constitution of the Republic of Lithuania:

"All people shall be equal before the law, the Court and other state institutions and public officials. A person may not have his or her rights restricted in any way, or be granted any privileges on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions or opinions".

It may seem at first sight that the conditions concerning non-discrimination specified in Article 29 of the Constitution are not as extensive as those contained in Article 14 of the Convention: the Constitution does not mention non-discrimination on the ground of property, birth, or belonging to a national minority. However the principle laid down in the Constitution in the form of a blanket provision is extended and described in more detail by other laws of the Republic of Lithuania. Thus, after comparing Article 14 of the Convention with Article 29 of the Constitution, it is possible to state that the wording of these Articles coincides. From the context of Article 14 of the Convention it is evident that everyone, i.e. not only nationals but also foreign nationals and stateless persons must be guaranteed the enjoyment of the rights and freedoms set forth in the Convention without any discrimination. The concept of "people" used in the Constitution also embraces these three categories of persons. This is also evident from the provision of Article 3 of the Law on the Legal Status of Foreigners in the Republic of Lithuania under which "foreigners (according to this law both persons possessing the citizenship of any foreign state and stateless persons are considered to be foreigners) in the Republic of Lithuania are equal before the laws regardless of their race, colour, sex, language, religion, political or other convictions, national or social origin, property, birth or any other status".

It is clearly stated in Article 1 of the Law on National Minorities of the Republic of Lithuania that: "The Republic of Lithuania, guided by the principles of equality and humanism, shall guarantee the free development of all national minorities residing in its territory and shall respect every nationality and its language. Any discrimination on the grounds of race, nationality, language and other grounds related to the question of nationality is prohibited and punishable according to the procedure established by the laws of the Republic of Lithuania." This blanket provision is contained in Article 72 of the Criminal Code, which makes a violation of national and racial equality a criminal offence.

The principle of non-discrimination is laid down not only in the Constitution of the Republic of Lithuania and the Law on National Minorities, but also in other laws (with slight differences with regard to content). For example, Article 1 of the Law on Wages states that it is prohibited to reduce wages on account of a person's sex, age, nationality, race or political convictions. Similar provisions are to be found in the Law on Education, the Law on Employment Contracts, Article 2 of the Law on Courts, Article 252 of the Code of Administrative Offenses, Article 12 of the Code of Criminal Procedure, Article 6 of the Code of Civil Procedure, the Law on the Legal Status of Foreigners and other laws. However, Article 4 of the Law on the Legal Status of Foreigners provides for the possibility of the Government of the Republic of Lithuania imposing restrictions on the rights and freedoms of foreigners as a "punishment" if other states violate the rights and freedoms of citizens of the Republic of Lithuania. The imposition of restrictions on the rights and freedoms of foreigners is not in conflict with the principles of international law that justify such responses. They are recognised as one of the possible measures available for a country to protect its citizens in a foreign state. However such measures should be laid down in a bilateral agreement between the states concerned. We suggest, therefore, that Article 4 of this law be repealed.

Mention should also be made of the laws of the Republic of Lithuania providing for the right to vote and eligibility for political office: the Law on Elections to the Seimas (Parliament), the Law on Presidential Elections and the Law on Elections to Municipal Councils. These laws confer universal suffrage only on the citizens of the Republic of Lithuania, so that the principle of non-discrimination on account of sex, nationality, race, origin or social status only applies

to the citizens of the Republic of Lithuania. The restrictions on political activities provided for in the Law on Political Parties and the Law on Trade Unions are based on Article 16 of the Convention and, in our opinion, are justifiable.

It would be more difficult, but nevertheless possible, to justify the restoration of the rights of ownership to existing real property only to citizens of the Republic of Lithuania permanently residing in the Republic (Law on the Conditions of and Procedure for the Restoration of the Rights of Ownership to Existing Real Property). This can probably be justified on social, economic, and historical grounds. The same applies to the Law on the Privatisation of Apartments.

In the case of *Van der Mussele v. Belgium, 1983*, a Belgian lawyer complained of not having been paid for providing legal defence in a case. In his opinion, the fact that lawyers and representatives of other professions appear in different capacities constituted a breach of Article 4 (forced or compulsory labour) and Article 14 of the Convention. The Court held that such unequal treatment by the state was justifiable. Thus in this case and in other cases (*Ireland v. UK, 1978*, *Rasmussen v. Denmark, 1984*, *Grandrath v. Germany, 1967*, the *National Union of Belgian Police v. Belgium, 1975)* the Strasbourg institutions have clearly formulated the principle of the possibility of positive discrimination, i.e. the possibility of granting certain privileges to persons by reason of their unequal position (e.g. to mothers, minors etc.). In the case of *Rasmussen v. Denmark, 1984*, the applicant complained that the competent authorities in Denmark had refused to perform a paternity test on the ground that he had filed an application after the expiry of a time-limit. However, according to Danish law, a woman may request a paternity test irrespective of the time-limit. The Commission and Court of Human Rights have not considered this difference in the treatment of mothers and fathers in the exercise of their rights to be a breach of Article 14 of the Convention, stating that a distinction was conditioned by the natural and objective differences in the status of a mother and a father.

In three cases addressing a number of aspects of the right to form and join trade unions, the Court found no violations of either Article 11, or Article 14 of the Convention (*National Union of Belgian Police v. Belgium, 1975*, *Schmidt and Dahlström v. Sweden, 1976* and the *Swedish Engine-Drivers' Union v. Sweden, 1976*). The Court held that the exceptions (different treatment) were justifiable. Thus, the restrictions and differences in the treatment of persons in the exercise of their rights provided for by the laws of the Republic of Lithuania should not be considered to constitute discrimination, provided of course, that they are justifiable.

Article 29 of the Constitution of the Republic of Lithuania provides for the principle of equality of all people before the law, the courts and other state institutions or officials, whereas Article 14 of the Convention does not provide for this.

Article 14 of the Convention only prohibits "negative" discrimination, i.e. it does not prohibit "positive" discrimination - the different treatment of persons by reason of their objectively different position, e.g. women, minors etc. This does not mean, of course, that people will be treated differently on account of their nationality or race. Under Article 1 of the Law on Alternative (Community) Service "Citizens of the Republic of Lithuania ...who are unable, owing to their beliefs, to serve in the national defence service, shall perform alternative (community) service". This principle is also established in the Marriage and Family Code, the Law on Wages and other laws. The Constitution of the Republic of Lithuania and other laws prohibit "positive" discrimination. Thus, in our opinion, different wordings should be considered, as the scope of the Convention in this respect is broader.

Conclusions and proposals

The ratification of the Convention will not cause any serious contradictions between the Convention and the laws of the Republic of Lithuania. However, it is necessary:

1. to solve the problem of "positive" discrimination, which does not contradict the practice of the Court of Human Rights but is prohibited by the laws of the Republic of Lithuania. The phrase "granting of privileges" should be defined more clearly;

2. to repeal Article 4 of the Law on the Legal Status of Foreigners in the Republic of Lithuania.

ARTICLE 15 OF THE CONVENTION

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed".

This Article of the Convention provides a possibility for the state - a party to the Convention - to derogate from its international obligations under Article 1. The state may only derogate from international obligations:

a) in the event of a war or a state of emergency threatening the life of the nation;

b) to the extent required by the exigencies of the situation;

c) provided such derogation is not inconsistent with other obligations under international law.

It is, however, strictly prohibited to derogate from the guarantee of the right to life, except in respect of deaths resulting from lawful actions of war (Article 2), from the prohibition of torture (Article 3), from the ban on holding people in slavery or servitude (Article 4 paragraph 1), from the principle of the presumption of innocence and from the ban on making a law retroactive (Article 7).

The provisions of the Constitution of the Republic of Lithuania corresponding to this Article of the Convention are contained in the Chapter headed "Foreign Policy and National Defence".

Article 142 of the Constitution provides for the grounds and procedure for the introduction of martial law, and Article 144 for the grounds and procedure for the introduction of a state of emergency.

Article 145 provides that "when martial law or a state of emergency has been imposed the rights and freedoms specified in Articles 22, 24, 25, 32, 35, and 36 may be temporarily restricted.

The following rights and freedoms may be restricted :
- inviolability of the private life of an individual;
- inviolability of a person's home;
- a person's right to have his or her own opinion and freely express it;
- the right of a citizen to freedom of movement;
- the right of a citizen to freely form and join associations, political parties or trade unions;

- the right of citizens to assemble at unarmed peaceful meetings.

Thus, the Constitution of the Republic of Lithuania provides for the possibility of restricting only certain rights and freedoms guaranteed by Article 15 of the Convention. On the other hand, Constitutional provisions establish only general regulations governing martial law or a state of emergency. Special rules which would establish the principle of "proportionality" with respect to all the restrictions applied would both provide definitions and lay down the procedure for their application. These restrictions must be provided for in a law on states of emergency (martial law).

In addition, when drafting these laws, the purpose of the application of restrictions to the rights and freedoms should be clearly defined, as Article 18 of the Convention establishes that " restrictions permitted ...to the said rights and freedoms, shall not be applied for any purpose other than those for which they have been prescribed."

Conclusions and Proposals

The ratification of the Convention should not pose serious problems for the Republic of Lithuania in respect of Article 15 of the Convention. However a law on states of emergency (martial law) should be drafted, establishing:

1) grounds for the application of restrictions on certain rights and freedoms, which would take account of the principle of "proportionality";

2) time-limits for the application of restrictions on rights and freedoms;

3) the purpose for which the restrictions are applied to rights and freedoms;

4) the procedure for the application of restrictions on rights and freedoms.

ARTICLE 16 OF THE CONVENTION

"Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens".

An analysis of Article 16 of the Convention is possible only in conjunction with the following Articles of Protocol No. 4:

Article 2:

> *"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
>
> *2. Everyone shall be free to leave any country, including his own.*
>
> *3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
>
> *4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".*

Article 3:

> *"1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.*
>
> *2. No one shall be deprived of the right to enter the territory of the State of which he is a national".*

Article 4:

> *"Collective expulsion of aliens is prohibited".*

Provisions of Article 16 of the Convention are also specified in Article 1 of Protocol No.7:

> *"1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed;*
>
> *a. to submit reasons against his expulsion;*
>
> *b. to have his case reviewed, and*
>
> *c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.*
>
> *2. An alien may be expelled before the exercise of his rights under paragraph 1. a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security".*

Article 16 of the Convention permits High Contracting Parties to restrict the political activity of aliens. On the basis of a study of the practices of the Strasbourg institutions, carried out by Hungarian experts in 1991, it is possible to state that neither the Commission nor the Court have ever had to deal with such cases, so that we can only make suppositions as to the decisions they might make with respect to the Hungarian (and the similar Lithuanian) legal provisions, by means of which, restrictions are placed on the political activities of foreigners. Recommendation No. 799/1977 of the Parliamentary Assembly on the political rights and position of aliens calls for excluding the possibility of applying restrictions. In this Recommendation, the Parliamentary Assembly calls on the Committee of Ministers to instruct competent committees of the Council of Europe to make proposals for amending the Convention in such a way as to exclude restrictions authorised by Article 16 with respect to political activity. It is likely that decisions of Hungarian administrative institutions and courts regarding freedom of assembly would be criticised by the Strasbourg institutions as, according to Law No. 2, Chapter 8, section 2 "only the citizens of Hungary may form and join political parties and hold posts in them. Only a member of a party who has Hungarian citizenship has the right to stand as a candidate".

Article 29 of the Constitution of the Republic of Lithuania states :

"All people shall be equal before the law, the court, and other state institutions and officers. A person may not have his or her rights restricted in any way, or be granted any privileges on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions or opinion".

The same guarantees are provided by the Law on the Legal Status of Foreigners in the Republic of Lithuania. According to Article 3 of this law, foreigners have the same rights and freedoms as citizens of the Republic of Lithuania unless the Constitution of the Republic of Lithuania and other laws of the Republic of Lithuania and international agreements to which the latter is a party provide otherwise. It also states that in the Republic of Lithuania foreigners, while exercising their rights and freedoms, must not carry out activities detrimental to the interests of the Republic of Lithuania, to the rights and legitimate interests of citizens of the Republic of Lithuania or of other persons.

Article 35 of the Constitution of the Republic of Lithuania and Article 1 of the Law on Political Parties guarantees the right freely to form societies, political parties and associations only to the citizens of the Republic of Lithuania. Article 9 of the Law on Legal Status of Foreigners in the Republic of Lithuania provides that "foreigners cannot elect or be elected to the representative bodies of government and other elective state bodies, or participate in referenda (plebiscites)". Thus, similarly to the Hungarian case, Lithuanian laws prohibiting foreigners from being members of political parties might also be criticised by the Strasbourg institutions.

Another thing is the possibility of imposing "restrictions on the political activity of aliens" provided in Article 16 of the Convention. Both the Constitution of the Republic of Lithuania and Article 8 of the Law on the Legal Status of Foreigners in the Republic of Lithuania contain provisions according to which foreigners residing in Lithuania enjoy freedom of thought, conscience, religion and belief. However, the guaranteed right is incompatible with criminal actions - instigation of national, racial, religious or social hatred, coercion and discrimination, slander and misinformation. In addition, under the Law on Assemblies of the Republic of Lithuania, foreigners are not entitled to organise assemblies. This right is conferred only on citizens of the Republic of Lithuania. A violation of these provisions may constitute grounds for the expulsion of a foreigner from the country.

It is also necessary to analyse the laws of the Republic of Lithuania in connection with the provisions of Articles 2, 3 and 4 of Protocol No. 4 and Article 1 of Protocol No. 7 of the Convention.

According to Article 32 of the Constitution of the Republic of Lithuania:

"Citizens are free to move home and choose their place of residence in Lithuania, and may leave Lithuania of their own will.

This right may not be restricted except as provided by law and if it is necessary for the protection of State security or the health of the people, or to administer justice.

A citizen may not be prohibited from returning to Lithuania.

Every Lithuanian may settle in Lithuania".

Article 19 of the Law on the Legal Status of Foreigners establishes the right of foreigners lawfully resident in the territory of Lithuania to move freely. However, on changing their permanent place of residence in the territory of Lithuania, they must notify the Ministry of Internal Affairs in accordance with the established procedure. This right is subject to restrictions only in the interests of state security and public order and in accordance with the laws of the Republic of Lithuania. It should be noted that one of the possibilities of restricting the right of foreigners to choose a place of residence is not provided for by law, as required by Article 2, paragraph 3 of Protocol No. 4, but in the Regulations issued by the Government of the Republic of Lithuania, concerning the Arrival of Foreigners in, Staying in, and Moving in Transit through the Territory of Lithuania. In certain areas, where the freedom to choose a place of residence is restricted, foreigners may reside permanently only in accordance with the procedure established by the Government of the Republic of Lithuania. Proceeding from these two aspects, attention should be drawn to two facts: firstly, Article 32 of the Constitution of the Republic of Lithuania is not in conformity with Article 2 of Protocol No. 4 of the Convention (the Constitution refers to a "citizen", the Convention to "everyone"), in which respect an inquiry has been lodged with the Constitutional Court[2] of the Republic of Lithuania. Secondly, attention should be drawn to certain restrictions.

Article 20 of the Law on the Legal Status of Foreigners in the Republic of Lithuania guarantees the right of foreigners to leave Lithuania of their own will. This right may be restricted if a foreigner:

1) has been charged with a crime, the right being suspended until the end of the proceedings;

2) has been sentenced for the crime, the right being suspended until he or she has served his or her sentence or until he or she has been exempted from serving it;

3) has failed to discharge his or her property obligations towards the Republic of Lithuania or property obligations arising from marriage or family relations, or any other property obligations established by the final decisions of a court.

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[2] The Constitutional Court has denied this opinion. The requirements for foreigners prescribed by the Government legal act do not in their form and force comply with the provisions of Article 2 paragraph 1 of Protocol 4.

A decision prohibiting a foreigner from leaving Lithuania must be taken by the Ministry of Internal Affairs. Article 35 of the Law on the Legal Status of Foreigners in the Republic of Lithuania guarantees the right of a foreigner to appeal to a court against such a decision.

If international agreements binding on the Republic of Lithuania establish other regulations than those provided for by the above-mentioned law, the relevant provisions of those agreements shall apply. Article 34 of this law provides that foreigners' rights and freedoms may be restricted only on the grounds provided for in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the laws of the Republic of Lithuania.

Article 1 of Protocol No. 7 of the Convention restricts the right of the State to expel foreigners. Article 36 of the Law on the Legal Status of Foreigners in the Republic of Lithuania provides that the Ministry of Internal Affairs shall recommend a foreigner who has violated the Constitution, this or other laws, or whose actions pose a threat to national security or public order, health or morals, to leave Lithuania within 30 days. If a foreigner refuses to leave, or if he or she does not leave within the recommended period, a decision on his or her expulsion shall be taken by the Minister of Internal Affairs. Foreigners who have entered or reside in the Republic of Lithuania illegally may be expelled following a decision by the Minister of Internal Affairs.

A decision to expel a foreigner must be taken when he or she:

a) violates the procedure for entering, staying or passing through the territory of the Republic of Lithuania or disregards administrative measures applied to him or her;

b) resides in the Republic of Lithuania without a valid passport or any other equivalent document, visa (if required) and residence permit, or refuses to produce documents certifying his or her identity or presents falsified documents;

c) resides in the Republic of Lithuania with a visa or residence permit obtained by illegal means (within ten years after the date of issue of these documents);

d) commits a deliberate crime for which he or she is sentenced to a term of imprisonment; he or she shall be expelled after serving the sentence or being pardoned. (It should be noted that the Republic of Lithuania intends to accede to the European Convention on the Transfer of Sentenced Persons, so that it will be possible to transfer a person when he or she is still serving a sentence).

e) while staying in the Republic of Lithuania, is unable to support himself or herself or has an illegal source of living. This provision does not apply to foreigners who have residence permits;

f) he or she abuses narcotic and toxic substances, or if administrative measures have been applied to him or her for drinking alcoholic beverages in a public place, or if he or she has a dangerous and contagious disease, or is pathologically retarded or mentally ill, and poses a threat to the morals and health of other persons;

g) he or she prejudices or may prejudice, if such information is available, the interests of the Republic of Lithuania and the rights and legitimate interests of its citizens.

Another important requirement provided for in Article 1, paragraph 1 of Protocol No.7 is the necessity to provide a foreigner whom it has been decided to expel, with the possibility of submitting reasons against the expulsion; to have the case reviewed and to be represented for these purposes before the competent authority or persons designated by that authority. Again, it should be noted that Article 29 of the Constitution of the Republic of Lithuania guarantees the equality of every person before the law, so in this case foreigners have all procedural rights provided by the Code of Criminal Procedure, the Code of Civil Procedure and other laws. In addition, it is laid down in the Government Regulations on the Expulsion of Foreigners from the Republic of Lithuania, that a foreigner shall be promptly informed, in a language which he or she understands, of the charges brought against him or her. He or she must also be provided with an opportunity to contact the diplomatic or consular mission of the state whose national he or she is. An appeal against a recommendation to leave the Republic of Lithuania contained in a decision taken by the Police Commissioner, can be lodged in accordance with the procedure established by law.

An appeal against a decision to expel a foreigner from the Republic of Lithuania can be lodged with a higher authority.

The collective expulsion of foreigners is not permitted under the laws of the Republic of Lithuania.

Moreover, attention should be drawn to the fact that Article 1 of Protocol No. 7 provides for the possibility of expelling a foreigner from the country prior to the exercise of his or her rights under paragraph 1. a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security. It is worthwhile considering the possibility of preparing and passing a Law on the Legal Status of Refugees in the Republic of Lithuania.

Conclusions and Proposals

In the event of the ratification of the Convention, Article 16 and Articles 2, 3 and 4 of Protocol No.4 and Article 1 of Protocol No.7 should pose no serious problems to the Republic of Lithuania.

The following amendments to the laws need to be made:

1. It is necessary to provide for the possibility of restricting a foreigner's right to freely choose his residence by law and not by regulations issued by the Government of the Republic of Lithuania.

2. Taking into consideration the fact that the laws of the Republic of Lithuania do not provide the possibility for a foreigner to become a member of a political party, the Law on Political Parties should be revised.

3. It is necessary to pass a Law on the Legal Status of Refugees in the Republic of Lithuania.

ARTICLE 2 OF THE FIRST PROTOCOL TO THE CONVENTION

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

This Article should be considered in conjunction with:

Article 9 of the Convention:

> *"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private to manifest his religion or belief, in worship, teaching, practice and observance"*

Article 10 of the Convention:

> *"Everyone has the right to freedom of expression"*

Article 14 of the Convention:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".*

Article 5 of Protocol No. 7 is closely connected with Article 2 of the First Protocol from the point of view of equal rights of spouses in their relations with their children and measures necessary in the interests of the children.

The term "education" is usually understood to include different types of education, such as pre-school education, general secondary education, vocational training and higher education.

The specific meaning of "education" presumes the right to freedom of scientific thought and the right to organise and carry out scientific research, prepare and publish research papers, acquire scientific degrees and titles, make use of and publish research results etc.

Article 2 of the First Protocol treats the right to education as a right which may not be denied to any person. On the other hand, nothing prevents anyone from establishing special conditions with respect to the exercise of this right. This is understandable, as some persons may actually exercise the right to education only when certain conditions exist. For example, children may attend school only when they reach a certain age, or temporarily detained persons (persons serving short-term detention) may do so only when they have been released from prison.

Moreover, the words, "no person" should be understood in the context of this Article to be a relative provision applied to nationals of a certain country and persons who are permanent residents of that country. Consequently, this provision should not apply to, for example, persons who enter the country for a brief stay or who pass through the country in transit.

According to Article 14 of the Convention the exercise of the right to education (like

other rights and freedoms set forth in the Convention) must be secured without discrimination on any ground such as sex, race, colour, language, religion, political opinion, national or social origin, association with a national minority, property, birth, or any other status.

Article 2 of the First Protocol obliges the State to concern itself with the question of education and respect the right of parents to choose for their children education that is in conformity with their religious and philosophical convictions.

The need for the state to concern itself with education should be understood to be its responsibility to adopt appropriate laws on education (and teaching), to establish an educational system and ensure its functioning, etc.

The state, in assuming its obligation to respect the right of parents freely to choose education for their children in accordance with their religious and philosophical convictions, can only guarantee this right if the domestic law provides for freedom of thought, conscience, and religion (no restrictions are imposed on a state religion or philosophical views). There is a duty of the state to respect the private life of the family, and if conditions exist for the functioning of the appropriate state or private educational establishments or those belonging to a national minority, also ensure their protection.

The content of the provision of Article 2 of the First Protocol is interpreted in a similar way by the European Court of Human Rights. In the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark, 1976*, the Court stated in its decision that Article 2 of this Protocol is closely connected with Articles 9 and 10, as well as Article 8, which sets forth "the right of everyone to respect for his private and family life, his home and his correspondence".

Science and education in the Republic of Lithuania are governed by the Constitution of the Republic of Lithuania, the Law on Education and the Law on Science and Studies. In addition to these legal provisions, issues relating to science and education are dealt with by the Law on the Legal Status of Foreigners in the Republic of Lithuania, by the Draft Law on Ethnic Minorities, Chapter 9 of the Marriage and Family Code, the Corrective Labour Code, the Law on the State Language and other laws.

It is therefore expedient to consider whether the above laws are in compliance with the requirements of Article 2 of the First Protocol, taking into account the persons who acquire the right to education on the basis of valid laws and other legal provisions. In this respect the following aspects of the right to education should be analysed:

1) the guarantee of the right to education;
2) the right to education of foreigners and stateless persons;
3) the right to education of persons belonging to national minorities;
4) the right to education of persons held in places of deprivation of liberty.

1. Guarantees of the right to education.

Article 41 paragraph 1, of the Constitution of the Republic of Lithuania states: "Education shall be compulsory for persons under the age of 16". This right and duty is guaranteed by the provision of paragraph 2 of this Article according to which education at state and municipal secondary, vocational and higher educational establishments shall be free of charge. This applies not only to the citizens of the Republic of Lithuania but also to other persons who are permanent residents of the Republic of Lithuania. Article 40 of the Constitution is also in compliance with the requirement of Article 2 of the First Protocol to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. This Article of the Constitution establishes that state and municipal teaching and education establishments are secular. At the request of parents,

they may offer religious instruction. Private teaching and educational establishments may be established in accordance with the procedure established by law. The state supervises the activities of teaching and education establishments.

"There is no state religion in Lithuania" (Article 43 paragraph 7 of the Constitution). The state shall recognise traditional Lithuanian churches and religious organisations and other churches and religious organisations provided that they have a basis in society and their teaching and rituals do not conflict with law and morals (Article 43 paragraph 1 of the Constitution).

The above-mentioned and other constitutional provisions are specified in the Law on Education. The preamble to this states that "Education is a priority sphere of development in Lithuania, and is promoted by the State".

The education system in the Republic of Lithuania includes pre-school education, normal and further education, and is carried out by the following types of educational institution: pre-school establishments, general secondary schools, vocational schools, high schools and institutions of further education (Article 2 of the Law on Education).

Pre-school children may, at the request of their parents (guardians), be enrolled in nursery schools and day-care centres. Orphans and neglected children must be placed in child-care institutions.

The state must encourage the education of pre-school children at home and pay child-care benefits. Educational and health care institutions must provide methodical, diagnostic, and consulting assistance to families educating pre-school children at home (see Article 3 of the Law on Education).

A general secondary education may be acquired in three stages over a period of twelve years at a school of general secondary education (see Article 4 of the Law on Education). The three stages of schooling may constitute separate administrative units: primary, principal and secondary schools. The duration of learning in such schools is governed by the regulations of a general secondary school.

Under Article 19 paragraph 1 of the Law on Education, pupils must acquire a primary education or attend a general secondary school or any other school until they reach the age of 16.

Vocational training must be offered at vocational schools and colleges (see Article 5). Vocational training in these schools is carried out concurrently with general education.

Schools of vocational training usually enrol pupils who have already acquired a compulsory general education. According to the procedure established by the Ministry of Education, they may also enrol pupils who have not completed compulsory general education but who are not younger than 15 years of age (Article 5 of the Law on Education).

Persons enroling in colleges must have completed their secondary education (Article 6).

Extracurricular courses and clubs provide additional education for those who wish to pursue interests in such fields as art, sports, languages, technical studies, etc.

Article 12 of the Law on Education deals with the conditions for the exercise of the right to education of mentally or physically disabled children: "All mentally or physically

disabled children shall be educated either at home, in general or corrective groups in pre-school establishments, in special pre-school establishments, in general or corrective classes in schools of general education or special schools located as close as possible to the parents' place of residence".

Article 4 of this law also guarantees the option to exercise the right to education in respect of pupils undergoing treatment in sanatoriums, hospitals, or at home. Schools of general education are provided in sanatoriums for children undergoing treatment. Schoolchildren being treated in hospitals or at home must be taught in the manner laid down by the Ministry of Education.

Article 4 of the Law on Education also guarantees the right to education of schoolchildren who demonstrate anti-social behaviour and, at the same time, obliges them to study. According to this law, "special administrative schools of general or vocational education shall be established for such children". At the present time these schools are being turned into special child-care homes: one home for girls (in Vilnius) and three homes for boys in Veliučionys, Švenčionys and Gruzdžiai are already functioning. The activities of each of these facilities are governed by separate regulations. Model statutes of child-care homes are in preparation. However, up to now the regulations concerning these institutions have been unsatisfactory: there is no special law governing the grounds and procedure for placing minors in such homes; the teaching, education, and vocational training etc. of such minors should be much better regulated.

We believe that these and other issues concerning the right to education of minors who behave in an anti-social manner, their duty to study and their vocational training, should be resolved by a law. These issues should be provided for in the law on the Protection of Minors' (Children's) Rights, the draft of which is being prepared.

The education system provided for in the Law on Education and functioning in the Republic of Lithuania, enables schoolchildren to exercise the rights enshrined in the provisions of Article 2 of the First Protocol.

Schoolchildren have the right to enter any school, provided that their education and other requisites (i.e. health requirements, command of the language of instruction etc.) correspond to the terms of admission, to join children's or youth organisations, to develop the activities of such organisations and take part in special-interest clubs; to participate in the self-government of an educational institution in accordance with the regulations of the institution and, upon attaining the age of 15, decide the future of their religious education etc. (Article 18).

Article 20 of the same law provides for the rights of parents and guardians to freely choose a public or private education institution for their children, to send their children to the school assigned to them in accordance with the parents' place of residence or to another chosen pre-school establishment or school of general education, to participate in the self-government of educational institutions and to obtain information from the relevant schools concerning their children's education, behaviour and study conditions.

Article 17 of the Law on Education specifies the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. Article 17 provides that "if the parents (or guardian) so wish, children may receive religious instruction in school from persons authorised by church dignitaries of the chosen denomination. Those who do not attend a class in religion will be taught other subjects pertaining to moral education and ethics. Children in care shall be instructed in the religion professed by their families or relatives.

The duty of the State to respect private and family life is laid down in Article 22 of the Constitution of the Republic of Lithuania. Paragraph 1 of this Article states that "The private life of an individual shall be inviolable", whilst paragraph 4 provides that the law and the court shall protect individuals from arbitrary or unlawful interference in their private or family life, and from any violation of their honour and dignity. These constitutional provisions are specified in other laws and may be applied directly.

Mention should also be made of some provisions according to which the right of parents to choose an education for their children in conformity with their religious and philosophical convictions may be restricted, namely:

a) when "it is necessary for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others" (Article 8 of the Convention, Article 43 paragraph 1 of the Constitution of the Republic of Lithuania);

b) when "the State takes measures as are necessary in the interests of the children" (Article 5 of Protocol No. 7 of the Convention, Article 39 paragraph 3 of the Constitution of the Republic of Lithuania);

c) "upon attaining the age of 15, schoolchildren shall have the right to decide the future of their religious education" (Article 18 of the Law on Education).

We are of the opinion that these stipulations are not in conflict with the provisions of Article 2 of the First Protocol of the Convention. On the contrary, they supplement them. For example, if a child were to fall under the influence of some religious sect detrimental to his or her health or morals, the relevant state institutions, and primarily, the Children's Rights Protection Service, must take the appropriate measures of legal protection that are also provided for in the Marriage and Family Code, the Code of Administrative Offenses, and the Criminal Code.

The Constitution of the Republic of Lithuania also guarantees the citizens of the Republic of Lithuania and other persons residing in it, the right to education in the full meaning of this term, i.e. the right to scientific research, studies, freedom of thought etc. Article 41 paragraph 3 of the Constitution of the Republic of Lithuania provides that: "Everyone shall have an equal opportunity to attain higher education according to his or her individual abilities. Citizens who demonstrate suitable academic progress shall be guaranteed education at establishments of higher education free of charge". These provisions are supplemented by Article 42 of the Constitution, which states:

"Culture, science, research and teaching shall not be subject to restrictions.

The State shall support culture and science and shall be concerned with the protection of Lithuanian historical and cultural monuments and other valuable parts of its heritage.

The intellectual and material interests of the authors of scientific, technical, cultural and artistic works shall be protected by law".

The above provisions are, in our opinion, in compliance with the requirements of Article 2 of the First Protocol, and ratification of these documents should not cause any problems. Moreover, these provisions are specified in detail by the Law on Science and Studies and the Law on Copyright. The Law on Science and Studies (Articles 1, 33, 34 etc.) guarantees each member of society, in accordance with his or her knowledge and ability, the right to become a student of a higher education establishment or other scientific or educational institutions and

to receive scholarships and support from the state, as well as academic freedom, and the possibility of participating in professional and social activities (Articles 35, 36, 37). From the point of view of the Convention, the provision of Article 35 paragraph 1 is especially important: "In state, scientific and educational institutions, scholars shall have equal employment opportunities on a competitive basis regardless of their sex, race, political and religious convictions, nationality or citizenship". Emphasis should be also laid in this respect on Article 35 paragraph 3 of this law:

"A scholar shall be guaranteed:

- all rights arising from the authorship of creative works and products of inventive labour as established by law and in international agreements;

- independence from ideological and political institutions;

- protection against restrictions and sanctions for publishing the results of research, and for the manifestation of personal beliefs, with the exception of cases in which information constitutes a state secret or a secret as otherwise established by the Government of the Republic of Lithuania".

Consequently, there are no problematic issues regarding the compliance of the above-mentioned laws with the requirements of Article 2 of the First Protocol.

2. The right to an education of foreigners and stateless persons.

The provisions of the Constitution and the laws discussed above are in practice applied not only to citizens of the Republic of Lithuania but also to foreigners (with some exceptions), i.e. to persons possessing the citizenship of another state and to stateless persons.

The concept of a "foreigner" is treated similarly in Article 1 of the Law on the Legal Status of Foreigners in the Republic of Lithuania.

Article 22 of this Law provides that "foreigners permanently residing in the Republic of Lithuania shall enjoy the same rights to an education as citizens of the Republic of Lithuania, which shall be exercised in the manner established by the laws of the Republic of Lithuania". Thus, this Article establishes a requirement that a foreigner must be a permanent resident of the Republic of Lithuania.

Under Article 6 of the same Law, foreigners may permanently reside in Lithuania if they have a residence permit issued by the Ministry of Internal Affairs and a document of identification. The meaning of the term "permanent resident" is specified in another legal provision, the Seimas Resolution of 8 June 1993 (No.I-176) "Concerning the Amendments to the Supreme Council Resolution on the Procedure for the Implementation of the Law on Citizenship of the Republic of Lithuania". According to paragraph 1 of this Resolution (by which paragraph 3 of the previous Resolution is partly replaced and supplemented) "a person shall be deemed to be a permanent resident of the Republic of Lithuania if he or she has acquired the ownership of a dwelling, has been renting a dwelling for an unlimited period, is a family member or tenant of the owner of a dwelling and has been working in Lithuania under an employment contract for at least one year or has another occupation subject to taxation, or if he or she receives a legal pension in Lithuania, is supported by other persons in Lithuania or has a legal means of livelihood and has been paying income tax or other taxes for at least one year as prescribed by law in the Republic of Lithuania, as well as social insurance contributions.

A person who applies for his or her permanent place of residence to be entered in his or her passport or other equivalent document, must submit the relevant documents to the Migration Department of the Police Commissariat, certifying that he or she meets all the requirements. The Migration Department, after having checked the documents submitted and having determined that the person is permanently residing in the Republic of Lithuania, enters in his or her passport or other equivalent document the address of the permanent place of residence and submits data concerning the person concerned to the Statistics Department in the manner prescribed by law.

Article 39 of the Law on Education provides that "Foreigners and stateless persons shall have the right to teach and study in the Republic of Lithuania". Their working and study conditions at Lithuanian educational institutions shall be laid down in appropriate legal provisions of the Republic of Lithuania and in international treaties. This Article does not indicate which state institution has the right to enact the provisions regulating the exercise of a foreigner's right to an education, because Article 22 of the Law on the Legal Status of Foreigners in the Republic of Lithuania only mentions the relevant laws. However, these differences in the laws are not important. Only their wording is different and can be easily adjusted.

There are more differences of this type. For example, Article 41 of the Constitution states: "Everyone shall have an equal opportunity to attain higher education according to his or her individual abilities. Citizens who demonstrate suitable academic progress shall be guaranteed education at higher educational establishments free of charge", whereas Article 22 of the Law on the Legal Status of Foreigners in the Republic of Lithuania guarantees foreigners the same rights to education as it does to Lithuanian citizens, without specifying these rights.

We are of the opinion that there are no essential contradictions between these provisions. Article 41 of the Constitution, according to which free education is guaranteed, is more a guarantee of the exercise of the right than the right itself.

This guarantee is provided only for the citizens of the Republic of Lithuania, although foreigners and nationals enjoy the same rights to an education. In any event, this is a problem of domestic law as Article 41 of the Constitution does not conflict with Article 2 of the First Protocol to the Convention.

According to Article 34 of the above-mentioned Law on Science and Studies, citizens, foreigners and stateless persons are treated equally: "Students may receive scholarships from enterprises, higher educational establishments, scientific institutes, the state and other institutions".

State scholarships are granted to students and postgraduates studying for a doctorate degree who do not have other scholarships. State scholarships are financed from state subsidies and grants to scientific and educational institutions in accordance with the procedure established by the Government of the Republic of Lithuania. Moreover, Article 33 of the same law states that every member of society shall, according to his or her competence, knowledge and abilities, have the right to study. In the context of this law and Article 29 of the Constitution, the term "member of society" covers all three categories of natural persons who are permanent residents of the Republic of Lithuania.

Article 35 paragraph 1 of this law, which provides that "In state scientific and educational institutions, scholars shall have equal employment opportunities on a competitive basis, regardless of their sex, race, political and religious convictions, nationality and

citizenship", dispels all doubts as to the compliance of the laws of the Republic of Lithuania with the provision of Article 2 of the First Protocol from the point of view considered.

3. The right to an education of citizens belonging to national minorities.

Article 37 of the Constitution provides that "citizens who belong to ethnic communities shall have the right to foster their language, culture, and customs". As far as Article 2 of the First Protocol to the Convention is concerned, this constitutional provision is mentioned in the draft law on ethnic minorities of the Republic of Lithuania and in the Law on Education. It is established in paragraph 2 of this Article of the Constitution that "in the numerous separate communities of ethnic minorities, the state will either provide or support pre-school and school education and classes of general education in the native language".

Paragraph 3 of this Article is also associated with the guarantees of rights of ethnic minorities: "The state schools providing a general education may establish separate classes and optional Sunday school classes for small ethnic minorities which do not comprise a separate community but would like to learn or improve their native language".

Thus, there seems to be no problems of any consequence (with the exception of the financial problems encountered by all schools) concerning implementation of the above-mentioned provisions.

4. The right to an education of persons sentenced to a term of imprisonment.

The Corrective Labour Code provides for the following places of confinement in Lithuania:

1) prisons;
2) corrective labour colonies;
3) corrective labour colony/village/settlement;
4) corrective labour colonies for juveniles.

The following four basic corrective and educative measures are applied:

1) general regime;
2) labour;
3) educational work with convicted persons;
4) general education and vocational-technical training.

Article 61 of the Corrective Labour Code provides for compulsory general education in places of confinement for persons under 40 years of age. The question arises as to whether this provision of the Code does not conflict with Article 41 paragraph 1 of the Constitution, according to which "education shall be compulsory for persons who are 16 or younger. Older persons and disabled persons of Groups 1 and 2 are taught only on a voluntary basis.

These people shall be taught at teaching centres established by the Corrective Labour Department and managed by municipal departments of education. The corrective labour institution must provide the material and technical basis necessary for teaching. Exams are taken in grades 9 and 12. During the examination period the inmates are relieved of their compulsory labour duties. Having passed their exams and after their release from their place of confinement, these persons are issued with certificates stating that they have received a general secondary education.

In the new draft of the Punishment Execution Code, a general education will only be compulsory for minors. The principle that education is voluntary will apply to adult inmates. This is in compliance with Article 41 of the Constitution of the Republic of Lithuania.

A general secondary education in places of confinement is carried out in the form of evening school, i.e. after work. However, this conflicts with paragraph 5 of Council of Europe Recommendation No. R(89)12, which concerns education in prison.

Article 63 of the Corrective Labour Code provides that compulsory vocational training shall be organised for those convicts who have no occupation. Disabled persons of Groups 1 and 2 shall be taught only at their request. This shall be done in the following forms:

1) in groups;
2) individually;
3) in special courses.

Upon completion of training, qualification exams are taken. During the examination period inmates shall be relieved of their work duties. Only in the colonies of corrective labour for juveniles are education and vocational training included in the time spent at work. In other institutions, vocational training, like the programme of general education mentioned above, is carried out after work.

In places of confinement, retraining courses to improve existing qualifications may be organised.

Neither vocational training nor retraining in places of confinement is particularly practical as far as its future use is concerned. On the basis of Article 64 of the Corrective Labour Code, inmates are most often trained for such jobs as are in demand in places of confinement (with the exception of special courses organised when a group of inmates wants to be trained for an additional job.)

It is emphasised in paragraph 9 of Council of Europe Recommendation No. R(89)12 concerning education in prisons that an inmate must be trained for such jobs which will enable him to find employment after he has been released from prison.

Article 33 of the Law on Science and Studies states that "every member of society shall, according to his knowledge and abilities, have the right to study."

In the Republic of Lithuania persons sentenced to deprivation of liberty enjoy this right. They may study at institutions of higher education and colleges. Paragraph 14 of Council of Europe Recommendation No. R(89)12 concerning education in prison states that: "Where possible, an inmate should be provided with the possibility of studying at educational establishments outside the place of confinement".

Having regard to the threat that they pose to society, their behaviour in the institution of correctional labour and their abilities, inmates have the right to study at higher educational establishments or colleges by taking at least a correspondence course.

Paragraph 16 of Council of Europe Recommendation No. R(89)12 concerning education in prisons provides for the possibility for inmates to continue their studies after their release from prison.

Thus, in our opinion, the above-mentioned guarantees for the practical exercise of the right to education of persons sentenced to terms of detention are only recommendations to

be addressed to the legislators. In fact, convicted persons are not deprived of this right (this is in compliance with the requirement of Article 2 of the First Protocol to the Convention).

Conclusions and Proposals

The ratification of this Protocol will not cause any serious problems for the Republic of Lithuania. The following amendments are necessary:

1. Article 61 of the Corrective Labour Code, which provides for compulsory general education for persons under 40 years of age should be repealed as it is not in compliance with Article 41 paragraph 1 of the Constitution of the Republic of Lithuania, according to which "education shall be compulsory for persons under 16 years of age."

2. It is desirable that the Corrective Labour Code (Punishment Enforcement Code) should contain a provision according to which education and vocational training in places of confinement should be included in the time spent at work.

3. The Corrective Labour Code (Punishment Enforcement Code) should oblige both the administration of the place of confinement and educational institutions to provide inmates with the conditions necessary for studying and with vocational training so that it would be easier for them to find a job after serving their sentence.

4. Schools (teaching centres) should be re-established in all places of confinement.

ARTICLE 3 OF THE FIRST PROTOCOL TO THE CONVENTION

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

This Article provides for the obligation of states to ensure one of the basic principles of a democratic society, namely the democratic election of the legislature. It should be noted that it deals only with the elections of one state authority, i.e. that exercising legislative power. Since under Article 67 paragraph 2 of the Constitution, laws in Lithuania are enacted only by the Seimas, the laws and other legal provisions which regulate the elections to the Seimas and embody the right of citizens to elect and be elected members of the Seimas and to establish the guarantees of the exercise of this right, will be analysed for the purpose of establishing whether the laws of the Republic of Lithuania and other legal provisions are in compliance with Article 3 of this Protocol.

Article 3 of the First Protocol to the Convention provides for the following obligations of States:

1) to hold elections at reasonable intervals;
2) to hold free elections;
3) to have the legislature elected by secret ballot;
4) to provide conditions which will ensure the free expression of the opinion of the people.

The basic provisions of the elections to the Seimas of the Republic of Lithuania are laid down in Articles 33, 34, and 35 of the Constitution and in the Law on the Elections to the Seimas.

Article 33 of the Constitution states that citizens shall have the right to participate in the government of their state both directly and through their freely elected representatives. Under Article 34 of the Constitution, citizens who on the day of election are 18 years of age or over shall have the right to vote. Citizens who are declared legally incapacitated by a court cannot participate in the elections. Article 55 of the Constitution states that members of the Seimas shall be elected for a four-year term on the basis of universal, equal and direct suffrage by secret ballot.

Article 3 of the First Protocol of the Convention provides that elections must be held at "reasonable intervals". This Article does not establish a concrete interval. However the word "interval" means that these elections must be held from time to time (in cases provided by law pre-term elections may be held). The interval between the elections may not be very long, as it must be "reasonable". Thus, Article 3 of the First Protocol to the Convention enables states to determine themselves when to hold elections to their legislative body. Article 55 of the Constitution and Article 1 of the Law on Elections to the Seimas, which state that members of the Seimas shall be elected for a four-year term, and Article 57 of the Constitution, under which regular elections to the Seimas shall be held no earlier than 2 months and no later than 1 month before the expiration of the powers of the members of the Seimas, and Article 58 of the Constitution, which provides for early elections to the Seimas, after a decision by the Seimas adopted by a three-fifths majority of all members, are in compliance with this provision. In addition, the President of the Republic may also announce early elections to the Seimas, if it fails to take a decision on the new programme of the Government within 30 days of its presentation, or if the Seimas disapproves twice in succession of the Government programme within 60 days of its initial presentation, or if the Seimas passes a direct vote of

no confidence in the Government. This Article also establishes that the President of the Republic of Lithuania may not announce early elections to the Seimas if the term of office of the President of the Republic of Lithuania expires within less than six months. The elections to the new Seimas may be held no later than within three months from the adoption of the decision to hold early elections.

According to the Protocol, the elections to the legislature must be free and this body must be elected by secret ballot. These provisions are embodied in Articles 34 and 35 of the Constitution of the Republic of Lithuania and Articles 1, 2, 3, 4, and 5 of the Law on Elections to the Seimas. Article 1 of this law states that "members of the Seimas of the Republic of Lithuania shall be elected for a four-year term in single-member or multi-member constituencies, on the basis of equal suffrage and by secret ballot in direct mixed-system elections". The principle of universal suffrage is established in Article 2 of the Law on Elections to the Seimas which states that "citizens of the Republic of Lithuania who, on the day of the election, are 18 years of age or over, shall have the right to vote", and that citizens who have been declared legally incapacitated by a court shall not participate in elections. The principle of equal suffrage is established by Article 3 of the Law on Elections to the Seimas which states that "Every citizen of the Republic of Lithuania who has the right to vote shall have one vote in a single-member or multi-member constituency; the vote of every citizen having the right to vote shall be of equal value. All citizens shall be represented in the Seimas on an equal basis according to the representation quota, which shall be established before every election. There may be no voting by proxy in elections to the Seimas; voters shall vote in person and by secret ballot (Article 4 of the Law on Elections to the Seimas). Controlling the will of the voters in elections is prohibited (Article 5 of the Law on Elections to the Seimas).

According to the laws of the Republic of Lithuania, foreigners and persons under 18 years of age on the day of the elections or persons declared legally incapacitated by a court have no right to vote.

Article 62 of the Law on Elections to the Seimas provides for a number of additional conditions in order to protect patients from the influence of other persons: on the instruction of the head of a medical facility or social care institution it may be prohibited to disturb a person who is too ill to vote; it is also prohibited to disturb an individual for the purpose of voting whom a panel of doctors has determined in the manner established by the Ministry of Health to be unable to control and understand his or her acts at the time of voting due to a chronic mental disorder, feeble-mindedness, or temporary mental disability.

Provisions under which foreigners, minors and legally incapacitated persons are prohibited from voting do not contradict Article 3 of the First Protocol to the Convention. Pursuant to the interpretation of this Article by the European Court of Human Rights in the case of *Matthew-Mohin and Clerfayt v. Belgium, 1987*, the right to vote in elections to the legislature is not absolute. The state has the right to lay down by law certain conditions and restrictions. In all countries it is the case that persons who participate in the elections must meet certain requirements. The ban on foreigners, minors and legally incapacitated persons from participating in elections is also established in the laws of other countries.

Proceeding from the same interpretation of Article 3 of the First Protocol to the Convention as that made by the Court, it is obvious that this Article deals not only with the right to vote but also with the right to stand for election.

According to Article 56 of the Constitution of the Republic of Lithuania and Article 2 of the Law on Elections to the Seimas, any citizen of the Republic of Lithuania who is not bound by an oath or pledge to a foreign state and who on the election day is 25 years of age or over

and is a permanent resident of the Republic of Lithuania may be elected a member of the Seimas.

Persons who have not served the court sentence imposed on them, and persons declared legally incapacitated by a court, may not be elected members of the Seimas.

Article 141 of the Constitution of the Republic of Lithuania provides that soldiers on active military service or alternative service, officers of the national defence, the police and internal security service, non-commissioned officers, re-enlisted persons who have not retired from service and other paid officers of military and security services may not be members of the Seimas. Provisions prohibiting persons of these categories from being elected members of the Seimas do not conflict with Article 3 of the First Protocol to the Convention, as there is nothing that prevents states from imposing restrictions. The European Court of Human Rights decides in each separate case whether a state has exceeded the permitted limits.

The Convention provides for the obligation of states to hold elections in such a manner that the people have the possibility of freely expressing their opinion in the choice of the legislature. In addition to the above-mentioned Article 5 of the Law on Elections to the Seimas, which provides for voting in person and by secret ballot and prohibits controlling the will of the voters, Article 44 of the same Law provides that "during an election campaign officers of state institutions and employees of the mass media shall be prohibited from using their official duties for campaigning or from otherwise exerting influence on the will of the voters".

The Law on Elections to the Seimas provides that voters in Lithuania shall have the right to vote before the date fixed for the elections: they may vote by mail seven days before they take place. Voters abroad on the day of the election may vote at a diplomatic mission. They are also provided with an opportunity to vote on ships sailing under the national flag of the Republic of Lithuania if the ship leaves a port of the Republic of Lithuania at the time when it is not yet permitted to vote by mail and does not return by the day of the election.

In medical facilities and social care institutions special post offices designated for voting must be established. The inmates of such facilities, who are able to move, can vote by themselves. Inmates unable to move are visited by officials of special post offices authorised by constituency electoral committees. The person voting must, under conditions of privacy, personally mark the ballot-paper and put it into the envelope provided. If necessary, he or she may be assisted by a person whom he or she trusts.

Special post offices designated for voting must be established in military units of the national defence system and internal security service. If possible, commanding officers must provide conditions for servicemen to vote in the constituencies of their permanent place of residence.

In prisons, special post offices designated for voting must be established. The prison authorities may allow convicted persons to vote in the constituencies of their permanent place of residence.

Article 27 of the Law on Elections to the Seimas states that a voter shall have the right to lodge an appeal with the constituency electoral committee, concerning errors in the voter list as a result of which he or she may not exercise his right to vote. An appeal against the decision of this committee may be lodged with the district (area) court, whose decision shall be final.

Article 38 of the Law on Elections to the Seimas establishes that persons who by means of force, threats, fraud or otherwise prevent the exercise of the right to vote or to be

elected to the Seimas or to organise campaigns, as well as members of the electoral committees or other officers who falsify election documents, fraudulently count the votes, breach the secrecy of the voting procedure or otherwise violate this law shall be responsible under the laws of the Republic of Lithuania. The responsibility is provided for only in the Criminal Code of the Republic of Lithuania, Article 134 of which makes it a criminal offence to hinder a person to exercise his or her right to vote by means of force, fraud, threat or bribery (the punishment may be up to 1 year of corrective labour). Article 135 of the Criminal Code makes it a criminal offence to falsify election, referendum and plebiscite documents, to fraudulently count votes, to breach the secrecy of the voting or plebiscite procedure (the punishment is imprisonment for up to 3 years, up to 2 years of corrective labour or a fine). There are no provisions for considering such an act to be an administrative offence. Consequently, Article 135 should be revised by establishing that acts specified in it are only criminal offenses if their commission affects the outcome of elections. If not, they should be considered administrative offenses.

In addition, Article 44 of the Law on Elections to the Seimas states that during an election campaign, officials of state institutions and employees of the mass media shall be prohibited from using their official duties for campaigning or otherwise exerting influence on the will of the voters. Article 46 of the Law on Elections to the Seimas provides that campaigning shall be prohibited 24 hours before the beginning of elections and on the election day, with the exception of permanent campaign posters in the places established for this purpose, provided they were posted at least 48 hours prior to the election. An infringement is not a criminal offence, and we are consequently of the opinion that the commission of such an act should be an administrative offence.

Conclusions and Proposals

1. The provisions of the laws of the Republic of Lithuania comply with the requirements of Article 3 of the First Protocol to the Convention.

2. It is necessary to revise Article 135 of the Criminal Code by establishing that the acts specified in it should only be criminal offenses when their commission has had a substantial effect on the outcome of elections. In other cases, they should be considered administrative offenses.

3. It is necessary to prepare a draft amendment to the Code of Administrative Offenses by establishing that the commission of the acts mentioned in Articles 44 and 46 of the Law on Elections to the Seimas constitute an administrative offence.

ARTICLES 2-4 OF THE SEVENTH PROTOCOL TO THE CONVENTION

"Article 2

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offenses of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4.

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for the offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention".

Article 2 of Protocol No. 7

There is no provision in the Constitution of the Republic of Lithuania that directly corresponds to Article 2 of Protocol No. 7. Nevertheless, some principles are laid down:

Article 109 states: "in the Republic of Lithuania justice shall be administered exclusively by the courts",

Article 31 provides: "every person shall be presumed innocent until proven guilty according to the procedure established by law and until declared guilty by a final court judgment,"

"Every person charged with having committed an offence shall have the right to a fair and public hearing by an independent and impartial court."

Article 3 of the Criminal Code and Article 11 of the Code of Criminal Procedure state: "no one can be found guilty and sentenced for having committed an offence other than by a final court judgment and in accordance with the law".

Thus, anyone convicted by a court may appeal to a higher court. (The grounds and procedure for an appeal are mentioned in Article 2 of Protocol No. 7.)

In this case, mention should be made of the following problems :

1) Article 37 of the Code of Criminal Procedure contains some categories of cases (crimes against the state, murder, rape of a minor, bribery and some other cases) which fall within the jurisdiction of the Supreme Court of the Republic of Lithuania. In this case, according to Article 365 "no appeal against sentence may be made to a court of cassation". We are of the opinion that such provisions reduce the possibility for a convicted person to appeal against the sentence and are not in compliance with the requirements of Article 2 of Protocol No. 7. It should be mentioned that the Law on Courts under which the Supreme Court may not prosecute cases at the first instance came into effect on 1 January 1995.

2) Articles $15^{(1)}$, $52^{(1)}$, and 53 of the Criminal Code deal with cases in which it is held that a person has committed an offence but is exempt from liability or is pardoned. In this case the problem is that a person has not been found guilty of having committed an offence by a court judgment.

Article 3 of Protocol No. 7

Article 30 of the Constitution corresponds to Article 3 of Protocol No. 7 in its general sense, namely that:

"anyone whose constitutional rights or freedoms have been violated shall have the right to apply to a court.

The law shall establish the procedure for paying compensation for pecuniary and non-pecuniary damage inflicted on a person."

Article 486 of the Civil Code of the Republic of Lithuania provides for compensation for damage caused by unlawful actions of officers who conduct an inquiry or investigation, of the prosecutor's office and of a court:

"A person who has suffered damage as a result of an unlawful conviction, the unlawful institution of proceedings against him or her, unlawful detention on remand, the unlawful imposition of an administrative penalty - arrest or corrective labour, shall be compensated by the State in full, regardless of whether the damage was inflicted through the fault of the officers conducting the inquiry, the officers of the pre-trial investigation bodies, the prosecutor's office or the court".

In this case the provisions of the Civil Code do not fully comply with the requirements of Article 3 of Protocol No. 7 as, according to the Protocol, compensation for damage must be paid in all cases involving the reversal of a conviction or the grant of a pardon.

Article 4 of Protocol No. 7

Article 31 paragraph 5 of the Constitution of the Republic of Lithuania states that:

"no person may be punished for the same offence twice".

This corresponds to Article 4 paragraph 1 of Protocol No. 7. This constitutional provision is supplemented by the Criminal Code, Article 3 paragraph 4, which also states that:

"no person may be punished for one and the same offence".

Article 6 paragraph 3 provides that:

"Criminal proceedings shall not be instituted against a person who has committed an offence abroad if he or she:

1) has served the punishment imposed by the court abroad;
2) has been acquitted by a final judgment of the foreign court, if criminal proceedings against him have been terminated or if he has become immune from punishment by reason of lapse of time or on other legal grounds applicable in that country".

The rules of criminal procedure establishing the grounds on which a sentence may be appealed against, correspond to Article 4 paragraph 2 of Protocol No. 7. The following principal aspects should also be mentioned:

I. Appeal against judgments that have not become final (Article 365-397 of the Code of Criminal Procedure).

The defendant, his or her defence counsel and other legal representatives, as well as the plaintiff and his or her representative, shall have the right to appeal against the judgment of the court in accordance with the cassation procedure.

The prosecutor must appeal against every unlawful or unjustified judgment by requesting the quashing of the judgment.

A civil plaintiff, civil defendant and his or her representatives have the right to appeal against a judgment given in a civil action.

A person acquitted by a court shall have the right to appeal against acquittal when he or she challenges the causes and grounds of acquittal.

An appeal against a sentence that has not become final may be made to the appeal court through the court which passed the sentence.

An individual, public prosecutor or senior public prosecutor, who has appealed to have a judgment quashed, has the right to withdraw the appeal prior to the hearing of the case in the appeal court concerned.

The judgment delivered at the end of a further hearing of a case may be appealed against in accordance with the general procedure.

An appeal against the judgment may be made within 7 days from the day of the service of the judgment.

When hearing the case in cassation proceedings, the court examines whether the judgment is lawful and justified on the basis of the facts which have already become known or which have been discovered. The court is not bound by the arguments presented in the appeal and examines all cases in respect of all convicted persons, including those who have not appealed and those in respect of whom no cassation appeal has been lodged.

When hearing a case in cassation proceedings, the court may reduce the penalty imposed by the court of first instance or apply the law that applies to a less serious crime, but

it has no right to impose a heavier punishment nor to apply the law relating to a more serious crime.

The sentence may only be reversed because it is necessary to apply the law relating to a more serious crime, or because too light a penalty has been imposed in such cases in which the prosecutor or the victim have appealed against the judgment on the same grounds.

An acquittal may be reversed by the court of cassation only after an appeal has been lodged by the prosecutor, the plaintiff or the acquitted person.

When hearing an appeal to quash a judgment, the court shall take one of the following decisions:

1) to leave the original sentence by dismissing the appeal;
2) to reverse the sentence and refer the case for reinvestigation or retrial;
3) to reverse the sentence and discontinue the case;
4) to change the sentence.

The grounds for reversing or changing a sentence when hearing the case on appeal are as follows:

1) one-sided and incomplete judicial examination;
2) the findings stated in the judgment do not correspond to the facts of the case;
3) there has been a material violation of the law of criminal procedure;
4) inappropriate application of the criminal law;
5) disproportionate sentence.

II. Review of Final Judgments (Articles 416-432 of the Code of Criminal Procedure).

The President of the Supreme Court of the Republic of Lithuania, the Prosecutor General of the Republic of Lithuania and their deputies have the right to appeal against final sentences of the district (city) court to the Judicial Collegium (Criminal Cases) of the Supreme Court.

The Prosecutor General of the Republic of Lithuania and his deputies have the right to appeal against decisions of the Judicial Collegium (Criminal Cases) of the Supreme Court to the Presidium of the Supreme Court of the Republic of Lithuania.

The Chairman of the Supreme Court of the Republic of Lithuania and the Prosecutor General of the Republic of Lithuania have the right to appeal against the decisions of the Presidium of the Supreme Court of the Republic of Lithuania.

An appellant has the right to withdraw his or her appeal. The prosecutor's appeal may be withdrawn by a senior prosecutor. The appeal may be withdrawn only prior to the court hearing of an appeal.

It is permitted for a court to review a conviction in the exercise of its supervisory powers by reason of the necessity to apply in respect of the convicted person a law applying to a more serious crime because the punishment is too lenient, or on other grounds that will worsen the position of the convicted person, as well as an acquittal, but only within one year of the judgment coming into effect.

Upon hearing the case in the exercise of its supervisory powers the court may:

1) dismiss the appeal;
2) reverse the conviction and discontinue the case or refer it for reinvestigation or retrial;
3) reverse the ruling given in cassation proceedings as well as subsequent court rulings and decisions and refer the case for reinvestigation;
4) reverse rulings and decisions by a court taken in the exercise of its supervisory powers, and leave in effect the court judgment and cassation ruling with or without making changes;
5) amend the court sentence, ruling or decision.

The grounds for the reversal of a final judgment are the same as for the reversal of the judgment which has not yet come into effect. When hearing the case in the exercise of its supervisory powers, the court is not bound by the arguments of the appeal and must hear the whole case.

If several persons have been convicted in a case and the appeal has been lodged only in respect of one or some of the convicted persons, the court must hear the case in respect of all the convicted persons.

When a conviction, ruling or decision must be reviewed because the law applying to a more serious crime must be applied, or because the sentence is too lenient or on other grounds that worsen the position of the convicted person, as well as in the case of an acquittal or a decision to terminate the case, the court hearing the case in the exercise of its supervisory powers may reverse the sentence, ruling or decision and refer the case for review by the court of appeal, by the court of first instance or order a retrial.

III. Reopening of a criminal case upon discovery of new facts (Articles 433 - 439 of the Code of the Criminal Procedure).

The final court judgment, ruling or decision may be reversed on the ground of newly discovered facts. The grounds for the reopening of a criminal case upon the discovery of new facts are as follows:

1) knowingly false evidence of a witness or victim, or the findings of an expert on which the final court decision is based, as well as the uncertainty of other evidence on which the sentence or decision is based;
2) criminal judicial misconduct in the course of the trial, which becomes evident from the final court decision;
3) criminal misconduct of those examining the facts of the case, misconduct which becomes evident from the final court decision and by reason of which an unlawful or unjustified decision to terminate the case was reached;
4) other facts which were not known to the court at the moment of the delivery of the verdict and which, when taken separately or together with the previously discovered facts prove that the convicted person is not guilty or that he or she committed a more serious or less serious crime than that for which he or she was sentenced, or which prove that the acquitted person or the person whose case has been terminated is guilty.

It is only permitted to review an acquittal, ruling or decision to dismiss the case or to review a conviction, ruling, or decision because the punishment is too lenient or it is necessary to apply a law relating to a more serious crime within the time limits for instituting criminal proceedings prescribed by the Criminal Code of the Republic of Lithuania, but no later than one year after the day on which new facts have been discovered.

The Judicial Collegium (Criminal Cases) of the Supreme Court, or the Presidium of the Supreme Court or the Plenary Session of the Supreme Court, having considered a case and the material relating to the investigation of the facts referred to them by the Prosecutor General of the Supreme Court and the findings concerning the reopening of the proceedings following the discovery of new facts, must take one of the following decisions:

1) to reverse the court sentence, ruling or decision and refer the case for reinvestigation or retrial;
2) to reverse the court sentence, ruling or decision and terminate the case;
3) to dismiss the prosecutor's findings.

After the reopening of the case because of the discovery of new facts, a pre-trial examination and court hearing shall be held and an appeal may be lodged against the subsequent sentence in accordance with the general procedure.

When hearing a criminal case in which the judgment was reversed by reason of newly discovered facts, the court of first instance is not bound by the level of punishment imposed in the reversed judgment.

Conclusions and proposals

In the event of the ratification of Articles 2, 3 and 4 of Protocol No. 7, the Republic of Lithuania should not encounter any serious problems. Nevertheless, amendments to certain laws are necessary:

1. The provisions of the Criminal Procedure Code must be harmonised with the Law on Courts, which states that the Supreme Court shall not investigate criminal cases at first instance.

2. It is necessary to revise Article 486 of the Civil Code so that in the event of a conviction or acquittal being reversed, the state must pay compensation for the damage incurred, unless the fact leading to the conviction being reversed or the defendant being acquitted was not known to the court through the fault of the convicted (and acquitted) person.

3. It is necessary to consider the need for a law laying down the grounds and procedure for paying compensation for damage incurred.

SUMMARY

Finally, we present a separate list of laws which need to be enacted, draft laws which have to be prepared and a list of amendments to existing laws so that the Lithuanian legal system is in compliance with the requirements of the Convention. (It should be noted that these proposals are being brought into line with the necessary reservations concerning Articles 5 and 6 of the Convention).

I. Draft laws that have already been prepared

1. Law on Detention on Remand. The law has been submitted by the Government to the Seimas. The working group has analysed and approved it.

2. Law on Mental Health (Care). The draft of this law has been submitted to the Seimas. It will deal with the legal status of mentally ill persons, the application of medical treatment, the grounds and procedure for placing persons in psychiatric hospitals, and complaints concerning these measures.

3. Law on Emergency Situations (Martial Law). The draft law has been submitted to the Seimas. This law will deal with possible restrictions on rights and freedoms and the grounds and procedure for their implementation, as well as the procedure for furnishing information on restriction to the Council of Europe.

4. The Law on the Legal Status of Refugees in the Republic of Lithuania. The draft of this law has been submitted to the Seimas. The working group has analysed and approved it, after pointing out that it is necessary to define more precisely the concept of a "refugee", to define the legal status of refugees, to refer disputes to a court and to establish the grounds and procedure for the abolition of the status of "refugee".

5. Law on the Mass Media. The draft of this law is being considered by the Seimas.

6. Law on Religious Communities. The draft of this law has been submitted to the Seimas. The working group has analysed and approved it.

II. Required amendments to laws already in effect

1. Revised version of the Law on Pursuit Activities. The draft revision is being considered by the Government of the Republic of Lithuania. The working group has analysed and approved the draft.

2. Amendments to the Criminal Code:

   - decision on Articles 24 and 105;
   - revision of Articles 24, 59, 135 and 137;
   - repeal of Article 225 paragraph 1;
   - to make it a criminal offence to violate the right of assembly by using force.

3. Amendments to the Code of Administrative Offenses. It is necessary:

   - to strike out the word "natural" in Article 339 paragraph 1;
   - to make it an offence to compel a person to choose and profess a religion or faith;
   - to make it an offence to violate the alternative (community) service procedure;
   - to make it an offence to violate the procedure for assembling in meetings;

- to make it an offence to compel a person to join a trade union;
- to make it an offence to violate the procedure for elections to the Seimas;
- to add provisions concerning drying out facilities for drunken persons;
- to add provisions concerning reception and distribution centres;
- to add provisions on informing a person of the grounds on which a person's personal freedom has been restricted;

4. Amendments to the Code of Criminal Procedure. It is necessary:

   - to add provisions on informing a person of the grounds on which he or she has been detained or arrested;
   - to repeal Article $50^{(1)}$;
   - to elaborate Article 58 paragraphs 2 and 3, stating that "an investigator or person conducting an inquiry shall have no right to be present during the consultations of the arrested or detained person with his or her defence counsel".
   - to elaborate Article $317^{(1)}$ by making provision for the right of the defendant or his or her defence counsel to question a witness or the injured party whose identity is being kept secret.

5. It is necessary to revise Article 486 of the Civil Code to the effect that an acquitted person shall, in all cases, have the right to compensation for damage incurred. The compensation shall be paid from the state budget (a special law could also be enacted).

6. It is necessary to repeal Article 4 of the Law on the Legal Status of Foreigners in the Republic of Lithuania and to amend the law by establishing grounds for restricting the right of foreigners to choose their place of residence.

III. Draft laws to be prepared

1. Law on Abortion. This law should embody the right of a woman to self-determination and to proper medical facilities, the rights of a father and foetus, and the duties and responsibilities of medical staff.

2. Law on Medical Institutions (the title may be changed). This law should deal with the rights and responsibilities of medical doctors (for example the right of access to a place of residence without the owner's permission, euthanasia, the right to hospitalise a seriously ill person against his or her will, aspects of confidentiality, medical tests, treatment without a patient's consent and drying out facilities).

3. Law on Organ Transplants. This law should lay down the basic principles of and procedures for transplants, the rights and duties of relatives, the powers of medical doctors, restrictions and the medical conditions necessary.

4. Law on the Protection of Personal Data. This law should lay down the basic principles and procedures for the collection, storage and use of personal data.

5. Law on the Protection of Children's Rights. This law should establish children's rights, the machinery for their protection (in particular children from anti-social families) and types of, and principles and procedures for, applying compulsory educational measures.

6. Law on the Protection of State Secrets. This law should contain a list of subjects on which secrecy may be maintained (or the means of compiling it), lay down the principles and procedures involved, and deal with the question of criminal offences.

General Remarks

The Seimas of the Republic of Lithuania can now commence the procedure for the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms. While the Convention is before the Seimas, a decision will be required on the drafting and enactment of laws bringing the national legal system into line with the provisions of the Convention. Attention should be focused on those laws which have not yet been drafted, as this is complicated and time-consuming work. It is worth mentioning that, in the opinion of the working group, a long list of necessary laws should not cause concern in relation to the possible consequences of the ratification of the Convention. This opinion is based on the fact that the first complaints would reach the European Commission of Human Rights in only two or three years, and this period is sufficient for the enactment of the necessary laws. Moreover, the cases investigated by the Commission and the Court show that complaints concerning the type of laws which have to be drafted in Lithuania would not be numerous. On the other hand, it should be borne in mind, that the ratification of the Convention at the present moment would be possible only after making reservations to certain provisions of Article 5 and 6:

- Article 5: concerning the application of punishment by detention in para-military institutions;

- Article 5: concerning the deprivation of liberty in certain cases sanctioned by non-judicial institutions.

- Article 6: concerning procedural guarantees in proceedings concerning administrative offences, as well as in appeal and cassation proceedings.

Decision of the Constitutional Court of the Republic of Lithuania regarding the conformity with the Constitution of the Republic of Lithuania of Articles 4, 5, 9 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of the Fourth Protocol to the Convention

24 January 1995, Vilnius

The Constitutional Court of the Republic of Lithuania sitting as a Chamber composed of the Constitutional Court Judges: Algirdas Gailiūnas, Kęstutis Lapinskas, Zigmas Levickis, Vladas Povilonis, Pranas Vytautas Rasimavičius, Stasys Stačiokas, Teodora Staugaitienė, Stasys Šedbaras and Juozas Žilius, Rolanda Stimbirytė as Registrar, with the participation of Deputy Speaker of the Seimas Juozas Bernatonis, the representative of the applicant, the President of the Republic (deliberated in public at a hearing of the Court on 5 January 1995), pursuant to Article 105 paragraph 3 of the Constitution of the Republic of Lithuania and Article 1 paragraph 2 of the Law on the Constitutional Court of the Republic of Lithuania, on the case No. 22/94 in response to the inquiry made by the applicant, the President of the Republic, concerning the question of whether or not Articles 4, 5, 9, and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of Protocol No. 4 to the Convention are in conformity with the Constitution of the Republic of Lithuania.

The Constitutional Court delivers the following decision:

The applicant requests the Constitutional Court to present its conclusions as to whether or not Articles 4, 5, 9, and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of Protocol No. 4 to the Convention are in conformity with the Constitution of the Republic of Lithuania. The request is based on the following motives.

Article 1 of the Convention provides for the duty of the State "to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of this Convention". Owing to this commitment of the Republic of Lithuania, domestic laws on human rights issues must be harmonised with the requirements of the Convention.

On 11 February 1994, a working group was formed in accordance with decree No. 233 of the President of the Republic to conduct a comparative analysis of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the Constitution of the Republic of Lithuania. In the applicant's opinion, a comparative analysis of the Convention and the Constitution shows that certain Articles of the Convention and its Protocols might not be in conformity with the provisions of the Constitution (or might not fully correspond to them in scope). Should this be the case, the Republic of Lithuania, upon ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, would not be able to fulfil its international commitments, as Article 7 of the Constitution provides that "Any law or other statute which conflicts with the Constitution shall be invalid".

On the basis of the motives stated above, the applicant requests the Constitutional Court to present its conclusions on:

1. whether or not Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with Article 48 of the Constitution of the Republic of Lithuania;

2. whether or not Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with Article 20 of the Constitution of the Republic of Lithuania;

3. whether or not Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with Article 26 of the Constitution of the Republic of Lithuania;

4. whether or not Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with Article 29 of the Constitution of the Republic of Lithuania; and

5. whether or not Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with Article 32 of the Constitution of the Republic of Lithuania.

The Constitutional Court states:

The European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") was concluded in Rome on 4 November 1950 and came into effect on 3 September 1953. According to Article 66 paragraph 1 of the Convention, it is subject to ratification. The Fourth Protocol to the Convention was signed at Strasbourg on 16 September 1963 and came into effect on 2 May 1968. On 14 May 1993, the Minister of Foreign Affairs of the Republic of Lithuania signed the Convention and the First, Fourth and Seventh Protocols to the Convention. The Protocols are also subject to ratification.

Human rights and freedoms, which, under Articles 1 and 57 of the Convention, must be secured by the state which has ratified it to everyone within its jurisdiction, are defined in Section I of the Convention. Article 1 of the Convention establishes that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Consequently, every state which ratifies the Convention must effectively implement its provisions (or the Protocols to the Convention which have been ratified by the state), in order to fulfil its obligations under the Convention.

This general requirement is directly connected with the relation between international and domestic law in general and with individual issues - human rights and freedoms - in particular. At the present time the so-called parallel system of harmonisation of international and domestic law, based on the rule that international treaties are transformed (and incorporated) into the state's legal system, is fairly widespread. This method of implementing international treaties and therefore, the Convention too, is also laid down in the Constitution of the Republic of Lithuania.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is a specific source of international law, and its purpose differs from that of most international legal acts. The purpose is to seek universal and effective recognition of the rights declared in the Universal Declaration of Human Rights as well as compliance with them in protecting and further implementing human rights and fundamental freedoms. As regards this purpose, the Convention plays the same role as the Constitutional guarantees of human rights. As the Constitution enforces these guarantees within the state, so the Convention does the same at the international level. Therefore, it is extremely important to assess and establish the relation between the Convention and the Constitution.

The rights and freedoms which must be secured to persons who are within the jurisdiction of the Republic of Lithuania are defined in Chapter 2 ("The Individual and the State") of the Constitution as well as in the preamble and in Chapters 3, 4 and 8.

The legal system of the Republic of Lithuania is based on the principle that all laws or other legal acts and international treaties to which it is a party (in this case the Convention) must be in conformity with the Constitution. Otherwise, the Republic of Lithuania would not be able to secure the legal defence of rights and freedoms enshrined in the Convention and referred to in Article 13, which constitutes the basis for the implementation of the provisions of the Convention in the domestic legal system of each state. This Article declares the following: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Consequently, the national authorities responsible for legal protection must directly apply the rules of the Constitution and implement the provisions of the Convention. These provisions must become a constituent element of the state's domestic law, and there may be no obstacles to their application in courts and other bodies providing legal remedies.

At the same time, it must be pointed out that the Convention does not directly formulate, as this would be impossible, the requirement that a state's domestic laws should correspond word for word to the contents of the provisions of the Convention. Neither does the Convention contain any strict instructions concerning ways of implementing the human rights laid down in the Convention. The state itself determines in what ways it will secure the enforcement of the provisions of the Convention. Here it is important to define powers of discretion, i.e. to establish adequate protection in domestic law for the rights specified in the Convention. These "powers of discretion" shall be provided by public authorities on the basis of powers accorded to them by the Constitution. In its judgment of 6 February 1976 in the *Swedish Engine-Drivers' Union v. Sweden* case, the European Court of Human Rights noted that on the whole neither Article 13 nor the Convention itself prescribes for the Contracting Parties any specific manner for ensuring the effective enforcement of any of the provisions of the Convention provisions in domestic law.

However, the provisions of Sections II, III, IV and V of the Convention regarding the international protection of human rights and freedoms set forth therein undoubtedly state that the provisions of the Convention must be implemented in practice, and that a violation of these rights and freedoms may not be justified by the fact that the domestic laws provide otherwise. This validity of the Convention may be explained by the obligation of the state, which is the Contracting Party, to ensure the application of the provisions of the Convention in its domestic legal system. However, international treaties, including the Convention, are applied differently in different spheres of activity. Specific methods and forms of implementation are established by the laws of the Republic of Lithuania. In civil legal procedure, the direct application of international treaties is established as a way of resolving the conflict between international treaties and rules contained in the laws of the Republic of Lithuania: if international treaties to which the Republic of Lithuania is a party establish regulations other than those provided for by the laws of the Republic of Lithuania, the regulations of the international treaties prevail (Article 606 of the Civil Code and Article 482 of the Code of Civil Procedure). In criminal legal procedure, the need to resolve a conflict or rules does not apply. In these cases the laws directly applicable are criminal laws and criminal procedure laws of the Republic of Lithuania while international treaties apply only in special cases specified by these laws (Article $7^{(1)}$ of the Criminal Code and Articles 20, $21^{(1)}$, $21^{(2)}$, 22, $22^{(1)}$, and $22^{(2)}$ of the Code of Criminal Procedure). Should doubts arise during the application of a criminal law concerning safeguards for the exercise of human rights set forth in the Convention, the issue of the compliance of the applied law with the Constitution should be settled in accordance with the procedure of constitutional review. On the other hand, human rights set forth in the Convention

may not be exercised without directly applying domestic laws. In other words, if only the direct application of the Convention is recognised, the above-mentioned rights cannot be secured, as the Convention itself does not establish either the methods for the realisation of the rights in the states which ratify it, or the legal responsibility of those who violate them, or the required procedures and special jurisdiction of a state's legal institutions. Here the rule *ubi jus ibi remedium* (where there is a right, there is a remedy) manifestly applies. Such remedies are established in a state's legal system by the laws of that state. The Convention establishes such remedies only in cases in which the dispute concerning the protection of human rights set forth therein becomes the object of international jurisdiction.

Article 138 paragraph 3 of the Constitution establishes the following: "International agreements which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania". With regard to the Convention this constitutional provision signifies that upon its ratification and coming into effect it shall become a constituent part of the legal system of the Republic of Lithuania and will have to be applied in the same manner as the laws of the Republic of Lithuania. Within the system of sources of law of the Republic of Lithuania, the provisions of the Convention are equivalent to laws, since Article 12 of the Law on International Treaties of the Republic of Lithuania of 21 May 1991 (*Parliamentary Record*, No. 5, 1992) establishes that "International treaties of the Republic of Lithuania shall have the force of law on the territory of the Republic of Lithuania".

The application of the Convention in the domestic law of the Republic of Lithuania on a par with that law and the fact that its provisions have the force of law does not *ipso facto* ensure the effective implementation of the provisions of the Convention at all times, because Article 7 paragraph 1 of the Constitution establishes that: "Any law or other statute which conflicts with the Constitution shall be invalid". Although this provision of the Constitution cannot in itself invalidate an international treaty - in this case the Convention - it prescribes the conformity of the provisions of an international treaty with the Constitution, because in the contrary case the implementation of the Convention as part of the domestic law of the Republic of Lithuania would be problematic.

When evaluating the contents of human rights enshrined in the Constitution and the Convention, it is necessary to take into account the methodological basis of compatibility between comparative constitutional law and international law. The provisions of the Convention could be considered to conflict with the Constitution if:

1. the Constitution established a comprehensive and final list of rights and freedoms, while the Convention laid down certain other rights and freedoms;

2. the Constitution prohibited certain actions, whereas the Convention defined these actions as rights or freedoms of one type or another;

3. a provision of the Convention were not applicable in the legal system of the Republic of Lithuania because it is not in conformity with a certain provision of the Constitution.

Point 1. It may be stated on the basis of a combined analysis of the Constitution and the Convention that neither the Constitution nor the Convention present a comprehensive and final list of human rights and freedoms. This is also confirmed by Article 18 of the Constitution, which establishes that "The rights and freedoms of individuals are inborn". No legal act may establish a final list of inborn rights and freedoms.

The interpretation of the conformity (relation) of provisions of the Constitution with the Convention must not be merely based on the actual words used but on the meaning and the

requirements of logic. A purely literal interpretation of human rights is unacceptable because of the very nature of the protection of human rights. Thus, Article 5 paragraph 2 of the International Covenant on Civil and Political Rights establishes: "There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent".

A literal interpretation of legal rules, when employed as the only method of interpretation, is unacceptable, because it is not the form of words used to formulate a particular rule that is most important for an interpretation of its contents. The most important thing is that it should be possible to fully understand on the basis of the text, that it relates to an order addressed to certain entities to act in a certain manner, under certain conditions.

A formal literal interpretation of the provisions of the Convention is not recognised in the case-law of the European Court of Human Rights either. The Court, for example, in its decision of 27 June 1968 in the *Wemhoff v. Germany* case and in the decision of 17 January 1970 in the *Delcourt v. Belgium* case repeatedly stated that, taking into account that this is a treaty which creates a right, it is also necessary to seek the most suitable interpretation for achieving the object and purpose of the treaty, and not use this as a way to formally restrict the obligations entered into by the parties.

The fact that fundamental human rights and freedoms and guarantees thereof have been laid down in the Constitution in one form or another does not allow one to assert that the wording is in all cases absolute with regard to the application of provisions. Human rights and freedoms and guarantees thereof may be described in more detail in a law than in a specific article or paragraph of the Constitution. Thus their wider implementation is possible if they are enshrined in another act having the force of law (in this case the Convention and its Protocols). Here, Article 138 paragraph 3 of the Constitution, which establishes the principle of the incorporation into the legal system of the Republic of Lithuania of international agreements ratified by the Seimas and, consequently, their application on a par with laws, is of the utmost importance.

Therefore, the provisions of the Convention determining human rights and freedoms may be applied together with the provisions of the Constitution provided that they are in conformity with the latter.

Point 2. Having carried out a general analysis of the text, the Constitutional Court emphasises that no provision of the Constitution or the Convention which lays down human rights and freedoms, allows one to assert that the Constitution prohibits any actions while the Convention defines these actions as a right or freedom of one sort or another.

An assessment of the interaction between the rules of the Constitution and the Convention and the limits of interpretation of that interaction reveals that it is impossible not to take into account the provision of paragraph 1 of Article 6 of the Constitution: "The Constitution shall be an integral and directly applicable statute". The Constitutional Court emphasises that the integrity of the Constitution first of all signifies that Constitutional provisions are inter-connected not only formally but also according to their contents. This integrity of constitutional rules means that both the preamble, chapters and articles constitute the body of the Constitution. The significance of the Constitution as a uniform and directly applicable statute is exceptional as far as constitutional provisions concerning human rights and freedoms are concerned. It is obvious that in many cases in which the content of a specific Constitutional provision is being interpreted, it may not be interpreted separately from the other Constitutional rules. It is very important that this should be taken into account in

instances in which reference is made to such chapters of the Constitution as "The Individual and the State", "Society and the State", "The National Economy and Labour", and other chapters referring to the guarantees and legal remedies for the implementation of human rights and freedoms.

Point 3. The Constitutional Court notes that it would be possible to answer the question of the conformity of the provisions of the Convention with specific articles of the Constitution only after analysing these specific provisions. An analysis is given below of the provisions of the Convention and the Constitution and their compatibility, doubts about which have been expressed in the inquiry.

1. The conformity of the Constitution of the Republic of Lithuania with Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

It is pointed out in the inquiry submitted by the President of the Republic that Article 4 paragraph 2 of the Convention states that "No one shall be required to perform forced or compulsory labour", while paragraph 3 of this Article states what kind of labour is not considered forced or compulsory. Article 4 paragraph 3 sub-paragraph (a) provides that this is "work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention" and work "during conditional release from such detention". Article 48 paragraph 5 of the Constitution states that "Nor shall labour which is performed by convicts (...) and which is regulated by law be deemed to be forced labour". Every type of criminal sentence mentioned in the Criminal Code may contain such an element as the convicted person's duty to work. This principle is implemented by a sentence to corrective labour without deprivation of liberty (Article 29 of the Criminal Code). The rule formulated in the Convention only allows a sentence to provide for the duty to work in the case of a person who is deprived of his or her liberty or who is released conditionally from detention. It is maintained in the inquiry that the provision of the Convention is narrower in scope, so that the conclusion may be drawn that Article 4 paragraph 3 sub-paragraph (a) of the Convention is not in conformity with Article 48 paragraph 5 of the Constitution.

The Constitutional Court emphasises that such an interpretation of the provisions of the Constitution and the Convention is not accurate, if only for the reason that the Constitution contains no provision that treats corrective labour as a criminal punishment. In fact, the Constitution does not mention corrective labour. The rule established by Article 48 paragraph 5 of the Constitution that labour performed by convicted persons and regulated by law is not regarded as compulsory labour does not mean that the law must provide for a sentence of compulsory labour without deprivation of liberty. It should also be noted that there is no provision in the Criminal Code for the sentence of a convicted person to compulsory employment.

On the other hand, in Article 4 paragraph 5 sub-paragraph (a) of the Convention forced or compulsory labour is connected with the application of Article 5 of the Convention, i.e. lawful detention (or conditional release from detention). This view has, as a matter of fact, also been confirmed by the European Court of Human Rights as well as the Courts of other European states in their case law. As an example we would cite the *Van Droogenbroeck v. Belgium* case, the essence of which was the compulsory labour imposed on a recidivist serving a term of imprisonment. He was required to work in order to save 12000 BF. In its decision of 24 June 1982 the European Court of Human Rights stated that in this particular case it was crucial to consider whether the conditions of the applicant's detention were in compliance with Article 5 of the Convention. The Court also stated that other conditions of work the applicant was asked to do did not go beyond what was "ordinary" in this context,

since it was intended to assist him in reintegrating himself into society and had as its legal basis provisions which have their equivalent in certain other member States of the Council of Europe.

A comparative analysis of Article 48 of the Constitution and Article 4 of the Convention as well as of the practice of the application of these provisions allows one to draw the conclusion that Article 4 paragraph 3 sub-paragraph (a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not conflict with the Constitution of the Republic of Lithuania.

2. The conformity of the Constitution of the Republic of Lithuania with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

It is stated in the inquiry of the President of the Republic that, firstly, Article 5 paragraph 3 of the Convention provides that "Everyone arrested or detained (...) shall be brought promptly before a judge". At the same time, Article 20 paragraph 3 of the Constitution provides that "A person caught *in flagrante delicto* must, within 48 hours, be brought to court". A comparison of these two provisions shows that it is possible to assume that the Convention provides a wider guarantee, since it prescribes that each person detained in accordance with the criminal procedure must be brought to court, whereas under the Constitution this applies only to a person caught *in flagrante delicto*. It is stressed in the inquiry that in this case it would be possible to assert that this Constitutional provision is a special rule, whereas Article 20 paragraph 2 of the Constitution contains a general norm proclaiming that "No person may be deprived of freedom except on the grounds, and according to the procedures, which have been established by law". However, such a conclusion may only be reached by the Constitutional Court.

Secondly, the inquiry contains a request to establish whether the term "promptly" as used in the Convention corresponds to the 48-hour rule laid down in the Constitution.

Thirdly, Article 5 paragraph 4 of the Convention demands that a judge should decide the lawfulness of detention, whereas according to the Constitution the court must determine only its validity. The applicant insists that this is a fundamental difference, since lawful detention is also valid, whereas valid detention may be unlawful.

The Constitutional Court emphasises that such doubts cannot be regarded as sufficient grounds for asserting that the Convention is not in conformity with the Constitution. It is noted in the preamble to the expository part of this decision that the fact that the Constitution does not lay down any human rights or freedoms or guarantees thereof, or formulates them slightly differently, does not mean that such rights or freedoms or measures for their exercise cannot, in general, be guaranteed under the legal system of the Republic of Lithuania. They can be and, as a rule, are provided for by other legal acts and are exercised through the application of the latter. Generally speaking, they may also be secured by applying the Convention based on Article 138 paragraph 3 of the Constitution. The provisions of the Convention would be inapplicable only, if as a result of their content, they were to conflict with the Constitution.

Firstly, having compared the phrase "brought promptly before a judge" (Article 5 paragraph 3 of the Convention) and the phrase "within 48 hours be brought to court" (Article 20 paragraph 3 of the Constitution), the Constitutional Court stresses that in their essence they are not in conflict with one another. In the practice of the application of the Convention, the 48-hour time-limit corresponds to the provision that a person be "brought promptly before a judge". There is no need to conduct an independent analysis of the application of the

Convention practice in order to prove the truth of the above statement, since it has been universally recognised that a 4-day period in cases involving ordinary criminal offenses and a 5-day period in exceptional cases corresponds to the requirement that an offender be brought promptly before a judge. On the other hand, after comparing the Constitutions of other European Union member States, we come across analogous constitutional rules, e.g. an identical 48-hour period is established in the Constitution of Portugal and Italy (Articles 28 and 13 respectively), and a 72-hour period is prescribed by the Constitution of Spain (Article 17). Thus, even a comparative analysis of the Constitutions of the European Union member States confirms the assessment already presented of this issue.

Secondly, that the comparison of the supposition made in the inquiry, Article 20 paragraph 3 of the Constitution and Article 5 paragraph 3 of the Convention, will show that "the Convention provides a wider procedural guarantee, since under it each person detained in accordance with the criminal procedure must be taken to court, whereas under the Constitution the provision applies only to a person detained at the scene of the crime". The Constitutional Court notes that the principal purpose of the provision set forth in Article 20 paragraph 3 of the Constitution is to ensure that such a person is taken to court within 48 hours, which is in fact a guarantee of bringing him or her promptly to court. However, even assuming that the supposition made in the inquiry is true, it would be possible to harmonise the two provisions. When applied concurrently, they would complement each other to form a single legal guarantee.

Thirdly, whilst Article 5 paragraph 4 of the Convention requires that the judge should decide the lawfulness of detention, under Article 20 paragraph 3 of the Constitution it is the court that must determine the validity of detention, and in the applicant's opinion, there is an essential difference: these provisions, if they are not interpreted literally but according to their meaning, prove to be compatible with one another. Both the Constitution and the Convention establish that the court must assess the lawfulness and the validity of detention. However, Article 20 paragraph 3 of the Constitution may not be assessed separately from the full text of the Article and from other Constitutional provisions concerning guarantees of lawfulness. It is established in paragraph 2 of this Article that "No person may be arbitrarily arrested or detained. No person may be deprived of freedom except on the bases, and according to the procedures, which have been established by law". These provisions establish the principle of lawfulness as a universal rule. Therefore, the term "validity" used in Article 20 of the Constitution has a wider meaning than that of a factual causal relationship, i.e. it also covers "lawfulness".

From the above the following conclusion can be drawn: Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with the Constitution of the Republic of Lithuania.

3. The conformity of the Constitution of the Republic of Lithuania with Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

It is stated in the inquiry of the President of the Republic that Article 9 paragraph 2 of the Convention provides for the possibility of restricting the "freedom to manifest one's religion or beliefs", whereas Article 26 paragraph 4 of the Constitution states that "A person's freedom to profess and propagate his or her religion or faith" may be subject to limitations. It is noted in the inquiry that both in the Convention and in the Constitution, personal freedom to profess and propagate religion or beliefs is divided into two separate freedoms, so that it is possible to affirm that the Convention does not provide for the possibility of restricting a person's right to profess his or her religion or belief.

The Constitutional Court points out that no two independent freedoms - a person's freedom to profess a religion and freedom to propagate a religion or belief are singled out either in Article 9 or any other Article of the Convention. The Convention simply contains no mention of the freedom to profess religion or belief. Article 9 paragraph 1 of the Convention establishes the following: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

However, this text of the Convention differs not only from the wording of Article 26 of the Constitution but also from the wording of Article 18 paragraph 1 of the International Covenant on Civil and Political Rights, which contains the word "to profess". Consequently, both international legal acts and the Constitution, which recognise a person's freedom of religion, use different terms to characterise this particular freedom.

There are therefore no grounds for assuming that Article 26 of the Constitution provides for the possibility of restricting a person's freedom to profess religion or belief. On the contrary, Article 26 paragraph 1 of the Constitution establishes the general principle that "Freedom of thought, conscience, and religion shall not be restricted", whereas the following is set out in paragraph 2: "Every person shall have the right to freely choose any religion or faith and, either individually or with others, in public or in private, to manifest his or her religion or faith in worship, observance, practice or teaching".

The profession of a religion or faith divorced from propagating or preaching it is part of a person's spiritual life and means that person holds religious convictions or beliefs. It is no coincidence that in the French and English versions of Article 18 paragraph 1 of the International Covenant on Civil and Political Rights the words "la liberté d'avoir" and "freedom to have" correspond to the Lithuanian words "the right to profess". In the translation the word "to profess" has been used instead of "to have", since the latter does not fully reflect the spiritual origin of religion or faith and, at the same time, a person's inner spiritual state. This state cannot be subject to any limitations unless the person is persecuted for his religion or faith, but even in such a case persecution may not deprive him or her of his or her religious convictions or faith. In this case the general principle of law *lex non cogit ad impossibilia* - the law does not require the impossible - applies.

The Constitutional Court notes that the word "to profess" used in Article 26 paragraph 4 in the phrase "A person's freedom to profess and propagate his religion or faith may be subject only to those limitations prescribed by law" should be interpreted to correspond in meaning to the words "his religion" used in the Convention. If Article 26 paragraph 4 of the Constitution provided for a separate limitation of the freedom to profess a religion or faith, the conjunction "or" would be used instead of "and". The joining of the words "profess" and "propagate" by the conjunction "and" means nothing else but "his religion or belief". It is mainly for this reason that the Constitutional provision has brought about no negative legal consequences in the legal system of the Republic of Lithuania as regards freedom of belief or religion. No law restricts the right to profess a religion or belief.

Taking into consideration all that has been said above, the conclusion should be drawn that Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with the Constitution of the Republic of Lithuania.

4. The conformity of the Constitution of the Republic of Lithuania with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

It is stated in the inquiry of the President of the Republic that the Convention prohibits only so-called negative discrimination, whereas the Constitution prohibits both "negative" and "positive" discrimination (the granting of privileges). It addition, it is maintained in the inquiry that the Convention provides a more comprehensive list of grounds for prohibiting discrimination, whilst the Constitution makes no mention of a person's colour or membership of a national minority.

The Constitutional Court points out that so-called positive discrimination mentioned in the inquiry may not be treated as the granting of privileges. The Constitution merely establishes several universally recognised special rights characteristic of a certain group of people, namely, the rights of national minorities, which are laid down in Articles 37 and 45 of the Constitution. The Constitution also establishes that the state takes care of families bringing up children at home, renders them support and provides privileges to working mothers (Article 39) etc.

This attitude towards special human rights is also characteristic of the Convention organs in their case-law. The European Court of Human Rights concluded in its *Lithgow and Others v. the UK* judgment of 8 July 1986 that the Contracting States enjoy a certain margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify different treatment in law.

Taken together with the general rule of non-discrimination, all rules stated above guarantee the basic principle of equal rights to all persons. This is also confirmed by the general rule laid down in Article 29 paragraph 1 of the Constitution: "All people shall be equal before the law, the court and other State institutions and officers".

Paragraph 2 of the above-mentioned Article derives from paragraph 1 of the same Article since it prevents a violation of the principle of equal rights by establishing that "A person may not have his or her rights restricted in any way, or be granted any privileges, on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions or opinions". Here the phrase "a person may not have his or her rights restricted or be granted privileges" is identical to the phrase "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds" contained in Article 14 of the Convention, which is under analysis here. The restriction of a person's rights on the grounds of his/her sex, race, nationality etc., is discrimination prohibited both by the Convention and the Constitution. As it has already been stated, this in no way affects the validity of the rights of national minorities, working mothers or other special rights, i.e. what has been referred to in the inquiry as positive discrimination.

The Constitutional Court points out that only upon making a close comparison of the wording of Article 29 paragraph 2 of the Constitution and Article 14 of the Convention is it possible to state that the Convention provides for wider guarantees of non-discrimination since it prohibits discrimination on the grounds of a person's colour, membership of a national minority, property, birth or other status. However, it is necessary to take into account the essential identity of the rules regarding the non-discrimination of people on any grounds as laid down in the Constitution and the Convention, and not the differences in the verbal expression of separate aspects of non-discrimination. In addition, it is worth noting that different words used in the Constitution and Convention essentially mean one and the same aspect of non-discrimination or embrace several of these aspects. For example, it may be presumed that the word "belief" used in the Constitution embraces the word "religion" used

in the Convention. In the event of a different interpretation one could raise doubts as to whether or not the Convention recognises such grounds for non-discrimination as a person's belief. The notion "social status" used in the Constitution embraces two notions, namely, as used in the Convention, "social origin" and "property". On the other hand, the fact that the phrase "social status" is not used in the Convention, where reference is made only to "social origin", should not be interpreted as a possibility of establishing unequal rights for persons from certain social groups. The different words "races", "nationalities" and "national minorities" which have been used essentially to characterise grounds for non-discrimination, should be interpreted in *mutadis mutandis*.

Thus, if the provisions of the Constitution and the Convention regarding non-discrimination are compared not merely with respect to their wording, the conclusion should be drawn that Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is in conformity with the Constitution of the Republic of Lithuania.

5. The conformity of the Constitution of the Republic of Lithuania with Article 2 of the Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms

It is pointed out in the inquiry of the President of the Republic that Article 2 paragraph 1 of the Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that "Everyone lawfully within the territory of a State shall, within that territory, have the right of liberty of movement and freedom to choose his residence". Article 32 paragraph 1 of the Constitution declares that "Citizens may move and choose their place of residence in Lithuania freely, and may leave Lithuania of their own free will". The applicant maintains that a systematic analysis of the articles of the Constitution shows that the legislators use the words "person", "man" and "citizen". An analysis of the Articles in which these words are used permits the conclusion that they are not synonymous and have a certain legal meaning. For example, the words "man" and "person" are used in Articles 22, 24, 25 and 26 of the Constitution which provide for universal human rights (those of a state citizen, a foreign national and a stateless person). However, the word "citizen" is used only in those Articles which provide for specific rights that are connected with the relationship between a person and the State of Lithuania (i.e. citizenship) (e.g. Article 3 paragraph 2, Article 32 paragraphs 1, 2, and 3, Article 33 etc.). All these points are used by the applicant to substantiate his doubt as to whether the scope of Article 32 paragraph 1 of the Constitution is adequate enough for it to conform with Article 2 of the Fourth Protocol to the Convention.

The Constitutional Court emphasises that the rule that "Everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement and freedom to choose his residence", which is laid down in Article 2 of the Fourth Protocol to the Convention, consists of two interdependent parts. One means the right to freely move and freely choose a place of residence, whereas the other establishes that the right is secured only to persons who are lawfully within the territory of the State. These persons may be citizens of the state as well as foreign nationals or stateless persons. The presence of a citizen in his or her own state is always lawful. Article 32 paragraph 3 of the Constitution establishes that "A citizen may not be prohibited from returning to Lithuania", whilst for foreign nationals and stateless persons the conditions relating to the lawfulness of their entry and departure from, and their presence in, the state are determined by domestic law. Such conditions are laid down in the Law on the Legal Status of Foreigners in the Republic of Lithuania (*Parliamentary Records*, 1991, No. 27-729).

Under the above-mentioned law, foreign nationals and stateless persons who are lawfully in the Republic of Lithuania have the same rights and freedoms as the citizens of the Republic of Lithuania, unless the Constitution and other laws of the Republic of Lithuania and international treaties provide otherwise. Thus, the provisions of the Fourth Protocol to the Convention, when applied within the legal system of Lithuania, and the provisions of the Law on the Legal Status of Foreigners in the Republic of Lithuania and other laws, would complement one another. The only issue to be settled would be to decide, in each specific case, the lawfulness of the presence of a foreign national or stateless person within the territory of the Republic of Lithuania in order that he or she shall enjoy the full right to freedom of movement and the right freely to choose his or her place of residence.

After assessing all that has been stated above, the conclusion should be drawn that the Constitution of the Republic of Lithuania is in conformity with Article 2 of the Fourth Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Constitutional Court, taking into account the motives stated in the expository part of the present Decision and the interpretation of certain notions of the Constitution and Convention, and proceeding from Article 105 paragraph 3 of the Constitution of the Republic of Lithuania and Article 73 paragraph 3 and Article 83 of the Law on the Constitutional Court of the Republic of Lithuania, concludes that:

the Constitution of the Republic of Lithuania is in conformity with Articles 4, 5, 9 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of the Fourth Protocol to the Convention.

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

Constitutional Court judges:

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