On Lessons Learned and Yet to Be Learned

Reflections on the Lithuanian Cases in the Strasbourg Court's Grand Chamber*

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Abstract

During the two-and-a-half decades while Lithuania has been a party to the European Convention on Human Rights, the Grand Chamber of the European Court of Human Rights has decided five Lithuanian cases. They all (perhaps but one) raised controversial issues not only of law but also of those pertaining to matters non-legal: psychology, politics, history and so on. There had been follow-ups to most of them, allowing for consideration as to the merits and disadvantages of the respective judgments. These cases are narrated on in their wider-than-legal context and reflected upon from the perspective of their bearing on these issues and of the lessons they taught both to Lithuania, as a respondent State, and to the Court itself.

Keywords: human rights, European Convention on Human Rights, European Court of Human Rights, Lithuania.

1. Introduction

The subtitle of the article contains a construct from the *argot* of the European Court of Human Rights (ECtHR), or the Strasbourg Court: 'Lithuanian cases'. Strictly speaking, in ECtHR case law there is no such thing as 'Lithuanian' cases, or, for that matter, 'Spanish', 'Turkish' or 'Estonian' cases. The lodging of an application against a State does not endow that case with a respective 'nationality'.[1] Although the duty to abide by the Court's final judgment in a case is explicitly attributed solely to the Member State that is a party to that case (Article 46 § 1 of the Convention[2]) and the effect of the Court's judgments thus seems to be confined *inter partes*, this is only an appearance: the binding force of ECtHR judgments is in fact *erga omnes*. Lithuanian cases are part of a broader texture. They are inherently interrelated with cases against other States in two ways, which both logically emanate from the Court's aspiration to ensure the consistency and

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1 Or 'multiple nationality', when an application is lodged against two or more States.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Further, 'of the Convention' is omitted after references to its articles.

continuity of its case law. Firstly, judgments (and decisions) in Lithuanian cases are based on the principles developed in cases against (also) other States. For example, the finding of no violation of Article 8 in *Kosaitė-Čypienė and Others*,[3] a nominally Lithuanian case, could be predicted on the principles pertaining to the regulation of assistance to home births, set out in *Dubská and Krejzová*,[4] in no formal way related to Lithuania, but to the Czech Republic. In *Matiošaitis and Others*,[5] which concerned the lifers' 'right to hope', highly constricted in Lithuanian law until 2019, the domestic authorities fully experienced the bitterness of the *erga omnes* effect of *Vinter and Others*,[6] which they unduly disregarded, for which they were retributed with the finding of a violation of Article 3. Secondly, Lithuanian cases are routinely cited in cases against other States. Some of the Court's fundamental doctrines take their origination or essential explication from Lithuanian cases, in particular those decided by the Court's Grand Chamber (GC), such as *Ramanauskas*,[7] regarding *agents provocateurs*; *Cudak*,[8] regarding the State immunity from foreign courts' jurisdiction; or *Paksas*,[9] regarding the right to stand for elections. 'Lithuanian cases' is but a convenient term of art.

It would be less banal to speak of Lithuanian cases in a less formalistic sense, so unformalistic that it draws nigh on to artificiality. The Court's case law sets guidelines for the States' legislative and law application practice. In this sense, the above-mentioned cases of *Dubská and Krejzová* or *Vinter and Others* were more Lithuanian than, respectively, *Kosaitė-Čypienė* and *Matiošaitis and Others* (also both mentioned above), for the Lithuanian authorities had to draw conclusions from these Czech and British cases prior to being taught a lesson in a nominally Lithuanian case. They doubtless mulled over the probable effect of *Dubská and Krejzová* principles on *Kosaitė-Čypienė and Others* – and did not err in not hastily acknowledging a violation of Article 8[10] and closing the case by means of a friendly settlement[11] or a unilateral declaration.[12] In *Matiošaitis and Others* Lithuania's defeat was anticipated, unless she amended her legislation by providing for the possibility of lifer's early release, which would have allowed for striking the applications out of the Court's list of cases.[13] The authorities, however, played

3 *Kosaitė-Čypienė and Others v. Lithuania* (no. 69489/12, 4 June 2019; not final at the time of writing of this article, which is June 2019).

4 *Dubská and Krejzová v. the Czech Republic* ([GC], nos. 28859/11 and 28473/12, 15 November 2016). *See also Pojatina v. Croatia* (no. 18568/12, 4 October 2018).

5 *Matiošaitis and Others v. Lithuania* (nos. 22662/13, 51059/13, 58823/03, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, 23 May 2017).

6 *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09, 130/10, 3896/10, 9 July 2013).

7 *Ramanauskas v. Lithuania* ([GC], no. 74420/01, 5 February 2008).

8 *Cudak v. Lithuania* ([GC], no. 15869/02, 23 March 2010).

9 *Paksas v. Lithuania* ([GC], no. 34932/04, 6 January 2011).

10 Even if *Ternovszky v. Hungary* (no. 67545/09 67545/09, 14 December 2010), in which a violation of Art. 8 was found, might have suggested to the contrary. *Dubská and Krejzová*, a GC case, substantially narrowed the applicability of *Ternovszky*.

11 Under Art. 37.

12 Under Rule 62A of the Rules of the Court, which allows for the striking out of an application under Art. 37 § 1 (c).

13 Under Art. 37 § 1 (b).

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unmindful of the *Vinter* principles (even after their reconfirmation in a series of cases against other States[14]), which they treated as having originated in a case extraneous to Lithuania. In 2019, the authorities have overcome their obstinacy: the relevant legislation has been passed (as it has now become known, it was in drafting even prior to *Vinter and Others*) in the hope that this will prompt the Court to strike the batch of post-*Matiošaitis* applications, which at the time of writing of this article (June 2019) are pending before the Court.[15]

Generally, Lithuania is said to have learned important lessons from the Court's case law, which has contributed to the betterment of the domestic human rights situation. Lithuanian cases in which violations of the Convention were found[16] concerned (apart from the lifers' 'right to hope' dealt with above) the right to life;[17] inhuman or degrading conditions of detention;[18] police brutality;[19] liberty and security of a person (including unlawful arrest, length of detention on remand and detention of persons of unsound mind);[20] shortcomings of criminal proceedings giving rise to violation of Article 3;[21] fairness of trial (including

14 *See, e.g., Lászlo Magyar v. Hungary* (no. 73593/10, 14 May 2014); *Harakchiev and Tolumov v. Bulgaria* (no. 61199/12, 8 July 2014); *Čačko v. Slovakia* (no. 49905/08, 22 July 2014); *Bodein v. France* (no. 40014/10, 13 November 2014); *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016); *T.P. and A.T. v. Hungary* (nos. 37871/14 and 73986/14, 4 October 2016).

15 *Dardanskis and Others v. Lithuania* (no. 74452/13 and 17 other applications), https://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"docname":["DARDANSKIS"],"respondent":["LTU"],"documentcollectionid2":["COMMUNICATEDCASES"],"itemid":["001-178423"]} (last accessed 14 June 2019).

16 By the GC or a Chamber. Here Committee cases are not referred to.

17 *Juozaitienė and Bikulčius* (nos. 70659/01 and 74371/01, 24 April 2008); *Česnulevičius v. Lithuania* (no. 13462/06, 10 January 2012); *Banel v. Lituania* (no. 14326/11, 18 June 2013); *Bakanova v. Lithuania* (no. 11167/12, 31 May 2016). But *see also Akelienė v. Lithuania* (no. 54917/13, 16 October 2018), where the Court found that the Lithuanian authorities had discharged of their positive obligations under Art. 2.

18 *Valašinas v. Lithuania* (no. 44558/98, 24 July 2001); *Karalevičius v. Lithuania* (no. 53254/99, 7 April 2005); *Savenkovas v. Lithuania* (no. 871/02, 18 November 2008); *Kasperovičius v. Lithuania* (no. 54872/08, 20 November 2012); *Mironovas and Others v. Lithuania* (nos. 40828/12, 29292/12, 69598/12, 40163/13, 66281/13, 70048/13 and 70065/13, 8 December 2015); *Abu Zubaydah v. Lithuania* (no. 46454/11, 31 May 2018); *T.K. v. Lithuania* (no. 14000/12, 12 June 2018); *Ščensnovičius v. Lithuania* (no. 62663/13, 10 July 2018).

19 *Iljina and Sarulienė v. Lithuania* (no. 33234/07, 26 March 2013); *Gedrimas v. Lithuania* (no. 21048/12, 12 July 2016); *Yusiv v. Lithuania* (no. 55894/13, 4 October 2016).

20 *Jėčius v. Lithuania* (no. 34578/97, 31 July 2000); *Grauslys v. Lithuania* (no. 36743/97, 10 October 2000); *Graužinis v. Lithuania* (no. 37975/97, 10 October 2000); *Stašaitis v. Lithuania* (no. 47679/99, 21 March 2002); *Butkevičius v. Lithuania* (no. 48297/99, 26 March 2002); *Vaivada v. Lithuania* (nos. 66004/01 and 36996/02, 16 November 2006); *Balčiūnas v. Lithuania* (no. 17095/02, 20 July 2010); *D.D. v. Lithuania* (no. 13469/06, 14 February 2012); *Albrechtas v. Lithuania* (no. 1886/06, 19 January 2016); *Lisovskij v. Lithuania* (no. 36249/14, 2 May 2017); *Abu Zubaydah v. Lithuania* (note 18 *supra*); *D.R. v. Lithuania* (no. 691/15, 26 June 2018). But *see also Ščensnovičius v. Lithuania* (note 18 *supra*), in which the applicant's complaint under Art. 5 § 3 was rejected on account that the Supreme Court acknowledged the delays in the criminal proceedings against the applicant and reduced his sentence, thus affording him redress for the delays in proceedings and the long duration of his detention.

21 *Kraulaidis v. Lithuania* (no. 76805/11, 8 November 2016); *Mažukna v. Lithuania* (no. 72092/12, 11 April 2017); *Kosteckas v. Lithuania* (no. 960/13, 13 June 2017).

access to a court, courts' impartiality, presumption of innocence, equality of arms, opportunity to question witnesses and examine experts, length of proceedings and execution of judgments);[22] (no) punishment without law;[23] double jeopardy;[24] right to effective remedy;[25] restitution of property nationalized by the Soviet regime;[26] rectification of authorities' mistakes in property disputes;[27]

22 *Grauslys v. Lithuania* (note 20 *supra*); *Daktaras v. Lithuania* (no. 42095/98, 10 October 2000); *Šleževičius v. Lithuania* (no. 55479/00, 13 November 2001); *Butkevičius v. Lithuania* (note 20 *supra*); *Birutis and Others v. Lithuania* (nos. 47698/99 and 48115/99, 28 March 2002); *Jasiūnienė v. Lithuania* (no. 41510/98, 6 March 2003); *Meilus v. Lithuania* (no. 53161/99, 6 November 2003); *Girdauskas v. Lithuania* (no. 70661/01, 11 December 2003); *Simonavičius v. Lithuania* (no. 37415/02, 27 June 2006); *Kuvikas v. Lithuania* (no. 21837/02, 27 June 2006); *Jakumas v. Lithuania* (no. 6924/02, 18 July 2006); *Jurevičius v. Lithuania* (no. 30165/02, 14 November 2006); *Gečas v. Lithuania* (no. 418/04; 17 July 2007); *Baškienė v. Lithuania* (no. 11529/04, 24 July 2007); *Norkūnas v. Lithuania* (no. 302/05, 20 January 2009); *Ramanauskas v. Lithuania* (note 7 *supra*); *Malininas v. Lithuania* (no. 10071/04, 1 July 2008); *Balsytė-Lideikienė v. Lithuania* (no. 72596/01, 4 November 2008); *Četvertakas v. Lithuania* (no. 16013/02, 20 January 2009); *Padalevičius v. Lithuania* (no. 12278/03, 7 July 2009); *Vorona and Voronov* (no. 22906/04, 7 July 2009); *Naugžemys v. Lithuania* (no. 17997/04, 16 July 2009); *Aleksa v. Lithuania* (no. 27576/05, 21 July 2009); *Igarienė and Petrauskienė* (no. 26892/05, 21 July 2009); *Šulcas v. Lithuania* (no. 35624/04, 5 January 2010); *Impar Ltd. v. Lithuania* (no. 13102/04, 5 January 2010); *Cudak v. Lithuania* (note 8 *supra*); *Novikas v. Lithuania* (no. 45756/05, 20 April 2010); *Pocius v. Lithuania* (no. 35601/04, 6 July 2010); *Užukauskas v. Lithuania* (no. 16965/04, 6 July 2010); *Kravtas v. Lithuania* (no. 12717/06, 18 January 2011); *Lalas v. Lithuania* (no. 13109/04, 1 March 2011); *Jelcovas v. Lithuania* (no. 16913/04, 19 July 2011); *D.D. v. Lithuania* (no. 13469/06 13469/06, 14 February 2012); *Esertas v. Lithuania* (no. 50208/06, 31 May 2012); *JGK Statyba Ltd and Guselnikovas v. Lithuania* (no. 3330/12, 5 November 2013); *Varnienė v. Lithuania* (no. 42916/04, 12 November 2013); *Jokšas v. Lithuania* (no. 25330/07, 12 November 2013); *Nekvedavičius v. Lithuania* (no. 1471/05, 10 December 2013); *Paliutis v. Lithuania* (no. 34085/09, 24 November 2015); *Buterlevičiūtė v. Lithuania* (no. 42139/08, 12 January 2016); *Arbačiauskienė v. Lithuania* (no. 2971/08, 1 March 2016); *A.N. v. Lithuanua* (no. 17280/08, 31 May 2016); *Urbšienė and Urbšys v. Lithuania* (no. 16580/09, 8 November 2016); *Naku v. Lithuania and Sweden* (no. 26126/07, 8 November 2016); *Fridmsan v. Lithuania* (no. 40947/11, 24 January 2017); *T.K. v. Lithuania* (note 18 *supra*); *Kožemiakina v. Lithuania* (no. 231/15, 2 October 2018).

23 *Vasiliauskas v. Lithuania* ([GC], no. 35343/05, 20 October 2015).

24 *Šimkus v. Lithuania* (no. 41788/11, 13 June 2017).

25 *Šulcas v. Lithuania* (note 22 *supra*); *Drakšas v. Lithuania* (no. 36662/04, 31 July 2012); *Arbačiauskienė v. Lithuania* (note 22 *supra*); *Abu Zubaydah v. Lithuania* (note 18 *supra*); *M.A. and Others v. Lithuania* (note 29 *supra*).

26 *See, e.g., Jasiūnienė v. Lithuania* (note 22 *supra*); *Aleksa v. Lithuania* (note 22 *supra*); *Igarienė and Petrauskienė* (note 22 *supra*); *Varnienė v. Lithuania* (note 22 *supra*); *Nekvedavičius v. Lithuania* (note 22 *supra*); *Pyrantienė v. Lithuania* (no. 45092/07, 12 December 2013); *Albergas and Arlauskas* (no. 17978/05, 27 May 2014); *Paplauskienė v. Lithuania* (no. 31102/06, 14 October 2014); *Paukštis v. Lithuania* (no. 17467/07, 24 November 2015); *Žilinskienė v. Lithuania* (no. 57675/09, 1 December 2015); *Misiukonis and Others* (no. 49426/09, 15 November 2016); *Tunaitis v. Lithuania* (no. 42927/08, 24 November 2015); *Noreikienė and Noreika* (no. 17285/08, 24 November 2015); *Kavaliauskas and Others v. Lithuania* (no. 51752/10, 14 March 2017); *Šidlauskas v. Lithuania* (no. 51755/10, 11 July 2017); *Grigolovič v. Lithuania* (no. 54882/10, 10 October 2017); *Beinarovič and Others v. Lithuania* (nos. 70520/10, 21920/10, 41876/11, 70520/10, 21920/10 and 41876/11, 12 June 2018).

27 *Pyrantienė v. Lithuania* (note 26 *supra*); *Albergas and Arlauskas* (note 26 *supra*); *Digrytė Klibavičienė v. Lithuania* (no. 34911/06, 21 October 2014); *Činga v. Lithuania* (no. 69419/13, 31 October 2017); *Tumeliai v. Lithuania* (no. 25545/14, 9 January 2018).

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domestic violence;[28] non-admission of refugees;[29] respect to private and family life;[30] freedom of religion;[31] freedom of expression (including the right to receive information);[32] right to stand for elections[33] (the list is not exhaustive). Many of these cases have induced essential improvements of law application practice and, where needed, legislative changes, which would require separate studies.[34] There are stumbling stones too, where Lithuania has been unable to implement ECtHR judgments. The most conspicuous are *L.* (regarding gender reassignment),[35] *Paksas* (regarding right to stand for elections)[36] and *Abu Zubaydah* (regarding the U.S. Central Intelligence Agency's black site).[37] The execution of these judgments is under supervision of the Committee of Ministers (CM) of the Council of Europe.

28 *Valiulienė v. Lithuania* (no. 32293/05, 15 March 2011).

29 *M.A. and Others v. Lithuania* (no. 59793/17, 11 December 2018).

30 *Valašinas v. Lithuania* (note 18 *supra*); *Puzinas v. Lithuania* (no. 44800/98, 14 March 2002); *Sidabras and Džiautas v. Lithuania*, (nos. 55480/00 and 59330/00, 27 July 2004); *Jankauskas v. Lithuania* (no. 59304/00, 24 February 2005); *Rainys and Gasparavičius v. Lithuania* (nos. 70665/01 and 74345/01, 7 April 2005); *Karalevičius v. Lithuania* (note 18 *supra*); *Čiapas v. Lithuania* (no. 4902/02, 16 November 2006); *L. v. Lithuania* (no. 27527/03, 11 September 2007); *Savenkovas v. Lithuania* (note 18 *supra*); *Armonienė v. Lithuania* (no. 36919/02, 25 November 2008); *Biriuk v. Lithuania* (no. 23373/03, 25 November 2008); *Jucius and Juciuvienė* (no. 14414/03, 25 November 2008); *Gulijev v. Lithuania* (no. 10425/03, 16 December 2008); *Žičkus v. Lithuania* (no. 26652/02, 7 April 2009); *Drakšas v. Lithuania* (note 25 *supra*); *Varnas v. Lithuania* (no. 42615/06, 9 July 2013); *Manic v. Lithuania* (no. 46600/11, 13 January 2015); *Sidabras and Others v. Lithuania* (nos. 50421/08 and 56213/08, 23 June 2015); *A.N. v. Lithuanua* (note 22 *supra*); *Biržietis v. Lithuania* (no. 49304/09, 14 June 2016); *Abu Zubaydah v. Lithuania* (note 18 *supra*); *Mockutė v. Lithuania* (no. 66490/09, 27 February 2018); *Kryževičius v. Lithuania* (no. 67816/14, 11 December 2018).

31 *Mockutė v. Lithuania* (note 30 *supra*).

32 *Jankovskis v. Lithuania* (no. 21575/08, 17 January 2017); *Sekmadienis Ltd. v. Lithuania* (no. 69317/14, 30 January 2018).

33 *Paksas v. Lithuania* (note 9 *supra*).

34 For a broader account *see* D. Jočienė, 'Lithuania: The European Convention on Human Rights in the Lithuanian Legal System: The Lessons Learned and Perspective for the Future', *in* I. Motoc & I. Ziemele (Eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge, Cambridge University Press, 2016, pp. 234-265.

35 *L. v. Lithuania* (note 30 *supra*).

36 *Paksas v. Lithuania* (note 9 *supra*).

37 *Abu Zubaydah v. Lithuania* (note 18 *supra*).

Further, I narrate and reflect upon five Lithuanian cases,[38] decided by the Court's Grand Chamber until mid-2019:[39] *Ramanauskas*,[40] *Cudak*,[41] *Paksas*,[42] *Kudrevičius and Others*,[43] and *Vasiliauskas*.[44] In all of them but one, *Kudrevičius*, the Chamber's jurisdiction was relinquished in favour of the GC, which found for the applicants; in *Kudrevičius* the Chamber found a violation of Article 10, but the GC reversed that finding. Three of the cases lost by the State had sequels or follow-ups – new Chamber cases on similar issues, which allow for some consideration as to what extent Lithuania has learned lessons of respective GC cases.

Learning is not – or should not be – a one-way street. Not only Member States should learn from ECtHR case law. The Court also should be able to draw conclusions from it, but also from the practice of States, by taking a (more) realistic account of the real challenges that the States are facing. The implacable reality of these challenges not always can be adequately assessed solely on the basis of the neat abstract principles of 'library law'. There is always a risk that the Court's case law will overlook that reality, having studied it from its supra-national ivory tower. The Court's cases, especially GC cases, which address fundamental, most controversial issues, teach legal lessons – legal in that sense that they can be said to have been learned, if States bring their law and practice in line with the Convention's requirements. But the lessons taught by the Court's case law are not only legal: there are also other lessons, not so technical. These lessons are not on law *per se*, but *on matters non-legal*, addressed and assessed by law, which thus are law's *raison d'être*. For no law is a goal in itself: it is an instrument for meeting social, political, economic and moral challenges, even those of nature, for maintaining and confronting human behaviour and human mind. Lithuanian cases present some food for thought on these matters. The titles of the further sections may look somewhat jesting, but the matters dealt within them are most serious.

38 In chronological order.

39 Five, in and of itself, is neither a high nor a low number. Compare with two other Baltic States: there has been only one GC case against Estonia, *Delfi AS v. Estonia* ([GC], no. 64569/09, 16 June 2015), but there have been as many as eleven GC cases against Latvia: *Slivenko v. Latvia* ([GC], no. 48321/99, 9 October 2003); *Ždanoka v. Latvia* ([GC], no. 58278/00, 16 March 2006); *Sisojeva and Others v. Latvia* ([GC], no. 60654/00, 15 January 2007); *Shevanova v. Latvia* ([GC], no. 58822/00, 7 December 2007); *Kaftailova v. Latvia* ([GC], no. 59643/00, 7 December 2007); *Andrejeva v. Latvia* ([GC], no. 55707/00, 18 February 2009); *Kononov v. Latvia* ([GC], no. 36376/01, 17 May 2010); *Vistiņš and Perepjolkins v. Latvia* ([GC], no. 71243/01, 25 October 2012 (merits), 14 March 2014 (just satisfaction)); *X v. Latvia* ([GC], no. 27853/09, 26 November 2013); *Avotiņš v. Latvia* ([GC], no. 17502/07, 23 May 2016); *Jeronovičs v. Latvia* ([GC], no. 44898/10, 5 July 2016).

40 *Ramanauskas v. Lithuania* (note 7 *supra*).

41 *Cudak v. Lithuania* (note 8 *supra*).

42 *Paksas v. Lithuania* (note 9 *supra*).

43 *Kudrevičius and Others v. Lithuania* ([GC], no. 37553/05, 15 October 2015).

44 *Vasiliauskas v. Lithuania* (note 23 *supra*).

East European Yearbook on Human Rights 2019 (2) 1
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2. *Ramanauskas v. Lithuania:* A Lesson in Psychology of Delinquency

Ramanauskas was an *agent provocateur* case.[45] The applicant, who had been a prosecutor, complained under Article 6 § 1 of having fallen victim of the authorities' provocation to take a bribe, when the 'criminal activity simulation model' was applied to him. In 'his words against theirs' dispute, the Government asserted that Mr Ramanauskas had an inclination to commit the criminal activity for which he was convicted. The Court was not convinced. It set an extremely high standard of proof:

> It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are *not wholly improbable*. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement. (§ 70; emphasis added)

This standard is not easy to satisfy, at times virtually impossible. For in contrast to *in dubio pro reo* with its reliance on the perception of how things normally are in life, the 'not wholly improbable' is an absolutist formula: there must be left no doubt whatsoever. The Court thus has substituted the complete improbability, or the probability that equals zero, for the pragmatically reasonable impossibility, or the chance that something took place being factually inconceivable from the angle of the shared human experience. Under the above-cited clause the accused must benefit from virtually any doubt, however meagre, unless it is absolutely unnatural, because everything what is not unnatural is also 'not wholly improbable' by definition. The accused thus must benefit also from doubts that are artificially invented, purely imaginative, but not unnatural in the strict sense of the word. It would be very difficult to conclusively rebut each and every fanciful version, if the probability of them having taken place does not render them unnatural and therefore does not equal zero. While some praise *Ramanauskas* for having "formed the legal basis and guidelines for the use of secret investigation methods for all European countries",[46] the same praise hardly could be extended to such 'guideline' as the 'not wholly improbable' standard.

Having applied that standard to the facts of Mr Ramanauskas' case, the GC held that an incitement had been there, because the actions of the State agents had gone beyond the mere passive investigation of the 'existing criminal activity' (§ 68). The GC was not persuaded that the bribe would have been taken, had the applicant not been provoked, and found a breach of Article 6 § 1.

That finding, in and of itself, did not raise eyebrows. The reasoning leading to it did. One could not dispute that the actions, attributed to the authorities, were not only passive. That being so, the reasoning is permeated with distrust of the Government's every submission, which all have been rejected without mercy. The

45 *Ramanauskas v. Lithuania* (note 7 *supra*). In these reflections I made use of my concurring opinion in *Ramanauskas v. Lithuania (no. 2)* (no. 55146/14, 20 February 2018).

46 Jočienė, p. 246 (note 34 *supra*).

GC saw no need to see any distinction between the applicant's situation and that of an average person, not so few of whom, in certain circumstances, succumb to an incitement by *agents provocateurs* to commit a criminal offence. It gave no prominence to the fact that Mr Ramanauskas was a prosecutor, who by the virtue of his office had to be much less incitement-prone than a 'man in the street'.[47] The 'just [?!] satisfaction' awarded to him amounted to Euro 30,000, a sum not imaginable by today's standards.[48] To compare, in later Lithuanian cases, which concerned incitement to commit drug-dealing-related offences, the Court (Chamber) was satisfied that

> the finding of a violation constitute[d] in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant[s].[49]

In *Ramanauskas*, the GC reiterated the Court's principled stance[50] that where an accused asserted that he had been incited to commit an offence, the courts had to carry out a careful examination of the material in the file under Article 6 § 1 and all evidence obtained as a result of police incitement had to be excluded; this was especially true where the police operation had taken place "without a sufficient legal framework or adequate safeguards" (§ 60). Although the GC did not pronounce on the quality of applicable Lithuanian law at the material time, in 2012 the Law on Operational Activities (which had been applied in Mr Ramanauskas case) was replaced with a new Law on Criminal Intelligence, as a general measure of implementation of the Court's judgment. The new law reputedly better meets the Convention requirements; at least since then there have been no complaints concerning entrapment by State agents, which would have been (by mid-2019) communicated to the Lithuanian Government. The domestic authorities might be said to have learned the *Ramanauskas* lesson. As to the individual measures of implementation of the judgment, in addition to being recompensed for the damage sustained, Mr Ramanauskas requested for the reopening of the criminal proceedings in his case; his request was satisfied by the Supreme Court, which then quashed the conviction and discontinued the reopened case.

Ramanauskas had a somewhat ironical sequel, *Ramanauskas (no. 2)*,[51] decided eight years later (by a Chamber), which involved the same applicant. Having his

47 In a case, examined a few months later, the Court (Chamber) was not lenient to the applicant who, at the time of committing an allegedly incited crime of bribery, was a judge. *See Milinienė v. Lithuania* (no. 74355/01, 24 June 2008).

48 Compare, *e.g., Pătraşcu v. Romania* (no. 7600/09, 14 February 2017); *Matanović v. Croatia* (no. 2742/12, 4 April 2017). The sum of Euro 30,000 covered both pecuniary and non-pecuniary damage. The justification of compensation of pecuniary damage included the 'whitewashing' argument, that "the applicant would not have been imprisoned or dismissed *from his post in the legal service* if the incitement in issue had not occurred". The reasoning as to the need to compensate non-pecuniary damages was limited to a statement that "the applicant indisputably sustained non-pecuniary damage, which [could not] be compensated for by the mere finding of a violation" (§ 87; emphasis added).

49 *Malininas v. Lithuania* (note 22 *supra*); *Lalas v. Lithuania* (note 22 *supra*).

50 *Khudobin v. Russia* (no. 59696/00, §§ 133-135, 26 October 2006).

51 *Ramanauskas v. Lithuania (no. 2)* (note 45 *supra*).

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reputation cleaned by the ECtHR and, as a consequence, by the Lithuanian Supreme Court, Mr Ramanauskas became an advocate. In that capacity he did not dilly-dally about consulting a prisoner (who, as it turned out, was cooperating with the police) on how much it would cost the latter in bribes to be released on probation. While consulting that prisoner he bragged about his victory in Strasbourg. He did not only consult his 'client', but also received, from an intermediary, cash for the purported illicit release. Whether he would have greased anyone's palms in the judicial system or would have pocketed the money without having accommodated the alleged instigator with the 'service' requested would be sheer speculation. What was certain is that the prosecutor-turned-convict-turned-applicant-turned-acquitted-turned-advocate promised the illicit 'service' and took the money. When caught red-handed, he claimed that this again was a provocation.

Who would have been so naïve to believe him this time? Not even the Strasbourg Court was. Although in *Ramanauskas (no. 2)* the Chamber explicitly referred to the previously discussed 'not wholly improbable' standard, it was not applied rigorously. Otherwise some episodes of the operation conducted against Mr Ramanauskas might have been interpreted as testifying that the State agents, who were investigating Mr Ramanauskas' 'existing criminal activity', did not stay absolutely passive. A lesson thus has been learned not only in Vilnius, where the legislation had been amended and the practice had been rectified, but also in Strasbourg, even if the overboards of Mr Ramanauskas' first case have not been (and perhaps will never be) explicitly admitted.

At the time of writing of this article only a year has passed since *Ramanauskas (no. 2)*. It is therefore early to generalize whether this judgment was a one-off instance of application of a more authorities-friendly approach (which might have been prompted by an unusual coincidence of an individual persistently stepping on a rake of 'provocation' again), or this approach has a chance to be adopted in other cases. Time will show.

3. *Cudak v. Lithuania:* A Lesson in International Relations

In *Cudak*,[52] the principles regarding the State immunity from foreign courts' jurisdiction were set out. They then were further elaborated in other cases, most notably in *Sabeh El Leil v. France*.[53]

While *Ramanauskas* has originated in the world of crime, *Cudak* in that of diplomacy. But (apart from this obvious difference) the two cases differ in two other important respects. Firstly, in *Cudak*, the GC's reasoning is balanced. Having acknowledged, in the spirit of respect of international law, that

52 *Cudak v. Lithuania* (note 8 *supra*).

53 *Sabeh El Leil v. France* ([GC], no. 34869/05, 29 June 2011).

> the generally recognised rules of public international law on State immunity [could not] in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1,

it nevertheless held that "in cases where the application of the principle of State immunity from jurisdiction restrict[ed] the exercise of the right of access to a court", it had to "ascertain whether the circumstances of the case justif[ied] such restriction" (§§ 57, 59), which, in its opinion, was not the case in *Cudak*. Secondly, as transpired from two post-*Cudak* Lithuanian cases, decided, respectively, six and nine years later, the Lithuanian authorities had learned the *Cudak* lesson not in full.

Ms Cudak, a Lithuanian national, had been working as a technical employee (secretary and switchboard operator) at the Polish Embassy in Vilnius. She was dismissed from her post after allegedly having failed to appear at work. She claimed that this happened after (and, presumably, because) she had complained to the Equal Opportunities Ombudsperson about the sexual harassment at the workplace, and that she herself asked to be dismissed, as she would no longer be able to work at the embassy because of her tense relations with her colleagues. Subsequently, the Ombudsperson's Office issued a report, in which it was maintained that sexual harassment indeed took place, and the relevant department of the Ministry of Foreign Affairs was informed of this finding. The Lithuanian courts had not accepted Ms Cudak's civil claim regarding the compensation for unlawful dismissal, relying on the foreign State's jurisdictional immunity doctrine. In the Supreme Court's interpretation, she could not initiate proceedings in the Lithuanian courts, but only in the Polish courts. Ms Cudak then took her case to Strasbourg.

And she won. The Court found a violation of Article 6 § 1. It reasoned that, although the right of access to a court by its very nature called for regulation by the State and thus was not absolute and might be subject to limitations, the limitations applied had not to restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right was impaired (§ 55), let alone that that right became only 'theoretical or illusory', not 'practical and effective' (§ 58). Now, those were commonplace iterations, which migrated from case to case both before and after *Cudak*. *Cudak*'s novelty lied in the application of the narrowed jurisdictional immunity doctrine.

The GC drew a distinction between *Cudak* and its earlier case, *Fogarty*,[54] which also concerned an employment dispute with a foreign embassy. In *Fogarty*, the applicant, an Irish national, had successfully sued against the United States for sex discrimination after her dismissal from a post of administrative assistant at the U.S. Embassy in London and had received compensation. Then, after several subsequent unsuccessful applications for other employment at that embassy, she had commenced fresh proceedings before the U.K. courts. The U.S. Government claimed immunity from jurisdiction, and the proceedings were discontinued. The Strasbourg Court found no violation of Article 6 § 1. It noted the trend

54 *Fogarty v. the United Kingdom* ([GC], no. 37112/97, 21 November 2001).

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in international and comparative law "towards limiting State immunity in respect of employment-related disputes", except those concerning the recruitment of staff in embassies (although international practice was divided on this question) (§ 37). Later, in *Cudak* it was stated that "the application of absolute State immunity ha[d], for many years, clearly been eroded" (§ 64).[55] The GC thus applied in *Fogarty* the doctrine of State immunity, or rather its remains that had survived the 'erosion'. In *Cudak*, it applied its 'eroded' part.

In both cases, the restrictions in question were deemed as having pursued a legitimate aim of "complying with international law to promote comity and good relations between States through the respect of another State's sovereignty" (§ 60[56]). But, unlike in the British case, the Lithuanian courts' declination of jurisdiction to the applicant's claim on the basis of the State immunity doctrine was found to have impaired the very essence of the right of access to a court, overstepped the authorities' margin of appreciation and, thus, disproportionate. For the GC, Ms Cudak's status as a technical employee of the Polish Embassy did not justify the refusal to grant her protection by the Lithuanian courts, even if the Lithuanian authorities might encounter 'difficulties' in enforcing against Poland a Lithuanian judgment in favour of Ms Cudak, for such considerations could not frustrate the proper application of the Convention (§ 73).

Cudak effectively restricted the scope of application of the jurisdictional immunity doctrine to disputes regarding employees' dismissal. The Lithuanian courts' practice, which was rooted in the Supreme Court's interpretation from 1998, was changed accordingly – within weeks. Its not being changed soon after *Fogarty* hardly could be attributed to the Supreme Court being unmindful that *Fogarty* had an *erga omnes* effect, was not extraneous to Lithuania at all and that its principles would be applied in Ms Cudak's case, decided by the Supreme Court almost five months before *Fogarty*, had she applied to the ECtHR, which she did two weeks after *Fogarty* had been delivered. Rather it was inertia. Ms Cudak appeared to be quicker than the Supreme Court; had it been otherwise, the Government might have argued (how convincingly would be another question) that a domestic remedy had been put in place to address her claim.

Having succeeded in Strasbourg, Ms Cudak requested that her civil proceedings were reopened, thus making use of the Court's consideration that

> where … an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 … a retrial or the reopening of the case, if he or she so requests, represents in principle an appropriate way of redressing the violation. (§ 79)

Ms Cudak asked to find that her dismissal had been unlawful and to award her compensation amounting to twelve times her monthly salary (maximum compensation provided in the domestic legislation applicable at the material time), as well as a conspicuously high compensation for non-pecuniary damage, but

55 This was repeated in *Sabeh El Leil v. France* (note 53 *supra*, § 53).

56 Of *Cudak*; a copy-paste from *Fogarty v. the United Kingdom* (note 54 *supra*, § 34).

claimed that she did not wish to be reinstated in her previous job. In the reopened proceedings, the case was remitted for fresh examination before the first-instance court. Now, in her revised civil claim, the applicant asked to be reinstated in her previous job at the embassy and to be paid her average monthly salary for the entire period of her forced absence from work. She also reserved the right to lodge a separate claim against the embassy in respect of non-pecuniary damage. The first-instance court dismissed her claims, but the Court of Appeal changed the legal grounds for her dismissal to 'dismissal at the employee's request'. The Court of Appeal was sensitive to the explanation of the embassy that there were no vacant positions that Ms Cudak could fill and the requirements for the job had changed and, therefore, she could not be reinstated but should instead be awarded compensation. It awarded Ms Cudak the maximum compensation provided by law, which was much lower than requested by her. This ruling was upheld by the Supreme Court.

Ms Cudak then lodged a new application with the ECtHR, complaining under Article 6 § 1 that the domestic courts had not fully remedied the damage she had suffered, had not properly considered her arguments as regards her reinstatement in her previous job (allegedly the most just solution) and had awarded her with manifestly insufficient compensation[57] (in the meantime the CM closed the examination of the execution of the GC judgment in her case[58]). She complained, in essence, about the alleged non-implementation of the ECtHR judgment. The Court (Chamber) thus had to decide whether it was prevented by Article 46 from examining the same applicant's new complaint about the unfairness of the civil proceedings instituted by her against the Polish Embassy, which had been reopened following GC judgment. It decided that this examination did not encroach on the prerogatives of the respondent State and the CM. As to the merits of Ms Cudak's complaints, the Government admitted that the legislation applicable at the material time provided a limited possibility to refuse to reinstate an unlawfully dismissed employee; however, the courts in labour disputes could go beyond the scope of the claim or apply a different remedy than requested, and the Supreme Court has formed the practice whereby the reinstatement requested by dismissed employees was not ordered and monetary compensation was considered more appropriate in respective circumstances. The ECtHR agreed with these arguments. It held that the assessment of whether the applicant's reinstatement was the most appropriate remedy in the circumstances, rather than ordering it automatically at her request, had been neither unforeseeable to her nor arbitrary or manifestly unreasonable. The Court also agreed with the Supreme Court that with the passage of time (which in Ms Cudak's case was twelve years from her dismissal until the adoption of the final court decision, which period included over eight years of her case's pending before the ECtHR) the relevant working conditions might substantially change or the position might cease to exist, let alone the changes as regards the requirements in respect of the previous job. The applicant now did not meet these requirements. As to the (in)adequacy of the

57 *Cudak v. Lithuania* (dec., no. 77265/12, 23 April 2019).
58 CM/ResDH(2016)194 of 6 September 2016.

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monetary compensation, the Court did not consider the amount awarded (the maximum of what was available under the domestic law) derisory or unreasonable. Accordingly, the Court found Ms Cudak's second application manifestly ill-founded and declared it inadmissible.

Cudak was not the only Strasbourg Court's Lithuanian case that concerned a labour dispute with a foreign embassy. Before its examination by the ECtHR, other cases had been decided by the domestic courts based on the Supreme Court's precedent in Ms Cudak's case. In 2016, one Ms Naku brought an action against the Swedish Embassy in Vilnius. She was dismissed, while being on sick leave, from her technical post in the embassy (initially a receptionist and translator, and later a cultural, information and press officer). Ms Naku related her dismissal to her activities as the chairperson of the trade union for locally employed staff at the embassy, which had several times complained in writing to the embassy about working conditions (deteriorating and oppressive working atmosphere; confused delegation of tasks; incomplete job descriptions or changes in them without local employees being consulted; lack of clear communication; lack of trust) and had suggested the conclusion of a collective agreement between the locally employed staff and the embassy. The complaints regarding allegedly unfair treatment of the local personnel at the embassy had been supported by the Lithuanian State Civil Servants' Trade Union and (in more general terms) by the Swedish media and trade unions. The embassy attempted at justifying Ms Naku's dismissal by her alleged 'difficulties to cooperate', 'lack of performance', 'constant questioning and arguing over duties to be performed' and 'inability to cope with changes in [the] embassy's and/or [her] own tasks', which had resulted in 'gross misconduct' against a Swedish colleague. The Lithuanian courts, from whose jurisdiction Sweden had claimed immunity, dismissed Ms Naku's claims regarding her reinstatement to her former post. The Court of Appeal suggested that she began proceedings in the Swedish courts. Ms Naku then applied to the ECtHR.[59] After *Cudak*, the outcome of her case under Article 6 § 1 was predictable.[60]

The respondent Government, apparently, did not think so. Among their two objections as regards the admissibility of Ms Naku's complaints one concerned the alleged non-exhaustion of available legal remedies, which she did not use, namely, the proceedings in the Swedish courts. The Court held that it was for the applicant to choose in the courts of which country to pursue her claims; as she chose the Lithuanian courts, the Swedish authorities had no possibility to rectify the wrongs through their own system, and the complaint against Sweden was declared incompatible *ratione personae* with the provisions of the Convention and rejected.

The Government's other objection was that Article 6 § 1 was not applicable to the dispute regarding Ms Naku's employment at the embassy, as the subject of

59 *Naku v. Lithuania and Sweden* (no. 26126/07, 8 November 2016).

60 Ms Naku also complained under Art. 11, both taken separately and in conjunction with Art. 14. These complaints were dismissed for non-exhaustion of domestic remedies, as the Court found 'no trace' that she had complained, 'however briefly', to the domestic courts about having been dismissed because of trade-union activities (§ 105).

her claim before the domestic courts was not only her dismissal from her position at the embassy but also her reinstatement to that job; the claim for reinstatement therefore could not be dealt separately from her other claims to acknowledge her dismissal as wrongful and to award her compensation, but it fell under the *Fogarty* exception as regards recruitment to foreign missions, where the State immunity doctrine still applied. For the Government, the applicant's title (cultural, information and press officer) and the nature of her duties at the embassy showed that she had contributed to the exercise of discretionary powers intrinsic to the sovereignty of Sweden, which required a special bond of trust and loyalty between the applicant and that State. This objection was joined to the merits of the case and then dismissed, the Court having considered that

> by plainly considering that everyone who worked in a diplomatic representation of a foreign State, including the administrative, technical and service personnel, by virtue of that employment alone in one way or another contributed to the meeting of the sovereign goals of a represented State … and thus upholding an objection based on State immunity and dismissing the applicant's claim without giving relevant and sufficient reasons that the applicant in the instant case in reality performed specific duties in the exercise of governmental authority … the Lithuanian courts impaired the very essence of the applicant's right of access to a court. (§ 95)

Naku allows to ratiocinate on what the Lithuanian authorities learned from *Cudak*. The lesson seems to have been learned not in full. On the one hand, the domestic court's practice has been rectified. On the other hand, the Government's objections as regards the (non-)applicability of Article 6 § 1 to Ms Naku's case reveal their unrealistic hope that, contrary to one Heraclitus, it was possible not only to step into the same river twice but also not get wet having repeatedly stepped into it. However, it appeared to have been possible to step twice into the same puddle, which resulted in addition of a new violation to the State's record.

The finding of a violation (of any provision) is by definition a stigmatizing experience. Of course, stigmas may be of different degrees: the severity of a breach of Article 6 § 1, as found in *Cudak* (or *Naku*), is not comparable to that of most serious violations of various Convention provisions, in particular Articles 2 or 3. A small stigma thus may be seen as a mere mistake, not a moral stigma. Still, it would have been not irrational for the Lithuanian Government to avoid the finding of a violation of Article 6 § 1 by the ECtHR, especially in view that the courts' practice in the cases of *Cudak* type had been rectified anyway, which precluded the possibility of such applications being lodged in future. After *Cudak*, it was inconceivable that the ECtHR could justify the non-acceptance, by domestic courts, of the claims analogous to those of Ms Cudak, as in Ms Naku's case. It thus would have been consequent for the Government to resort, insofar as it concerned her complaint as regards the access to a court, to the instruments of friendly settlement or unilateral declaration. The employment of these devices would have required that the Government acknowledged a breach of Ms Naku's

East European Yearbook on Human Rights 2019 (2) 1
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right. Still, such acknowledgement would have been less stigmatizing than the formal finding of a violation by the ECtHR.

Whether the Government's reluctance to acknowledge the violation, which would have been found anyway, and to avoid the full-scale losing in *Naku* signified a more general problem, would merit special consideration. My impression is that such reluctance has been present also in many other cases, where rather artificial objections as to the admissibility of the complaints have been raised, in particular as regards the alleged non-exhaustion of domestic remedies, which are not supported by the Court's case law.[61] The determination 'to stand until the end' may be a matter of policy. Policies, however, may be realistic or not, and non-realistic policies call for modification, especially in view that the ECtHR's (at least radical) departure from its case law – especially in the direction of narrowing individuals' rights – has always been an unlikely development (and as regards the well-reasoned *Cudak* doctrine unwelcome), even when that case law represents jurisprudential 'library law', not on overly friendly terms with the reality of life.[62] Which brings me to the third GC case against Lithuania.

4. *Paksas v. Lithuania:* A Lesson in the Theory of Democracy

Paksas[63] was and remains to be one of the Court's leading cases on Article 3 of Protocol No. 1. It involved the former President of the Republic (2003-2004), Mr Paksas, who was removed from office in impeachment proceedings and banned for life from standing in, *inter alia*, parliamentary elections. The ECtHR, however, found that prohibition disproportionate. The *Paksas* doctrine reflects the ECtHR's belief that even when a person had demonstrated that his election is fraught with risks to the national security, constitutional order, democracy, the rule of law and the people's trust in State institutions, 'the free expression of the opinion of the people in the choice of the legislature', as enshrined in Article 3 of Protocol No. 1, is a sufficient safeguard that the said values are not undermined and that by such a prohibition not only that person's right would be breached but also the people's right to choose the legislature. However, the publications on the law of the Convention, in which *Paksas* is commented, do not go beyond the few doctrinal max-

61 *Cf.*, among abundant authorities, *Kraulaidis v. Lithuania* (note 21 *supra*); *Paulikas v. Lithuania* (no. 57435/09, 24 January 2017); *Mažukna v. Lithuania* (note 21 *supra*); *Šidlauskas v. Lithuania* (note 26 *supra*); *Mockutė v. Lithuania* (note 30 *supra*); *Kožemiakina v. Lithuania* (note 22 *supra*); *Dainelienė v. Lithuania* ([Committee], no. 23532/14, 16 October 2018). On the other hand, there were not so few cases where the Government was successful in its objections regarding the (non-)exhaustion of domestic remedies. *See, e.g., Savickas and Others v. Lithuania* (dec., nos. 66365/09, 12845/10, 28367/11, 29809/10, 29813/10 and 30623/10, 15 October 2013); *Falkauskienė v. Lithuania* (dec., no. 42307/09, 4 July 2017); *Kužmarskienė v. Lithuania* (dec., no. 54467/12, 11 July 2017); *Mozeris and "Eugenijos ir Leonido Pimonovų Alzheimerio ligos paramos fiondas" v. Lithuania* (dec., no. 66803/17, 2 April 2019).

62 *E.g.*, the interpretation of Art. 12 as not enshrining the right to divorce, as provided in *Johnston and Others v. Ireland* ([Plenary], no. 9697/82, 18 December 1986) an era ago, calls for being abandoned; still, recently it was re-confirmed in *Babiarz v. Poland* (no. 1955/10, 10 January 2017).

63 *Paksas v. Lithuania* (note 9 *supra*).

ims and, as a rule, leave the factual context unattended. The GC judgment itself is also rather selective on the relevant facts. Therefore let them be briefly racapitulated here.[64]

In the end of 2003 and the first half of 2004, Lithuania was engulfed in the passions of what turned out to be Europe's first removal from office by impeachment of an elected head of state. President Paksas took office in February 2003. In October 2003, information surfaced that some of his advisors might have been influenced, in the exercise of their duties, by Russia, or the criminal world, or both. Concerns were raised also with regard to the President himself. In particular, it was claimed that he was under an overwhelming clandestine influence of one Mr Borisov, a Russian businessman, who had given him colossal financial and organizational support during his electoral campaign. Mr Borisov, who had been a major of the Soviet army stationed in Lithuania during the years of occupation, after the declaration of Lithuania's independence had been dismissed from the actual military service to the reserve, but continued to reside in Lithuania. He had been a Lithuanian citizen, having acquired that citizenship, as it transpired, unlawfully, but a few months before the elections lost it by acquiring Russian citizenship.[65] He informed the Lithuanian authorities of this fact belatedly, only after Mr Paksas had taken the office of the President (he thus was a foreign citizen at the time when he supported Mr Paksas in his bid for presidency). After Mr Paksas took office, he granted Mr Borisov Lithuanian citizenship for the second time, this time 'by way of exception', allegedly for the latter's merits to Lithuania. Mr Borisov's business focused on the repair of dual-use helicopters and their export to a number of countries, including some third-world countries imposed with a EU and UN embargo for supporting terrorism, and he also had a similar business in Russia. The suspicions as to his connection to Russian military complex and secret services therefore did not look unreasonable. Although the fact of the relationship between the President and Mr Borisov was well known (after all, Mr Borisov's financing of Mr Paksas' campaign was public, even if not all of it), the suspicions as to the impropriety of the influence of Mr Borisov on the President augmented dramatically, when the information cropped up that Mr

64 It is fair to state from the outset that, as the President of the Constitutional Court at the material time, I was directly involved in the examination of the citizenship case, the impeachment case and the presidential elections case (all discussed below). This may render my reflections looking subjective (in particular given the fact that Mr Paksas' lawyers challenged my own objectivity). Still, certain factual issues are of tremendous relevance, however, they, as a rule, are passed around in silence in the publications, especially of foreign writers, in which the *Paksas* judgment is commented from an ivory-tower perspective, very much detached from its factual context. See, *e.g.*, D. Harris *et al., Law of the European Convention on Human Rights*, 3rd ed., Oxford, Oxford University Press, 2014, pp. 941-942.

65 The Lithuanian Constitution does not allow for multiple citizenship, unless in very exceptional cases. According to the Law on Citizenship, the granting of Lithuanian citizenship to foreign nationals is limited to persons having special merits to Lithuania. That statutory provision was applied too indiscriminately even before Paksas' presidency, whereby Lithuanian citizenship was granted also to foreigners whose merits to Lithuania were questionable or effectively non-existent. This was noted in the Constitutional Court ruling in Mr Borisov's citizenship case, dealt with further.

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Borisov had hired and brought to Lithuania a Russian backup team who acted behind the scene for Mr Paksas. The concerns that Mr Borisov's influence might have made the President vulnerable and thus might have posed a threat to Lithuania's national security were voiced officially by no one less than the Director General of the State Security Department, who spoke of these matters from the Seimas' (Lithuanian parliament's) rostrum. In an unprecedented sitting, the MPs had listened to the recordings of Mr Borisov's telephone conversations (tapped on the courts' orders) with Mr Paksas' aides from Russia and other persons from his entourage, from which it was clear (although Mr Borisov's language consisted largely of Russian three-storey expletives) that the President was, mildly put, in trouble, and the security concerns had a not insignificant basis.

In these circumstances, the Seimas established an *ad hoc* commission to investigate the possible threats to Lithuania's national security. In the course of the parliamentary inquiry, more information compromising the President was revealed. In particular, it transpired that Mr Paksas had granted his Russian sponsor Lithuanian citizenship 'by way of exception' not for the latter's merits to Lithuania, as officially announced, but under Mr Borisov's pressure and in repayment for his notably solid support to Mr Paksas' campaign. It also transpired that Mr Paksas had disclosed to Mr Borisov the secret information (which he was provided with as a head of State) concerning an ongoing operational investigation in regard of Mr Borisov's company and the tapping of his telephone conversations, and Mr Borisov had instantly shared that information with Mr Paksas' aides in Russia. As if that was not enough, it also transpired that the President had exerted illicit influence on heads and shareholders of a private company, pressurizing them to transfer shares to persons close to him, in particular to one Mr Borisov's collocutors in the aforementioned phone conversations. The commission confirmed the assertions of the President's vulnerability.

Of all that compromising information the issue of Mr Borisov's 'second' Lithuanian citizenship was singled out. The Seimas *in corpore* requested the Constitutional Court to assess the constitutionality of the President's decree, by which the citizenship had been granted. In that extraordinary live-televised case, the Constitutional Court found the decree unconstitutional,[66] for Mr Borisov had 'bought' Lithuanian citizenship from Mr Paksas for 'financial and other notably solid support' to him as a candidate in the elections, which 'service' to Mr Paksas in no way could be considered merits to Lithuania in the sense of the respective provision of the Law on Citizenship (which allowed for multiple citizenship by way of exception).[67]

66 Insofar as it concerned Mr Borisov, for by that decree five other (unrelated) persons had also been granted Lithuanian citizenship. Constitutional Court ruling of 30 December 2003 (Constitutional Court acts are available in English at www.lrkt.lt/en).

67 While Mr Borisov was a Lithuanian citizen for the first time, he had sponsored Lithuanian aviation sport and had been awarded with a medal for that. No merits to Lithuania had been shown while he was a Russian citizen. The whole procedure, which included Mr Borisov's application to be awarded citizenship, the issuance of the President's decree, the citizen's oath allegedly taken by Mr Borisov, the delivery to him of the Lithuanian passport and the first use of that passport for a foreign travel, was completed within a few hours. This in itself raised questions.

The citizenship case was not yet an impeachment case. However, it provided a factual and legal basis for one of the charges in the impeachment proceedings against the President. In view of the revelations of impropriety of Mr Paksas' and part of his entourage's relations with Mr Borisov, two-thirds of the MPs submitted a proposal to the Seimas to institute impeachment proceedings against the President. The Seimas then established another *ad hoc* commission (even before the Constitutional Court presented its ruling on the citizenship decree). The commission, whose work riveted the attention of all Lithuanian society, concluded that most of the charges brought against the President were grounded and serious enough for institution of impeachment proceedings. The Seimas then decided to institute these proceedings. As provided for in the Constitution, it applied to the Constitutional Court for a conclusion whether respective actions of the President were in conflict with the Constitution. They included, *inter alia*, the granting of Lithuanian citizenship to Mr Borisov, the disclosure to Mr Borisov of the secret information and the pressurizing of heads and shareholders of a private company. Should the Constitutional Court conclude that these actions amounted to a gross violation of the Constitution and a breach of oath given to the Nation, the impeachment proceedings had to be resumed in the Seimas, which could remove the President by three-fifths of votes.

But even before the impeachment commission presented its conclusions to the Seimas, it became known virtually to everyone that the President had become dependent on Mr Borisov by means of clandestine commitments (given allegedly in writing), in particular pledges to appoint Mr Borisov his advisor (although his Russian sponsor was not a Lithuanian citizen and did not speak the State language); to confer on him several State awards (within a certain period), and even (this seemed indeed beyond imagination, until it turned out to be true) to regularly (twice a week) meet with Mr Borisov 'for a game of tennis' (during which presumably affairs were to be discussed). It also became known that from the early days of Paksas' presidency, his Russian sponsor had threatened, in his foul-mouthed telephone exchange with several persons whom he asked to make sure that the message reached Mr Paksas, that if the latter made 'some stupidity' (by which Mr Borisov meant, in particular, him not being appointed presidential advisor), that would be his 'end', his 'death' as the President, for Mr Borisov would begin getting his money back, and Mr Paksas would be a 'political corpse'. Mr Borisov's 'presidential client' (or rather 'presidential hostage') was virtually bound hand and foot.

Pre-empting the further narrative, it must be noted that Mr Borisov was later convicted for blackmailing the President, namely, demanding that Mr Paksas appoint him presidential advisor, grant him Lithuanian citizenship, as well as grant him other favours, failing which he threatened to disclose information that could damage the President's reputation. What constituted that information, remained between the two and was never publicly confirmed.

Be that as it may, Mr Paksas abode, willingly or not, by his commitments to Mr Borisov (and whoever might have stood behind the latter) even when the examination of his actions, which already had created hell, was at its peak in the Constitutional Court proceedings, pending the impeachment proceedings in the

East European Yearbook on Human Rights 2019 (2) 1
doi: 10.5553/EEYHR/258977642019002001001

Seimas (provided that it would be concluded that these actions amounted to a gross violation of the Constitution and a breach of oath). In particular, the media succeeded in filming Mr Paksas' covert midnight meeting 'for tennis' with Mr Borisov, in defiance of the enormous risk that such meetings posed to him in view of ongoing criminal proceedings against Mr Borisov concerning the blackmailing of the President, and despite the President's non-admission that such meetings were taking place. Waylaid by the media, Mr Paksas only uttered that "the President [could] meet whoever he want[ed]". To make it even more surreal, both Mr Paksas and Mr Borisov announced that the latter (at that time no longer a Lithuanian citizen) had been appointed the President's advisor. This mind-blowing appointment was effectuated by Mr Paksas on the eve of the parties' concluding speeches in the Constitutional Court proceedings in the impeachment case, thus effectively depriving his lawyers' arguments of even slightest potency, at least in the eyes of the society at large. Having realized the folly of Mr Borisov's appointment, Mr Paksas called it off and went on TV camera. In his speech, he called the appointment a fatal mistake, apologized, confessed that Mr Borisov had threatened to disseminate compromising information about him, admitted that "a cornered man [might] become an obedient tool in someone's hands" and that "such [cornered] person [could] speak or do whatever he [was] advised or ordered", distanced himself from Mr Borisov and promised that he would not tolerate "any forms of pressure against him, his family and the State".[68] The repentance (if repentance it was[69]) was much belated. For it was obvious that the President was unable to adequately appreciate what was going around him, and it was logical to suppose that he might not be allowed to act freely, even if he was capable of such appreciation (however, his self-incrimination is not even hinted to in the GC judgment).

These developments, *ex post* to the charges against the President, constituted the context in which the impeachment case was examined by the Constitutional Court. Mr Paksas was found to have grossly violated the Constitution and have breached the oath to the Nation, whereby he vowed to be faithful to the Republic of Lithuania and the Constitution, to conscientiously fulfil the duties of his office

68 Cited from: https://kauno.diena.lt/naujienos/lietuva/salies-pulsas/lietuvos-prezidento-rolando-pakso-kreipimasis-i-tauta-440979 (last accessed 14 June 2019). In this context, one could mention also other rather suspicious connections of Mr Paksas, which many saw as his dependences. One of these connections was that with one Ms Lolishvili. That Georgian lady was a psychic. It was claimed that several years before Mr Paksas entered politics she had cured him from a most serious illness. Since then Ms Lolishvili's influence on him was extraordinary. Another possible dependence related to a criminal case, opened in Russia in 1996 or 1997, but later closed. It concerned Russian regional authorities' payments to Mr Paksas, who at that time was in construction business (including a lucrative project in Siberia). Although widely debated in the media and society, these connections did not feature in Mr Paksas' impeachment case.

69 The President's speech contained expressions of contriteness to Mr Borisov, on whom allegedly all sorts of 'misfortunes' had fallen. Mr Paksas also hinted that Mr Borisov's appointment had 'almost' taken place. Indeed, the relevant decree (if it was issued) was not shown to anyone, but it was no one else than the President's Office which had officially announced of the appointment as a *fait accompli*, which had been immediately confirmed to the media by both Mr Borisov and Mr Paksas.

and to be equally just to all. The breach was found on three counts: (i) granting Lithuanian citizenship to Mr Borisov; (ii) knowingly allowing the latter to conceive that there has been an ongoing operational investigation in regard of Mr Borisov's company and the tapping of his telephone conversations; and (iii) making use of his status to influence heads and shareholders of a private company, pressurizing them to transfer shares to persons close to him.[70] Pursuant to that conclusion, the President was removed from office by the secret vote of the Seimas on all the three counts. New presidential elections were scheduled.

On the latter two of the aforementioned counts criminal prosecution was opened against Mr Paksas. The case regarding the abuse of presidential authority in relation to a private company was discontinued by the Prosecutor General, as reported, for the reason that, while one of the (alternative) sanctions for that offence was the prohibition to take certain office, the President's removal from office and disqualification from elected office had already taken place. As regards the disclosure of information classified as a State secret, Mr Paksas was acquitted by the court of first instance for lack of evidence by criminal law standards, then found guilty by the appellate court (which, however, discharged him from criminal liability and discontinued the criminal proceedings owing to his removal from office and disqualification from elected office) and then acquitted by the Supreme Court.

In many States, the President's removal from office on the aforementioned counts (and in the context described here) would have been the end of the epopee. Lithuania's Constitution, however, does not provide for the President's suspension during the ongoing impeachment proceedings, nor her laws forbid to use all administrative resources available to him. Mr Paksas used these resources to the maximum, travelling around the country and recruiting supporters infected with a belief in a conspiracy theory that his expected ousting would result from a plot of the elite against an 'unsystemic' political player. Soon after the impeachment proceedings were over, he announced running in the next presidential elections. The Seimas passed a legislative amendment forbidding the impeached President to take that office if five years had not elapsed from his removal from office. That provision was challenged in the Constitutional Court in the procedure of abstract review, which interpreted the provisions of the Constitution as forbidding a person, whom the Seimas had removed from office[71] for gross violation of the Constitution and the breach of oath, to hold any office, the beginning of holding of which was linked with the taking of the oath provided for in the Constitution, *i.e.,* to become President of the Republic, Seimas Member, member of the Government, Justice of the Constitutional Court, judge of another court or Auditor General.[72] A person removed from the office of the President thus may never stand for election to that office. The rationale of this prohibition was that there would always exist and never disappear a reasonable doubt as to the certainty and reliability, or non-fictitiousness, of a repeatedly taken oath. This constitutional

70 Constitutional Court conclusion of 31 March 2004.
71 Or his mandate of Seimas Member has been revoked.
72 Constitutional Court ruling of 25 May 2004.

East European Yearbook on Human Rights 2019 (2) 1
doi: 10.5553/EEYHR/258977642019002001001

lifelong prohibition might have looked like a novelty, for this was the first time when a concrete content was put into a relatively old doctrinal statement that "the constitutional sanction applied in accordance with the procedure for impeachment [was] of irreversible nature".[73] This interpretation and the ensuing unconstitutionality of (only) a five-year restriction period prevented Mr Paksas from standing for the presidential elections in 2004 and later, and from standing for parliamentary election, which intention he had never expressed. Had he resigned before being removed from office by the Seimas, he would have been able to stand for these elections, but he chose not to resign, since it would have looked like an admission of the well-foundedness of the charges and would have weakened his conspiracy theory.

Mr Paksas applied to the ECtHR, complaining under Articles 6 §§ 1, 2 and 3, Article 7 and Article 4 of Protocol No. 7 as regards the lawfulness of the impeachment proceedings. His case was relinquished in favour of the GC, which held that neither the Constitutional Court proceedings in the citizenship and the impeachment cases nor the impeachment proceedings in the Seimas fell under the notions of 'determination of the applicant's civil rights or obligations' and 'criminal charge' of Article 6 § 1, nor did they fall under related notions of Article 6 § 2 and Article 4 § 1 of Protocol No. 7. These complaints were dismissed as incompatible *ratione materiae* with the provisions of the Convention.

While Mr Paksas' application was pending examination (before the relinquishment of his case to the GC), he lodged (sixteen months after the Constitutional Court's ruling in the presidential elections case) a supplement to it, complaining this time under Article 3 of Protocol No. 1 of his permanent disqualification from elected office. The GC admitted that this issue was not raised, even in substance, in his initial application. Still, that complaint concerned the provisions giving rise to a continuing state of affairs, against which no domestic remedy was available. That complaint was declared admissible, insofar as it concerned parliamentary, but not presidential, elections. The GC accepted that the prohibition in question was part of the 'self-protection mechanism for democracy' (§ 100), aimed at preserving the democratic order (a legitimate aim for the purposes of Article 3 of Protocol No. 1) and concerned restrictions on the electoral rights of a person who had seriously abused a public position and whose conduct had threatened to undermine the rule of law or democratic foundations. It stated that it did not wish to underplay the seriousness of Mr Paksas' conduct in relation to his constitutional obligations or to question the principle of his removal from office. At the same time the GC considered that

> the decision to bar a senior official who ha[d] proved unfit for office from ever being a member of parliament in future [was] above all a matter for voters, who ha[d] the opportunity to choose at the polls whether to renew their trust in the person concerned. (§ 104)

73 Constitutional Court ruling of 11 May 1999.

The prohibition in question thus was found disproportionate.[74] The judgment was delivered in 2011, seven years since Mr Paksas' removal from office. By then he had tried his luck, not unsuccessfully, in the municipal elections and the elections to the European Parliament, where an elected person did not have to take an oath provided for in the Constitution.

The Court held that the Lithuanian authorities had an obligation to determine, subject to supervision by the CM, the general and/or, if appropriate, individual measures

> to put an end to the violation found by the Court and make all feasible reparation for its consequences, in such a way as to restore as far as possible the situation existing before the breach … . (§ 119)

As the prohibition in question has been 'set in constitutional stone' (§ 110), the possibility for Mr Paksas to stand for parliamentary elections depends on the adoption of general measures, which effectively means amending the Constitution.

In Lithuania, the procedure for constitutional amendments requires two rounds of voting and in each of them a qualified (two-thirds) majority of all the MPs (or a referendum). The necessary level of accord in the Seimas having not been reached, the Seimas passed a statutory amendment, shortening the permanent prohibition in question to ten years. The Constitutional Court, in an abstract review procedure, found that amendment unconstitutional and reiterated that for bringing the domestic law into line with the ECtHR judgment statutory amendments did not suffice, but constitutional amendments were necessary.[75] The draft constitutional amendments were submitted to the Seimas, and their version was scheduled for adoption in 2014. However, as the procedure of the submission of amendments itself turned out to be not in line with the Constitution, the draft was discarded.

74 In contrast to *Ždanoka v. Latvia* ([GC], no. 58278/00, 16 March 2006), where a similar, to a great extent, prohibition was upheld. The difference between *Paksas* and *Ždanoka* was that in the latter case, which dealt with the lifelong prohibition to stand for elections set in a statute, the ECtHR was satisfied that the Latvian Constitutional Court observed that the Latvian parliament should establish a time limit on the restriction and observed that "in the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under Article 3 of Protocol No. 1"; according to the GC, "the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end", and "the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court" (§ 135). The GC also observed that the Latvian parliament had periodically reviewed the relevant statutory provision (§ 134). At the time of writing of this article, thirteen years after *Ždanoka*, the requested 'early end' has not come any closer.

75 Constitutional Court ruling of 5 September 2012. In the Lithuanian legal system, the Convention is of a lower force than the Constitution. In a peculiar early case, the Constitutional Court was asked to present a conclusion as to the Convention's compliance with the Constitution; only after the 'positive' conclusion had been presented, the Convention was submitted to the Seimas for ratification. Constitutional Court conclusion of 24 January 1995.

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Several other drafts were in the process of preparation when, in 2014, the United Nations Human Rights Committee (HRC) delivered its views[76] regarding Mr Paksas' inability to stand for presidential elections, which fell outside the scope of the ECtHR case. The HRC held that the said permanent prohibition had violated Mr Paksas' rights under Article 25(b) and (c) of the International Covenant on Civil and Political Rights (ICCPR). Accordingly, his right to stand for presidential elections also had to be restored. The Seimas then established an *ad hoc* commission to deal with the 'restoration of [Mr Paksas'] civic and political rights',[77] whose conclusions were approved by the Seimas resolution.[78] It was concluded that the Constitutional Court had to be obliged to review its rulings, the provisions of which are not in compliance with Article 25(b) and (c) of ICCPR (which effectively meant the ruling in the presidential elections case); the Seimas exercised the power to review the past impeachment proceedings without applying to the Constitutional Court (which itself would require a constitutional amendment); and the Seimas had a discretion to 'restore [Mr Paksas'] civic and political rights' based on a new interpretation of the content of the oath to the Nation (which meant that Mr Paksas' actions could be assessed as now being in line with the unamended constitutional requirements, included in the oath, already recognized as having been violated by him). The Constitutional Court, in an abstract review procedure, quashed the Seimas resolution and reaffirmed that the only constitutionally possible way to implement the *Paksas* judgment was that of constitutional amendment.[79] After several attempts to introduce the relevant constitutional amendments (drafts had been presented and withdrawn), the voting on one of the drafts took place in 2018, whereby the Seimas rejected it in the first vote.[80] The CM then adopted an interim resolution, urging Lithuania "to redouble their efforts to achieve concrete progress at parliamentary level so that Lithuania [could] comply with its obligations under the … Convention".[81] Although under the Constitution the same constitutional amendment can be resubmitted not earlier than one year after the failed voting, the Government informed the CM that another (previously registered) draft amendment or other proposals could be submitted for adoption earlier. Be that as it may, by mid-2019 the demanded 'progress' has not been achieved.

76 CCPR/C/110/D/2155/2012.

77 The commission included, among others, several of Mr Paksas' own lawyers and consultants.

78 Of 23 December 2015.

79 Constitutional Court ruling of 22 December 2016. In that ruling it has been also stated that in the preparation of the constitutional amendments the HRC recommendations had also to be taken into account.

80 The voting took place on 25 October 2018, symbolically (or ironically), the Constitution Day. The required majority of 94 MPs fell short by 16 votes.

81 CM/ResDH(2018)469.

Some contours of what 'Paksasgate'[82] had put at stake showed themselves in the case of *Drakšas*,[83] decided after *Paksas*. Mr Drakšas was Mr Paksas' business partner and close friend, in favour of whom the latter had pressurized a private company and with whom he was planning measures against the latter. He was Mr Borisov's collocutor in the previously discussed phone conversations, to whom Mr Borisov conveyed his threats towards Mr Paksas. Mr Drakšas complained under Article 8 that his conversations with Mr Borisov and other persons, including Mr Paksas, had been intercepted and disclosed. The ECtHR held that the monitoring of Mr Drakšas' telephone conversations, including those with Mr Paksas, were lawful, but found the breach of Article 8 on account that the recorded conversation (by then declassified) between Mr Drakšas and Mr Borisov was leaked and aired on TV. It also found a breach of Article 13.

Mr Drakšas complained also of the disclosure of his conversations at the Constitutional Court's hearing in the impeachment case. On this issue the ECtHR found no violation of Article 8, having reasoned as follows:

> Given the bad language used by the applicant during those telephone calls, the Court attaches a certain weight to his sentiment that the disclosure thereof might to a certain extent have discredited his name in business circles and with public in general. That being so, the Court cannot overlook the fact that those conversations were disclosed in the framework of Constitutional Court proceedings strictly adhering to the requirements of the domestic law and having obtained authorisation from a prosecutor … . Moreover, the reasons to play the conversations, on the basis of which the … President was later impeached, at the Constitutional Court's hearing appear to be weighty. … [R]eporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them. This is all the more so where public figures are involved, such as, in the present case, the applicant, who was a founding member of the State President's political party and a member of the Vilnius City Municipality Council, and the head of State. Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large … . (§ 61)

82 I have borrowed the word from C. Taube, 'Liability of Heads of State: "Paksasgate"', *in* Å. Frändberg *et al.* (Eds.), *Festskrift till Anders Fogelklou*, Stockholm, Iustus Förlag, 2008, pp. 275-286.

83 *Drakšas v. Lithuania* (note 25 *supra*). Mr Borisov also applied to the ECtHR, complaining under Art. 8 of the Lithuanian authorities' attempts to expel him – a foreign citizen convicted for blackmailing of the sitting President – from Lithuania. Before his case was examined, the administrative proceedings in connection with the threatened expulsion had come to an end, and he was issued with a permanent residence permit. The Court (Chamber) found that the matter giving rise to the applicant's complaint under Art. 8 had been resolved and struck the application out of its list of cases. *Borisov v. Lithuania* (no. 9958/04, 14 June 2011).

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Drakšas acknowledged the 'public's' right to receive information. What about extending this argument? The 'public's' right to receive information is not a goal in itself, but a condition for achieving higher goals, which Paksas' presidency undermined. The big painful lesson which 'Paksasgate' taught the Lithuanian polity and society was that democracies live by the rules. Paksas' presidency defied the rules. So did his campaign, run by Mr Borisov and their Russian aides, in which 'money talked', crowds of supporters marched in the night with torches (as if from the 1930s) and a major banking crisis was attempted by means of what is today called fake news – and extremely explosive ones. However, until 'Paksasgate' the 'public' had no knowledge about the magnitude of the (presumably foreign) illicit influence on the President, who himself later admitted that he had been 'cornered' with compromising information, had become "an obedient tool in someone's hands" and would have "[spoken] or [done] whatever he [was] advised or ordered". If the risks of such persons returning to power are not prevented, there can hardly be a full-rate 'free expression of the opinion of the people in the choice of the legislature', of course, on the condition that the word 'free' in this formula is not a mere ornament. Since 'Paksasgate', the Lithuanian legislation has been improved to allay these risks by enhancing the transparency of electoral campaigns and limiting and better supervising their funding (this theme, however, would require a separate study). But now is now, and then was then. In a democracy, individuals' rights must be protected, but so must be the polity and society against irrational populism or elected autocracy and kleptocracy. It is not a demagoguery to ask, what if an individual's right to stand for elections goes counter to the very democratic purpose of elections? Therefore, even assuming that Mr Paksas' rights under Article 3 of Protocol No. 1 have been violated, the same is not straightforwardly true with regard to the right of the people to 'the free expression of the opinion … in the choice of the legislature'. With hindsight, and in the long run, that right had been secured.

One may wonder whether the ECtHR today would not see that factual situation differently, in the light of the ongoing tumult concerning foreign interference in elections in a number of Western liberal democracies. A query whether Lithuania in 2002-2004 had not become a testing ground in this regard would not be a hollow one. In this light the illicit influence of Mr Borisov (and those with whom he was connected) on Mr Paksas has obtained new undertones.

When describing Mr Paksas' vulnerability, the representative of the State party aptly called him 'puppet President'. This did not impress the GC, which, insofar as it concerned Mr Paksas' right to stand for parliamentary elections, adopted a 'library law' *par excellence* judgment, neat on the formal principles, but not too friendly with geopolitical realities.

For Lithuania, the yet unfinished *Paksas* lesson is a formal one: ECtHR judgments must be executed. If that requires constitutional amendments, they must be passed. An accord to this regard must be reached in the Seimas. This does not mean that that judgment must be embraced without reservations, in particular as to how adequately the GC had grasped the nature, the peril and the magnitude of 'Paksasgate'.

5. *Kudrevičius and Others v. Lithuania:* A Lesson in Common Sense

The five applicants claimed a breach of their Article 11 rights (freedom of assembly and association). Compared to the three previously discussed cases, this case initially looked like an easy ride. It was not. The Chamber, by four votes against three, found for the applicants.[84] The case was referred to the GC, which found against them, this time unanimously.[85]

The applicants were farmers. In 2003, farmers were holding demonstrations to protest about the situation in the agricultural sector with regard to a fall in wholesale prices for agricultural products and the lack of subsidies. They demanded that the State take action, which meant raising wholesale prices for agricultural production and allotting a bigger chunk of the budget for subsidizing agriculture. After one demonstration (in front of the Seimas building), the Seimas adopted a resolution calling to reinforce the competitiveness of agricultural sector and to increase subsidies for it. That Seimas resolution was a legal act only in the formal sense; in fact, it was close to a policy declaration and thus not a normative act. The farmers claimed that the Government did not implement the resolution. The Chamber of Agriculture, an organization established to represent the farmers' interests, organized protests in three municipalities next to major highways, providing access to Klaipėda, Lithuania's only sea gateway, or connecting the country with Latvia and Poland. The municipalities issued permits to hold peaceful assemblies in designated areas at an indicated time. The organizers had been warned about possible criminal and administrative liability, if they did not observe the laws or adhere to the authorities' or the police's orders. The demonstrators, with no prior notification, blocked the roads, which was outside the scope of activities indicated in the permits: crowds of people (measured by hundreds and in one case amounting to about 1,500) walked onto the roads and remained standing there, thus stopping the traffic, and in some locations tractors had been driven onto the carriageways and had been left there (in one location certain vehicles had been allowed to go through). The protesters refused to obey police requests not to block the roads. The blockage lasted for more than forty-eight hours. It was a major hindrance to, *inter alia*, the flow of goods, especially as all the three roads were blocked at locations next to the customs posts. Following the negotiations with the Government, which the organizers considered to have been successful, the blocking of the roads had been stopped.

Pre-trial investigations against the applicants and several other persons were initiated on suspicion of having caused a riot. In the Criminal Code, which came into force three weeks before the road-blocking, 'rioting' was defined as

> organis[ing] or provok[ing] a gathering of people to commit public acts of violence, damage property or otherwise seriously breach public order, or … dur-

84 *Kudrevičius and Others v. Lithuania* (no. 37553/05, 26 November 2013; the case referred to the GC).

85 *Kudrevičius and Others v. Lithuania* (note 43 *supra*).

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> ing a riot, commit[ing] acts of violence, damage[ing of] property or otherwise seriously breach[ing] public order … .

The applicants were ordered not to leave their places of residence, but later that measure was lifted. One protester, not an instigator of the road-blocking, was fined with a small administrative fine; the criminal proceedings were discontinued in respect of several other persons, and some individuals were acquitted for lack of evidence. This was not so with regard to the applicants. Two of them were accused of incitement to rioting, and three of a serious breach of public order during the riot. The first-instance court found them guilty of incitement to rioting or participating in a riot. They were each given a sixty-day custodial sentence, suspended for one year and were ordered during that time not to leave their places of residence for more than seven days without the authorities' prior agreement (which was always granted, when requested). The conviction was upheld by the appellate court, and the applicants' appeal on points of law was dismissed by the Supreme Court, which provided an explanation of the substance of the offence of rioting, as defined in the Criminal Code, and of the applicants' actions as falling under its respective Article. Later, the Supreme Court discharged the applicants from their suspended sentences.

The Chamber's reasoning on the merits of the applicant's complaint under Article 11 was condensed to six paragraphs, in which the general principles applicable in Article 11 cases were interlaced with the considerations on the factual circumstances of the case. The Chamber found the interference into the applicants Article 11 rights to have been disproportionate. In support of this finding, it cited the Court's case law that

> any demonstration in a public place inevitably cause[d] a certain level of disruption to ordinary life, including disruption of traffic, and that it [was] important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly … [was] not to be deprived of all substance

and that

> any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it … . (§ 82)

These general tenets pointed to the authorities' obligations, but said nothing about those of their opponents.

In that spirit, all the facts which might be interpreted as mitigating, or rather exonerating, the applicants' liability, were given great prominence, clearly unduly. There were not many 'comfortable' facts available, though. Once the smokescreen of the general considerations is removed, the array of allegedly mitigating circumstances shrinks to the following meagre set: permits were issued to hold peaceful assemblies in selected areas (the fact that they contained a warning regarding the

possible criminal or administrative liability was ingeniously passed around in silence); only one carrier company sued the farmers for pecuniary damage; on one of the blocked roads passenger vehicles and vehicles that carried dangerous substances were still allowed through, and vehicles which carried goods and cars had been allowed to go through ten at a time on each side of the road; 'good faith negotiations' between the Government and the farmers had been ongoing; and the gathering did not involve violence (*ibid.*). Shelled out of their camouflage, these facts proved little. A more sophisticated argument therefore was added. The Chamber reproached the domestic courts for considering the case 'in the context of riot', which "did not allow for the proper consideration of proportionality of the restriction of the right of assembly and thus significantly restricted their analysis" (*ibid.*). This was not true: that analysis constituted an important part of the courts' reasoning, was thorough and contained references to ECtHR case law. Finally, the Chamber compared the situation of the protester, who, in its words, 'escaped' with an administrative fine, with that of the applicants, who "had to go through the ordeal of criminal proceedings and, as a result of criminal conviction, were given a custodial sentence" and were imposed, for one year, with a restriction concerning leaving their places of residence (*ibid.*).

The latter argument was striking, as the Chamber did not examine the circumstances of that protester's case; any pronouncement as to its merits was clearly outside the Court's competence. The comparison between that case and that of the applicants could only make sense, had the applicants claimed that they were discriminated by the domestic courts against other persons in situations comparable to theirs. But they did not raise such a claim. The Chamber's majority plainly took sides. Even more beyond the pale was the use, in a ECtHR judgment, of the word 'ordeal' for describing court proceedings in a Member State. For some observers and commentators it would look like a rhetorical question to ask whether such language did not reveal something that came close to bias.

The Lithuanian Government very seldom requests to refer a case, decided by the Chamber, to the GC. *Kudrevičius and Others* was an exception – and the only case where such a request was granted. The GC reversed the Chamber judgment.

An essential part of the GC's reasoning concerns the foreseeability of the criminal law provision applied. The applicants contested its foreseeability, alleging that the notion of 'serious breach of public order', as a defining criterion of 'rioting', was unclear.[86] The Chamber did not devote a sentence to this issue, which drowned in the hotchpotch of the general principles, the 'exonerating' facts and the considerations as to the necessity and proportionality of the measure taken. Even if the Chamber did not go so far as to state that the applicant's conviction had not been based on law, it assessed the lawfulness of that measure with scepticism. Its reproach that the courts considered the applicants' actions 'in the context of riot' revealed its view that rioting these actions were not. For the Chamber, the defining criterion for an action to constitute rioting was violence,

86 The applicants raised these arguments also in the context of Art. 7. Having found no violation of Art. 11, the GC considered that it was not necessary to carry out a separate examination of the complaint under Art. 7.

East European Yearbook on Human Rights 2019 (2) 1
doi: 10.5553/EEYHR/258977642019002001001

whatever the domestic law might say on this matter. The Chamber thus substituted its view on what had to be meant by 'rioting' for the meaning of this notion in the Lithuanian criminal law, in which rioting was a 'serious breach of public order', and rioting that involved violence but one of varieties of 'serious breach of public order'. Conversely, the GC's reading of this provision was adequate. It noted that the applicants were not convicted for committing acts of violence or damaging property, but for "otherwise seriously breach[ing] public order". While admitting the relative vagueness of the concept of 'breach of public order', the GC adopted a common-sense approach that "ordinary life [could] be disrupted in a potentially endless number of ways" and, therefore, "it would be unrealistic to expect the … legislator to enumerate an exhaustive list of illegitimate means for achieving a particular aim" and held that the interpretation of this notion by the courts was neither arbitrary nor unpredictable (§ 113). As to the fact that that criminal law provision was applied for the first time in no one else's but the applicants' case, the GC reasonably observed that "there [had to] come a day when a … legal norm [was] applied for the first time" (§ 115). The applicants thus could have foreseen that their actions, which entailed long-lasting roadblocks with ensuing disruptions of ordinary life, traffic and economic activities, could have been deemed to amount to a 'serious breach of public order' (§ 114).

The GC adequately read also the Court's case law, from which it did not stem at all that "a certain degree of tolerance towards peaceful gatherings" required that the authorities professed limitless tolerance to flagrant non-observation of the laws and overt overstepping of the limits of their permits to hold demonstrations. It was emphasized that "the appropriate 'degree of tolerance' [could not] be defined *in abstracto*": the particular circumstances of the case and particularly the extent of the 'disruption to ordinary life' had to be looked at (§ 155). It also was underlined that the intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others might justify the imposition of penalties, even of a criminal nature (for it was more significant than disruption caused by the normal exercise of the right of peaceful assembly). For the GC, the roadblocks were not justified by any current event warranting an immediate response; therefore, the moving of the demonstrations from the authorized areas onto the highways was a clear violation of the conditions stipulated in the permits, for which sanctions could be imposed on the applicants. Having looked into various aspects of the facts of the case under examination, the GC did not find the sanctions in question disproportionate.

With hindsight, *Kudrevičius and Others* taught a lesson not so much to the respondent State, but to the ECtHR. Although it is true that there have been not so few Chamber judgments, which suffer from the same faults as the Chamber judgment in this case, that is to say, the selective and one-sided interpretation of facts, misrepresentation of the Court's case law and the substitution of the Court's views on the interpretation of domestic law for that given by the domestic courts, in this case the GC not only rectified the Chamber's faults, but laid down consistent guiding principles for Article 11 cases.

Kudrevičius and Others also taught a lesson to the Lithuanian protesters. Although aggressive protests had taken place even after the delivery of the GC

judgment, since then neither the farmers nor other protesters had resorted to such actions as road-blocking (even if there were other drastic actions). Whether the case has made a broader impact on the Lithuanian society at large, is another question. In 2016, one of the 'Others' in *Kudrevičius and Others* was elected MP and became minister of agriculture. During his campaign he bragged about his victory in Strasbourg, citing the Chamber judgment. None of his opponents reminded him that his case did not end at the Chamber level. He soon was forced to resign from the post of minister after another law infringement-related controversy. In 2019, he was elected a mayor of one of the municipalities, in which the road-blockings in question took place.

6. *Vasiliauskas v. Lithuania:* A Lesson in History

In *Vasiliauskas*[87] the GC was split: nine votes against eight for finding a violation of Article 7. That Article enshrines that there should be no punishment without law; in other words, it prohibits the retrospective application of the criminal law to the disadvantage of an accused. *Vasiliauskas* dealt with one of the most painful periods of Lithuania's history, when there operated a nation-wide Movement of the Struggle for the Freedom of Lithuania – partisan movement against the Soviet occupation. The events under examination dated back to 1953, when the applicant, an officer in the Lithuanian branch of the Soviet State security services, was involved in the killing of two partisans. In 2004, he was convicted for genocide.[88] He complained that the interpretation of the crime of genocide, as adopted by the Lithuanian courts in his case, was too broad and had no basis in the wording of that offence, as laid down in international law: Article 99 of the Criminal Code provided for criminal liability for genocide of, *inter alia*, political groups, which the partisans allegedly were part of, although the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), prohibited certain acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group (Article 2) and did not include political groups among those protected by it.

The court of first instance sentenced Mr Vasiliauskas to six years of imprisonment. That court considered that, for Mr Vasiliauskas' actions to fall under Article 99 of the Criminal Code, it sufficed that his victims belonged to a political group of partisans. The Court of Appeal, however, essentially modified that interpretation. It held that the partisans had been representatives of the Lithuanian nation, *i.e.,* part of a national group, and that the Soviet genocide had been carried out on account of their nationality-ethnicity, which satisfied the requirement of the Genocide Convention for their killings to fall under the notion of genocide. This interpretation was upheld by the Supreme Court. According to the latter, Mr Vasiliauskas had to have known the Soviet government's goal to eradicate the resistance fighters.

87 *Vasiliauskas v. Lithuania* (note 23 *supra*). The author of this article was part of the GC's minority.
88 The final ruling of the Supreme Court was adopted in 2005.

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The Soviet criminal law did not contain any norm pertaining to genocide. Moreover, in 1953 there was no such thing as 'Lithuanian criminal law': in the Baltic States the Russian Criminal Code was applied. The crime of genocide was introduced into Lithuanian criminal law in 1992, soon after the reestablishment of independence. It was subsequently provided for in new Criminal Code, in force from 2003. Mr Vasiliauskas thus had been convicted based upon the provisions that had not been in force in 1953. Article 7 § 2, however, does not prejudice

> the trial and punishment of any person of 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.

As to whether Mr Vasiliauskas' conviction had been based upon international law as it stood in 1953, and whether he could foresee that he could ever be prosecuted for the participation in the killing of the Lithuanian partisans as genocide, the GC's answer was: no. It therefore found a violation of Article 7.

The finding of that violation was based on two premises. Firstly, the notion of genocide at that time did not cover political groups, which the partisans were part of, but only, insofar as it is relevant to this case, national and ethnical groups (despite the Lithuanian authorities' assertion that that political group was representing the Lithuanian nation as a national group). Secondly, the notion of genocide at that time included intentional destruction of the whole protected group or its part, provided that that part was substantial because of the very large number of its members (quantitative criterion), and only later it was developed, in the international case law, to include also intentional destruction of the part of the protected group, which was 'prominent' (qualitative criterion).

As to the first premise, the GC held that genocide had been recognized as a crime under international law in 1953, and international law instruments prohibiting it had been sufficiently accessible to Mr Vasiliauskas. At the same time, it held that at that time international treaty law had not included political groups in the definition of genocide, but only national, ethnical, racial or religious groups, and opinions were divided with regard to the scope of genocide under customary international law; therefore, it could not be established with sufficient clarity that customary international law had provided for a broader definition of genocide than the one set out in the Genocide Convention. The GC accepted that Mr Vasiliauskas' actions had been aimed at the extermination of the partisans as a separate and clearly identifiable group, characterized by their armed resistance to Soviet power. However, for the GC, it was not 'immediately obvious' that the ordinary meaning of the terms 'national' or 'ethnic', as employed in the Genocide Convention, could be extended to partisans, and the domestic courts' conclusion that the victims came within the definition of genocide as part of a protected group was "an interpretation by analogy, to the applicant's detriment, which rendered his conviction for genocide unforeseeable" (§ 183). Although the Lithuanian authorities averred that the partisans were representing the Lithuanian nation as a national group, the GC was not convinced. It did not state on its own behalf that the partisans did not represent the Lithuanian nation as a group pro-

tected under the Genocide Convention, but placed the responsibility for not proving that on no one else than the Lithuanian courts, which allegedly had not explained "what the notion 'representatives' entailed" and did not provide "much historical or factual account as to how the Lithuanian partisans had represented the Lithuanian nation" (the Court of Appeal), and did not interpret "the partisans' specific mantle with regard to the 'national' group" (the Supreme Court) (§ 179).

This reproach is falsifiable: it is possible to test its veracity. It is true that the first-instance court, the judgment of which never became final, rather formalistically convicted Mr Vasiliauskas for taking part in the destruction of the partisans as members of the political group, explicitly indicated in Article 99 of the Criminal Code. The Court of Appeal, however, devoted a crucial (even if not lengthy) part of its judgment for interpreting that the political group in question was representing the Lithuanian nation. The Supreme Court, as a court of cassation, upheld the judgment of the Court of Appeal; it was not its function to provide any additional interpretation of "the partisans' specific mantle with regard to the 'national' group". The reproach in question thus looks like carping at trifles. What is more, the 'explanation' of "what the notion 'representatives' entailed" and the "historical and factual account as to how the Lithuanian partisans had represented the Lithuanian nation", which the GC allegedly missed, constituted an essential part of the Constitutional Court ruling, adopted in an abstract review procedure, whereby the constitutionality of, *inter alia*, Article 99 of the Criminal Code was examined.[89] The GC, in its list of the Lithuanian courts that it reproached for not providing the requisite 'historical and factual account', ingeniously omitted the Constitutional Court. Even assuming that that omission was explainable by the fact that the Constitutional Court ruling was subsequent to Mr Vasiliauskas' conviction,[90] the relevant rather lengthy 'account' was there, in which the partisans' 'specific mantle' was made clear even to those who are ignorant in history of that part of Europe: the partisans constituted the backbone of the Lithuanian nation, which resisted Soviet occupation. They were numerous (quantitative criterion), but even more important was that they were prominent – a backbone of the nation (qualitative criterion). What is not 'immediately obvious' for some thus should have become 'obvious' upon examination.

Let us ask: how long or exhaustive should be an 'account', which the GC allegedly missed? How many details it should go into, in order to satisfy the ECtHR? Is it not capricious to require that domestic courts expand on what is known to every schoolboy in a respective society, even if it, alas, may be not known in Strasbourg? The Grand Chamber's judgment is silent and therefore obscure on these issues.

89 Constitutional Court ruling of 18 March 2014. The Constitutional Court upheld the broader concept of genocide, but recognized as unconstitutional another provision of the Criminal Code, insofar as it allowed for retroactive application of that broader concept.

90 The ruling was adopted not in Mr Vasiliauskas' case, then examined in Strasbourg. It was adopted in a case regarding the constitutionality of legislation, which originated in six criminal cases, in which six persons were tried for genocide, one of them the same Mr Vasiliauskas – for taking part in the capture of a partisan, who then had been deported to Siberia.

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The GC's refusal to see the Lithuanian partisans as representatives of the Lithuanian nation, as a group protected under the Genocide Convention, and consideration that they constituted 'only' a distinct non-protected political group must face a macabre paradox. It appears that a group is formally protected against destruction under the Genocide Convention, while it remains passive. However, as soon as one part of it takes arms to defend the whole protected group from destruction, that part becomes a distinct – political – group, which is not protected.

Regarding the second premise, on which the finding of a violation of Article 7 was based, the above-discussed 'explanation' that the partisans were representatives of the Lithuanian nation includes also the 'explanation' that they constituted a substantial – both numerous and prominent – part of the Lithuanian nation, as a group protected under the Genocide Convention.

The GC opined that the inclusion of the qualitative criterion of the notion 'in part' in the notion of genocide was a development, subsequent to the 1953 events under examination. This subsequent judicial interpretation of the notion 'in part' was done, in particular, in the cases brought before the international courts, such as the International Court of Justice or the International Criminal Tribunal for the Former Yugoslavia, where it was found that the intentional destruction of a distinct part of a protected group could be interpreted as genocide of the entire protected group, provided that the distinct part was substantial – if not owing to the very large number of its members, then owing to its prominence within the protected group. However, in the opinion of the GC, even if the international courts' subsequent interpretation of the qualitative criterion of the notion 'in part' was available in 1953, there was "no firm finding in the establishment of the facts by the domestic criminal courts" that would enable it to assess on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, *i.e.,* a group protected under the Genocide Convention. Well, if the qualitative criterion raised doubts, there was still available the quantitative criterion, and the statistical data were presented to the Court.

As a matter of principle, it would be cynical to maintain that the Genocide Convention, while prohibiting intentional destruction of the whole protected group or its part, which was numerous, at the same time implicitly established that the intentional destruction of its part, which, however prominent, was not so numerous, should not be deemed as genocide. This would effectively allow an ostensibly lawful 'piecemeal' destruction of the whole protected group or a big part of it.

International law is conservative, even if developing, even progressing. This conservatism is not a problem in and of itself. But the GC found it normal that *Realpolitik* was given priority over justice. For the non-inclusion, in 1948, of political or social groups in the list of groups protected by the Genocide Convention, as well as the narrow interpretation of the 'in part' clause, whereby it was limited only to the quantitative criterion, were a product of *Realpolitik*, in particular a reverence to the Soviet Union. And yet that concept has developed in international courts' case law, only this happened much later. For five decades after the adop-

tion of the Genocide Convention the international prosecution for genocide was a factually non-existent, so to say, only a theoretical reality, until in 1999 the first person was convicted for genocide by an international court, the International Tribunal for Rwanda. As mentioned, in *Kudrevičius and Others* the Court rightly affirmed that "there must come a day when a … legal norm is applied for the first time". This should hold true also to international law on genocide.

Be that as it may, the GC was not convinced that Mr Vasiliauskas, "even with the assistance of a lawyer, could have foreseen that the killing of the Lithuanian partisans could constitute the offence of genocide of Lithuanian nationals or of ethnic Lithuanians" (§ 181). The latter sentence has come from parallel reality. For in real life of the Stalinist USSR, it was unimaginable that anyone (not only Mr Vasiliauskas) could have asked for a lawyer's advice as to whether his actions, by which the Soviet state's policy had been implemented, would or would not constitute genocide, or that any lawyer would have pronounced himself on this matter. Both the asker and the answerer would have ended up somewhere where the legal profession was not practiced. This is what indeed is 'immediately obvious'.

The GC rejected the possibility, and with not much of reasoning, that Mr Vasiliauskas conviction could have been justified under Article 7 § 2. It admitted that the Court had, 'on only one occasion', applied Article 7 § 2 in the context of post-World War II and Soviet deportations,[91] but at the same time reminded of 'the original and exceptional purpose of that paragraph', which was

> to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 [did] not in any way aim to pass legal or moral judgment on those laws … . (§ 189)[92]

The GC did not address the fact that, while 'the wholly exceptional circumstances' for Belgium – for it was the Belgian case in which that 'original and exceptional purpose' was defined[93] – materialized in the 1940s, which for that State was 'the end of the Second World War', for Lithuania (and two other Baltic States, Latvia and Estonia) similar 'exceptional circumstances' came into being only in the 1990s, when she regained her independence, which was lost during World War II, whose one of the principal winners (which even had no Article in its criminal legislation to deal with genocide) continued to occupy her, after that war was over for most other States. The same goes for the second reference, on which the finding that the applicant's conviction could not be justified under Article 7 § 2 was based, namely, that

91 *Kolk and Kislyiy v. Estonia* (dec., no. 23052/04, 17 January 2006); *Penart v. Estonia* (dec. no. 14685/04, 24 January 2006). Those were already two 'occasions'. Also *cf. Larionovs and Tess v. Latvia* (dec., 45520/04, 25 November 2014).

92 *Kononov v. Latvia* (note 39 *supra*).

93 In the above-provided citation from *Kononov v. Latvia* (note 39 *supra*) the reference is made to *X. v. Belgium* (no. 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241).

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> Article 7 § 2 is only a contextual clarification of the liability limb of [the general] rule [of non-retroactivity contained in Article 7 §], included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war

and that "the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity" (§ 189).

Mr Vasiliauskas was convicted for genocide yet in another case.[94] He applied to the Strasbourg Court regarding this conviction, too. He, however, died two weeks after the judgment in his GC case was delivered. His wife and daughter supported his second application, but at some point in time their lawyer stopped communicating with the Court and the case was struck out of the Court's list of cases.[95]

As to the judgment in Mr Vasiliauskas' GC case, having been requested by his heirs the Supreme Court reopened his criminal proceedings. Its plenary session pointed out that both the Constitutional Court[96] and the Supreme Court in a recent case of Mr Drėlingas (discussed below) had provided extensive explanations about the nature of the Soviet repression against the Lithuanian partisans, as well as answers to the question why the Lithuanian partisans, their liaison persons and their supporters had constituted a significant part of the Lithuanian nation, as a national and ethnic group protected under the Genocide Convention, and held that these explanations allowed the conclusion that the extermination of the partisans could be considered genocide, both under Article 99 of the Criminal Code and under international law. The Supreme Court considered that the GC's doubts as to whether partisans could be treated as part of a protected national or ethnic group were chiefly prompted by the fact that in Mr Vasiliauskas' case the Lithuanian courts had not provided a wider historical and factual account as to how the Lithuanian partisans had represented the Lithuanian nation and that their role with regard to the protected national group had not been interpreted. The Supreme Court thus conceded to the GC's reproach. In particular, it condescended to the GC that the argumentation of the Court of Appeal in Mr Vasiliauskas' case was clearly insufficient to justify the conclusion that he had been convicted on charges of the genocide of a national group and that therefore during the criminal proceedings he had not been in the position of knowing the nature of that criminal charge and being able to defend himself against it effectively. In a *mea maxima culpa* move, the Supreme Court also acknowledged that at that time it also had not explained the partisans' particular significance for the national and/or ethnic group. The breach of Article 7,[97] which Mr Vasiliauskas' conviction constituted, could have been remedied only by amending the criminal charges. That had been impossible because of the death of Mr Vasiliaus-

94 Note 90 *supra*.

95 *Vasiliauskas v. Lithuania* (dec., no. 58905/16, 13 December 2018).

96 In its ruling of 18 March 2014.

97 And Art. 31 § 4 of the Constitution, which provides that punishment may be imposed or applied only on grounds established by law.

kas. The court decisions in his case therefore were quashed, and the criminal case was discontinued.

The CM, which supervised the execution of the *Vasiliauskas* judgment, was satisfied with all the measures taken by the respondent State[98] and closed the examination.[99] As to the individual measures, it considered that no further individual measures were necessary, given that the just satisfaction has been paid to the applicant's heirs and his criminal conviction has been quashed. As to the general measures, it stated that

> the main problem in the case of *Vasiliauskas* was that political groups did not fall within the protected groups under the offence of genocide as defined in international law at the material time;

however, for the CM, the developments in the Lithuanian courts' case law prevented similar violations. In particular, the CM was satisfied, *inter alia*, that (i) the Constitutional Court found the broad notion of genocide as provided by Article 99 of the Criminal Code (which included social and political groups in the range of protected groups) compatible with the Constitution, but not applicable retroactively, and concluded that "actions which took place at an earlier date and which had been directed against certain political and social groups might constitute genocide if it could be proved that the aim was to destroy groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation", as well as that "Lithuanian partisans constituted such a group, taking into account their activity during the 1944-1953 partisan war"; (ii) "the Supreme Court's judgment [in Mr Drėlingas' case (discussed below) took] into account the Court's findings in *Vasiliauskas* and expressly acknowledge[d] that the crime of genocide against political groups [could not] be applied retroactively"; (iii) in that judgment there were [provided] "comprehensive historical and factual accounts as to how the partisans represented the Lithuanian nation, as well as substantial explanations for the finding that in 1953 the Lithuanian partisans constituted a significant part of the national group and were therefore protected by the 1948 Genocide Convention"; (iv) in another case, in which a person charged with genocide had been acquitted, the Supreme Court noted that he had not acted with the special intent required for conviction of genocide; however, when it did find such intent in Mr Drėlingas' case (discussed below), it explained why an intention to destroy the partisans constituted intent to destroy part of a national group, which it had failed to do in *Vasiliauskas*. It was concluded that "the shortcomings identified by the Court ha[d] been rectified in the domestic case-law at the highest level".

This was not the end, but a new beginning. In December 2017, at the time when the CM was debating the implementation of the *Vasiliauskas* judgment, a new application was pending before the Court, submitted by Mr Drėlingas, the

98 Notes on the Agenda, prepared by the Council of Europe Committee of Minister's Secretariat, for the Committee of Ministers meeting of 5-7 December 2017.

99 CM/ResDH(2017)430.

East European Yearbook on Human Rights 2019 (2) 1
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outcome of (and the reasoning in) whose case the CM so positively assessed. In March 2019, the Court (Chamber) found no violation of Mr Drėlingas' Article 7 rights.[100] It, *inter alia*, looked into whether the lack of clarity in the domestic case law (of which the GC reproached the Lithuanian courts in *Vasiliauskas*) has now been dispelled, and if so, whether the relevant requirements have now been met in the applicant's case.[101] Legal aspects aside, for Lithuania this case was as sensitive as one could be, for the victims of Mr Drėlingas and his accessories were Mr Ramanauskas-Vanagas and his wife. Mr Vanagas was the chairman of the Movement of the Struggle for the Freedom of Lithuania, which in 1949 had declared itself "the highest political authority of the nation, leading the nation's political and military struggle for freedom". In 1956, when the resistance movement had been already suppressed and only isolated groups of partisans were operating, he was captured together with his wife, tortured and killed.

The Chamber judgment in *Drėlingas* has not become final. The applicant has submitted a request to refer the case to the GC. At the time of writing of this article (June 2019) that request has not been examined yet.

To be continued?

7. Conclusion

The story of the Lithuanian cases (like those against other States) in the ECtHR Grand Chamber has no conclusion. It is a never-ending journey. Future cases may raise legal issues, not even distantly related to those raised by the five cases discussed here. They also may teach different lessons on matters non-legal: both to Lithuania (and other States) and to the ECtHR itself.

Whereas there is an institutional mechanism in place allowing to control and test, at least to some extent, to what extent the Member States have learned their lessons from the Strasbourg Court's case law, there is no and there cannot be such mechanism applicable to the Court itself.

The narrative given in this article reflects a personal attitude. I have not attempted to hide my relation to the cases discussed. The overall balance is somewhat ambiguous. While I am fully in agreement with the judgments in *Cudak*[102] and *Kudrevičius and Others*,[103] I cannot support the reasoning in *Ramanauskas*[104] (and the 'just' satisfaction awarded in that case), although I accept the finding of a violation of Article 6 § 1. Still, the same finding could have been reached without resorting to the unreasonably absolutist 'not wholly improbable' clause.

100 *Drėlingas v. Lithuania* (no. 28859/16, 12 March 2019). The author of this article was part of the Chamber's majority (five votes to two).

101 *Cf. Hutchinson v. the United Kingdom* (no. 57592/08, 17 January 2017).

102 *Cudak v. Lithuania* (note 8 *supra*).

103 *Kudrevičius and Others v. Lithuania* (note 43 *supra*).

104 *Ramanauskas v. Lithuania* (note 7 *supra*).

The two other judgments, *Paksas*[105] and *Vasiliauskas*,[106] in my opinion, represent 'library law' *par excellence*; the second one, in addition, is as insensitive to the suffering of people as could be. However, there is no court that would not have had its *korematsus*.[107] Pretending that the ECtHR has never produced them would be untrue and hypocritical. Believing that it will never produce new ones would be naïve and self-deceptive. But it is worthwhile to put all effort to avoid them, or at least mitigate their impact.

It is said that hard cases make bad law. *Korematsus* originate in hard, borderline cases, moreover, in those of them that raise not only difficult legal but also moral (social, political etc.) dilemmas. They can be avoided, or at least their impact may be assuaged, if lessons on matters non-legal, which the Court deals with, are taken seriously. For it is *not only law* that the Strasbourg Court deals with. In the end, it even may be *not law*. It is, first of all, justice. And justice has more than one – legal – dimension.

In hundreds of ECtHR judgments it is asserted that the Convention is a 'living instrument'. The emphasis is usually put on the word 'living', which rightly conveys that the Convention is in ceaseless development.

No less important is that it is an 'instrument'.

Sapienti sat.

Post scriptum. Authors writing on any court's (not only the ECtHR's) case law, compete with time. The race with time is almost always a hopeless enterprise, because the case law is in ceaseless development: while the texts are being edited and printed, new case law comes into being. This renders many publications a bit outdated upon their very appearance. This article promised to be not an exception in this regard. Still, I am happy that very pertinent most recent developments could be mentioned at the very last moment, even if in a postscript – and I must not miss to thank the editors for their extraordinary flexibility. The developments in question are the following. (1) the *Kosaitė-Čypienė and Others* judgment (note 3 *supra*) has become final on 4 September 2019, none of the parties having requested the case to be referred to the GC. (2) As many as sixteen post-*Matiošaitis* applications (note 15 *supra*) have been struck out of the Court's list of cases by a Chamber decision, as the new domestic legislation has been considered to have resolved the matter giving rise to the respective complaints, as provided for in Article 37 § 1 (b) (*Dardanskis and Others v. Lithuania*, dec., nos. 74452/13, 583/14, 23542/14, 24971/14, 32519/14, 38916/14, 46591/14, 46640/14, 49765/14, 60038/14, 14696/14, 16039/15, 19405/15, 23905/15, 24187/15 and 33339/17, 18 June 2019). (3) The constitutional amendment lifting the permanent ban on impeached politicians (and other officials) to stand in parliamentary elections, has been (again) presented to the Seimas on 24 September 2019; the

105 *Paksas v. Lithuania* (note 9 *supra*).

106 *Vasiliauskas v. Lithuania* (note 23 *supra*).

107 I refer, in the appellative sense, to *Korematsu v. United States* (323 U.S. 214 (1944)), the U.S. Supreme Court case concerning the constitutionality of the executive order, which called for internment of Americans of Japanese ancestry during World War II, regardless of citizenship. The Supreme Court by six votes to three upheld the order as constitutional.

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deliberations (and presumably the first of the two required rounds of voting) are scheduled for 10 December 2019. The proposed amendment aims at implementing the ECtHR judgment in *Paksas*, but not the views of the HRC in the same 'author's' (a strange term employed by HRC) case before that Committee (both dealt with in Chapter 4 *supra*); if adopted, it would still not allow Mr Paksas to run for the position of the President of the Republic. (4) The *Drėlingas* judgment (dealt with in Chapter 6; note 100 *supra*) has become final on 9 September 2019, after the panel of five judges (Article 43 § 2) had rejected the applicant's request to refer the case to the GC. This is how the things stand in the end of September 2019.