Strasbourg, 26 April 1999
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Restricted
CDL (99) 13 rev.
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA

R U L I N G

On the compliance of the death penalty
provided for by the sanction of Article 105
of the Republic of Lithuania Criminal Code
with the Constitution of the Republic of Lithuania

Vilnius, 9 December 1998

Case No. 2/98

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On the compliance of the death penalty provided for by the sanction of Article 105 of the Republic of Lithuania Criminal Code with the Constitution of the Republic of Lithuania

Vilnius, 9 December 1998

The Constitutional Court of the Republic of Lithuania, composed of the Judges of the Constitutional Court Egidijus Jarasiunas, Kestutis Lapinskas, Zigmas Levickis, Augustinas Normantas, Vladas Pavilonis, Jonas Prapiestis, Pranas Vytautas Rasimavicius, Teodora Staugaitiene, and Juozas Zilys,

with the secretary of the hearing—Daiva Pitrenaite,

in the presence of:

the representatives of the petitioner—a group of members of the Seimas of the Republic of Lithuania—Dr. Stasys Staciokas, Chairman of the Seimas Legal Committee, and Egidijus Bickauskas, a Seimas member,

the representative of the party concerned—the Seimas of the Republic of Lithuania—Juozas Nocius, a consultant to the Legal Department of the Seimas Chancery,

pursuant to Part 1 of Article 102 of the Constitution of the Republic of Lithuania and Part 1 of Article 1 of the Republic of Lithuania Law on the Constitutional Court, on 16 November 1998 in its public hearing conducted the investigation of Case No. 2/98 subsequent to the petition submitted to the Court by the petitioner—a group of Seimas members—requesting to investigate if the death penalty which is provided for by the sanction of Article 105 of the Republic of Lithuania Criminal Code was in compliance with Articles 18, 19 and Part 3 of Article 21 of the Constitution of the Republic of Lithuania.

The Constitutional Court

has established:

I

The petitioner—a group of Seimas members—requests to investigate if the sanction of Article 105 of the Republic of Lithuania Criminal Code (hereinafter in the ruling referred to as the CC) which provides that an individual may be sentenced to death is in compliance with Articles 18, 19 and Part 3 of Article 21 of the Constitution.

The request of the petitioner is based on the following arguments.

Now in force Article 105 of the CC (the wording of the Republic of Lithuania law of 3 December 1991, the law of 8 June 1995 and the law of 30 April 1997) provides that for murder with aggravating circumstances an individual may be sentenced to death.

Article 18 of the Constitution indicates that the rights and freedoms of individuals shall be inborn. The most important human right is the right to life. Under Article 19 of the Constitution, the right to life of individuals shall be protected by law. Thus, there should exist no laws permitting to deny an individual's right to life.

Part 3 of Article 21 of the Constitution provides that it shall be prohibited to torture, injure, degrade, or maltreat a person, as well as to establish such punishments. Even though under Article 105 of the CC the death penalty may only be imposed on persons who have committed a grave crime, i.e. murder with aggravating circumstances, however, the gravity or cruelty of crime may hardly be deemed to be the basis for the cruelty of the punishment. In the course of carrying out of the death sentence sufferings are caused which may be assessed as a form of torture of a person.

II

In the course of the preparation of the case for the court hearing, the representative of the party concerned J. Nocius agreed with the opinion of the petitioner in that the death penalty is not in line with the provisions of the Constitution.

The most evident contradiction is that between the disputed criminal law and Part 3 of Article 21 of the Constitution. Articles 22, 24 and 105 of the CC provide for a possibility of imposition of the death penalty for murder with aggravating circumstances, i.e. of deprivation of the life of the offender, by shooting him. Meanwhile Part 3 of Article 21 of the Constitution stipulates that it shall be prohibited to torture, injure, degrade, or maltreat a person, as well as to establish such punishments. It is not directly stated in the Constitution that it shall be prohibited to establish punishments whereby an individual is deprived of his life, but this is evident by itself from the context as the Constitution prohibits to establish punishments which may injure an individual. An individual is injured not only by flogging, torture, cutting off a part of the body and like punishments, which are not provided for by our criminal law, but also by shooting, which is provided by the law. The discrepancy between the criminal law and the Constitution would not be removed even if this way of execution

were changed to a more humane way of execution. It is impossible to carry out the death penalty without terminating the physiological functions of the body of the sentenced individual, without influencing his organism so that he would die, i.e. without injuring him in one or another way.

III

In the course of the preparation of the case for the court hearing, the explanations of A. J. Backis, the Archbishop Metropolitan of Vilnius, E. Zingeris, Chairman of the Seimas Human and Citizens' Rights and Nationalities Affairs Committee, K. Pednycia, Prosecutor General of the Republic of Lithuania, Dr. T. Birmontiene, Director of the Lithuanian Centre for Human Rights, Dr. A. Dobryninas, Head of the Social Theory Department of the Faculty of Philosophy of Vilnius University, Dr. L. Labanauskas, President of the Union of Physicians of the Republic of Lithuania, Habil. Dr. V. Vadapalas, Director General of the Department of European Law, A. Dapsys, Director of the Law Institute, Dr. K. Stungys, Dean of the Law Academy of Lithuania, and Dr. M. Bloznelis, Chairman of the Kolyma Association of Political Prisoners of Lithuania, were received.

In the opinion of A. J. Backis, it is not allowed to resort to the strictest means and sentence an individual to death without a necessity. Society may be protected by other ways. Today, upon consequent improvement of the organisation of the penal system, the necessity to punish by death is very rare, and in practice, perhaps, not necessary. At present in Lithuania it is possible to protect society against offenders by other ways, by trying to avoid to impose the death penalty. By abolishing the death penalty, one would express esteem to every individual's life. Besides, the abolition of the death penalty would be a sign that one is not willing to deprive life for life, and that it is possible to introduce more humane ways in order to prevent crime.

E. Zingeris, on the grounds of not only legal but other motives as well, drew a conclusion that it is necessary to abolish the death penalty and ratify Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

K. Pednycia pointed out in his explanation that taking account of the complicated criminogenic situation as well as the interests of society and the state, the death penalty may be left in the list of punishments for a limited period of time, while later it would be possible to refuse it, as, by the way, is provided for by a new draft Criminal Code. The best possible decision regarding expediency of the death penalty could be adopted by a referendum.

In her explanation T. Birmontiene draws one's attention to the fact that after the end of World War II during which many lives were taken, catalogues of human rights were introduced in various national and international documents. All they began with an individual's right to life. This is so in one of the most important documents on human rights issues, too, i.e. the Universal Declaration of Human Rights adopted by the United Nations (UN) in 1948, and which has served as the basis for many conventions on human rights.

Taking account of the 50-year evolution of the interpretation of the right to life as provided for by the Universal Declaration of Human Rights, the provision of Article 19 of the Constitution whereby the right to life of individuals shall be protected by law should be

interpreted as prohibiting not to protect by law the right to life of any individual, including one who has committed a grave crime.

According to A. Dobryninas, the death penalty would not contradict the right to life only in case it is proved that it protects the life of other people. The criminological research, however, shows that no correlation as a causal link has been found between the death penalty and the protection of human life. The capital punishment issue is not only a logical or legal problem but also a political one. Both social and political theories link the death penalty with the problem of legitimation of power. It is through punishments that power reveals its capacities to control society. Every punishment, including capital punishment, reflects certain cultural and historical aspects, and it is due to this that the public opinion regarding the death penalty issue may change so radically. Public opinion is a quite serious and important element of legitimation of power, and especially in a democratic society. Public opinion and public standpoint concerning the death penalty largely depend on the social safety of the public and on whether public authority is capable of ensuring social order. This is clear from the conducted research. The respondents were asked if they approved of the death penalty having in mind that a dangerous criminal is properly isolated or socially reintegrated. Most of the respondents acknowledged that in such a case the death penalty is not necessary. Thus, even though in general 70-80 per cent of the respondents speak for the death penalty, but when they are ensured that the criminal will be isolated, they change their view. This shows that public opinion supports justice and order.

L. Labanauskas noted that due to a very bad criminogenic situation in Lithuania, the criminal laws of this country should provide for capital punishment for grave crimes.

It is maintained in the explanation of V. Vadapalas that at the present time there is an evident tendency in the world to abolish the death penalty.

An analysis of the documents of the Council of Europe and the European Union shows that the abolition of the death penalty becomes a compulsory norm in Europe.

The Parliamentary Assembly of the Council of Europe pointed out in its Recommendation 1246 (1994):

“The Assembly considers that the death penalty has no legitimate place in the penal systems of modern civilised societies, and that its application may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the European Convention on Human Rights.

It recalls, furthermore, that the imposition of the death penalty has proved ineffective as a deterrent, and, owing to the possible fallibility of human justice, also tragic through the execution of innocent people.”

In 1994 the Council of Europe established a condition for each state which wants to become a member of the Council of Europe to burden itself with an obligation to abolish the death penalty. Resolution 1044 (1994) of the Parliamentary Assembly of the Council of Europe provides that the willingness to sign and ratify Protocol No. 6 to the European Convention on Human Rights and to impose a moratorium on the death penalty upon becoming a member of the European Union should be made a prerequisite for membership of

the Council of Europe. Due to this all new members of the Council of Europe stated that they will meet this prerequisite. The 1997 summit of member states of the Council of Europe urged that the death penalty be abolished universally and that until then the current moratorium on executions be retained.

The abolition of the death penalty is also a condition for membership of the European Union although no legal act of the European Union has established such a formal condition yet.

In the 10 November 1997 Conference of the Representatives of the Governments of the Member States of the European Union in which the Treaty of Amsterdam Amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts was adopted, the Declaration on the Abolition of the Death Penalty was adopted also.

In the jurisprudence of the institutions of the European Convention for the Protection of Human Rights and Fundamental Freedoms an apparent tendency to recognise that the application of the death penalty may be qualified as an inhuman and degrading punishment becomes discernible.

V. Vadapalas noted that the Republic of Lithuania has joined certain international agreements which establish certain limitations on the application of the death penalty, viz., the International Covenant on Civil and Political Rights, the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Paragraph 2 of Article 6 of the International Covenant on Civil and Political Rights provides that “in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.” Paragraph 5 of the said article stipulates that “sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”

V. Vadapalas is of the opinion that the Republic of Lithuania, which is a member of the Council of Europe and signatory to the European Convention on Human Rights, must abolish the death penalty in time of peace at least. Carrying out of the death penalty in the Republic of Lithuania may be assessed as contradicting the provisions of Part 3 of Article 21 of the Constitution and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

A. Dapsys indicated in his explanation that the CC provides for the purpose of punishment. The death penalty is hardly compatible with the provisions of Article 21 of the CC as the convict is ultimately deprived of an opportunity to commit new crimes. Therefore capital punishment is not a punishment. It is just another legalised way of deprivation of life or physical destruction of the criminal which, in this case, is carried out by the state.

The criminological research shows that the presence or absence of the death penalty has little influence on the crime rate in this country. The culprit rarely considers the

punishment at the time of the commission of the crime. Part of murders are committed in a fit of passion. Therefore it is impossible to maintain that the presence of the death penalty serves as a deterrent from crimes. Part of murderers after the commission of murder become not dangerous to society as the actual reason of the crime (e.g. revenge) has disappeared.

The conducted research shows that part of murders for commission of which with aggravating circumstances the CC provides for the death penalty are committed by individuals are partially insane or those who are on the verge of it. It means that at present in Lithuania there is a danger that individuals who are mentally deranged may be sentenced to death. Upon sentencing an individual to death and carrying out this punishment, the mistakes, which, as history shows, occur, become irremediable. An innocent individual may become a victim of such a mistake.

K. Stungys explained that, along with the said articles of the Constitution, there are other normative acts which ensure the right of an individual to life. All these acts establish the obligation of society and its particular individuals to respect and protect human life. The people who commit grave crimes and consciously and maliciously murder other people are not protected by the said legal norms which regulate normal relations. To speak categorically against the death penalty means to give a privilege to the murderer in respect to the victim.

M. Bloznelis drew a conclusion that the criminal laws should refuse the death penalty. It may only be applied in time of war or in extreme cases.

IV

In the Constitutional Court hearing the representatives of the petitioner virtually reiterated the arguments set forth in the petition.

According to S. Staciokas, the right to life is the basis of all human rights. Without it there are no other human rights. If the right of an individual to life is not ensured and realised, the subject of human rights disappears after deprivation of his life.

The preamble of the 1992 Constitution which has been approved by the citizens of the State of Lithuania, on the basis of the traditions of its People and that of modern civilisation expresses an essential value of human mode of living, i.e. to embody the inborn right of each person and the People to live and create freely in the land of their fathers and forefathers. Article 18 of the Constitution specifies: “The rights and freedoms of individuals shall be inborn.” Thus the Constitution secures the inborn human rights for all and everyone. This is a fundamental constitutionality principle of the Constitution as well as the constitutional order which is built on the grounds whereof: the state is obligated to protect and safeguard the inborn human rights.

However, in the course of the drafting of the text of the Constitution, the right of an individual to life was formulated only by a general statement (Article 19): “The right to life of individuals shall be protected by law.” The text of the Constitution does not say anything as for the prohibition of the death penalty or its permissibility under certain exceptional circumstances. This constitutional clause does not permit to provide for any restrictions of or exceptions to this right. The aforesaid provision is positive and not negative or even not

alternative. It is evident that it is impossible to protect one's life by providing for an opportunity to deprive one of his life by law. Besides, an individual's life, as a category of subjective law, may not be differentiated. An individual either is alive or is not alive. Life cannot be temporarily restricted as in case of other types of punishment (for instance, the term of imprisonment or temporary restrictions of other rights of an individual).

S. Staciokas emphasised that there are no reliable scientific proofs which could justify the application of the death penalty, and the death penalty often is a peculiar calming of a certain part of the public that is not sufficiently informed. It has been established, however, that most of the criminals who commit grave crimes do not think about the awaiting punishment at the time of crime. Thus the death penalty, by its essence and "strictness", is not justified as a deterrent from grave crimes.

In its essence, the death penalty is not a punishment. It is a way of having done with individuals, which is, one way or the other, not within the limits of law. There is always a possibility that an innocent individual may be sentenced.

The presence of this punishment also has a direct impact on the reform of the overall system of punishments in Lithuania. The fact that the death penalty is still formally lawful, supports in society a not overly positive stance in respect to the policy of mitigation of punishments. The death penalty only consolidates the idea that the state is a force which, in order to protect certain public values, is capable of making use of even the most inhuman means "in case of need." This view is, however, not logical and it may never be true.

In its essence, the death penalty stands out in the system of punishments, as well as the comprehension of legal responsibility and the aims of punishment. A criminal punishment as a means of accomplishment of criminal responsibility has its specific objectives which are differently emphasised in different states, however the following points are commonly recognised: correction, reeducation, isolation, public protection (characteristic of the doctrine of normative law), attempt to reintegrate into society (characteristic of social doctrines). All these matters are linked with a concrete subject and restrictions applied to him, which is the essence of legal responsibility (social, material and other restrictions and limitations). The death penalty does not correspond with the essence of the means of accomplishment of responsibility as its implementation is linked not with a restriction but with the "elimination" of the subject from society.

In its essence the death penalty may not be a genuine punishment also due to the fact that it is absolute or, in other words, it is final and fatal. After it has been carried out, it may not be changed. Meanwhile, justice may never be fatal. Justice is a process but not a one-time act. In other words, justice is implemented by always leaving an opportunity to rectify a possible mistake or change the judgement in the light of new circumstances. Sometimes motives are presented that mistakes in cases wherein the death sentence is passed are very uncommon. These motives are unacceptable as a possibility of only one such erroneous sentence is dangerous to justice as the most important value of people's mode of living. The motives justifying the death penalty which are presented in this case at law may not be held valid, either. Even in this century in a number of states there have been cases when a court made a fatal mistake in passing the death sentence.

Concerning the request of a group of Seimas members whether the provisions of the CC on the death penalty are in compliance with Part 3 of Article 21 of the Constitution, the representative of the petitioner pointed out that from a psychological standpoint one of the most touchy aspects of the abolition of the death penalty is the relation between the murderer and his victim. The criminal must receive a proper punishment for the crime committed. A murderer must be punished with the most severe punishment: an alternative to the death penalty is life imprisonment. This is a permanent restriction of all his human rights but his right to life is preserved. However, the prevailing public view is that such a punishment is not adequate to the crime committed and the grief of the nearest and dearest of the victim. The constitutional problem is whether the adequacy of the criminal action is the same action in respect to the criminal. On the psychological basis such a stance is understandable. However, if this logic is applied to other categories of crimes, it becomes clear that the principle that "a criminal action must be punished by the same action" is unacceptable. The criminal who has maimed his victim may not be maimed in like manner. This is unacceptable to modern civilisation part whereof is our Constitution as well.

The representative of the petitioner E. Bickauskas underlined that the death penalty issue is inseparable from the general policy of punishments, as well as the issues of punishments becoming more severe and more rational. Since 1990 till now in Lithuania the crime rate has more than doubled. The number of individuals sentenced for imprisonment has increased more than 3 times. If compared to European countries, these are one of the biggest numbers. Today there are already 300,000 residents of Lithuania who have been sentenced for imprisonment. The effective CC, even though virtually completely amended after the Soviet times, is, perhaps, one of the most severe in Europe and it is further being developed in the direction of making it stricter. Thus the combat with crime is often a mere appearance. For example, after the punishment for thefts of vehicles had been made more severe, there were not less thefts, but, on the contrary, there were more of them. One of the most popular arguments justifying the death penalty is that on its abolition crime would increase further, as well as there would be more murders. It is maintained that the death penalty is a deterrent. However, in reality making punishments more severe has not any impact on the crime rate. Certain data received after questioning individuals who committed crimes punishable by death shows that even nine out of ten were not thinking at the time of the commission of the crime about the awaiting punishment. In the general conclusion of the results of the investigation into possibilities of the abolition of the death penalty conducted on the initiative of the United Nations it is pointed out that no scientifically grounded data which could confirm that the death penalty is a greater deterrent than life imprisonment have been obtained. This is also shown by the practice of the states which refused this punishment. Since 1996 in Lithuania the death penalty has not been carried out. This is known by the public, as well as the criminal world, but during this time period there was a significant decrease in murders. Thus, it is possible to assume that the impact of the application of such a punishment in the combat with crime is often overestimated. The death penalty as well as limitless making other punishments more severe is not the key to the solution of the problems of crime but it creates an illusion that crime is fiercely fought against and it diverts one's attention from much more complex solutions. It has been established that most of the individuals who for murder have been sentenced not to death behave in the place of their confinement much better than those imprisoned for crimes of different nature. Their rate of repeated crimes is, if compared to the others, even less. In Lithuania there has been not any analysis of death sentences. In 1987, after a similar investigation into the subject had been conducted in the USA, it was established that even 350 individuals from among those who

were executed in 1900-1985 were innocent. The death penalty totally deprived of a possibility to rectify the mistake. It is also possible to state that there were also such individuals among those who had been sentenced to death who would not have committed any crime in the future. Society has many possibilities to show its negative attitude to the crime and the criminal without the death penalty. The right to life is the basis of all human rights, therefore the death penalty issue is not only a legal problem or that of the combat with crime. This is a moral problem which is common to all society and due to the existence whereof the main human rights are violated. Inborn human rights are granted not by the state, therefore it has hardly any right to confer them for good behaviour or to deny them for misbehaviour.

V

In the Constitutional Court hearing, the representative of the party concerned additionally pointed out that the sanction of the effective Article 105 of the CC providing for the death penalty virtually has not been amended after the adoption of the new Constitution. The Seimas did not abolish the death penalty but it formulated new wordings of Articles 22 and 24 of the CC which provide for the death penalty. On 21 April 1998 the CC was supplemented by Article 71 on genocide by the sanction of Part 2 whereof the death penalty is provided for also. It means that the Seimas actually is for the death penalty.

The representative is of the opinion that the attitude of the petitioner that the death penalty contradicts Article 18 of the Constitution is subject to discussion. The Constitution holds that freedom of individuals shall be protected by law. The freedom of an individual is also an inborn right which is protected by law. However, courts often give punishment of imprisonment for commission of a crime. The effective CC even provides for life imprisonment.

VI

In the Constitutional Court hearing the specialists—E. Zingeris, Chairman of the Seimas Human and Citizens' Rights and Nationalities Affairs Committee, T. Birmontiene, Director of the Lithuanian Centre for Human Rights, A. Dobryninas, Head of the Social Theory Department of the Faculty of Philosophy of Vilnius University, V. Vadapalas, Director General of the Department of European Law, spoke. They virtually reiterated their arguments set forth in writing.

The Constitutional Court

holds that:

1. In the Criminal Code the death penalty is referred to in four articles: Article 22 of the general part of the CC which establishes the system of punishments; Article 24 which defines the exclusive nature of the death penalty; as well as Article 105 of the special part of the CC which provides for the death penalty for murder with aggravating circumstances; and Article 71 which provides for the death penalty for genocide with aggravating circumstances.

Defining the system of punishments, Article 22 of the CC exhaustively, in a certain order, sets forth all types of punishments as an indivisible whole. This system establishes punishments of different content and strictness, and which by individual punishments or in combination with the others permits to seek the ends raised to the punishment. In Article 22 of the CC all punishments are grouped into main and complementary. One of the four main punishments is the death penalty. Along with it, the said article provides for imprisonment, correctional labour without imprisonment and a fine. It is also established by the article that, in cases provided for by the law, the convicts may be given complementary punishments together with the main ones.

Defining the death penalty, Article 24 of the CC specifies that it is an exclusive punishment. The exclusive nature of the death penalty is determined by the following circumstances:

(1) This punishment may be given for two crimes only as provided for by the CC, i.e. murder with aggravating circumstances and genocide. (2) The death penalty may be imposed only when the murder which is specified by Article 105 of the CC is completed. (3) The death penalty may not be imposed, and, if imposed, carried out on women and persons who at the time of the commission of the crime were under eighteen years of age. Nor may the death penalty be imposed when the law permits the court to decide whether to bring someone to criminal responsibility and carry out the judgment in cases when a crime punishable by death has been committed but the prescription period has ended also. In case the court recognises that it is impossible to apply prescription in a concrete case, the death penalty is changed for imprisonment. (4) A court, after it has imposed the death sentence on an individual, may change it by life imprisonment. (5) The death penalty may be changed for life imprisonment under the amnesty or clemency procedure.

The common features of the crime of genocide are specified in Part 1 of Article 71 of the special part of the CC. These are actions by means of which one attempts to destroy all or part of the population belonging to a certain national, ethnic, racial, religious, social or political group, and which are manifested by brutal torture, heavy bodily injuries, impediment of the mental development of the members of the said groups; by purposeful creation of such living conditions by means of which one attempts to destroy all or part of such a group of people; by coercive shift of children from these groups into the other or by use of means by which one attempts to restrict birth. Such actions are punishable by imprisonment from five to twenty years.

Part 2 of the said article provides that the actions which are specified by Part 1 thereof in case they manifest themselves by murder of people, as well as by orchestrating and directing the actions specified by Parts 1 and 2 of the said article, shall be punishable by imprisonment for ten to twenty years, or life imprisonment, or the death penalty.

Article 105 of the CC provides for the death penalty for murder with aggravating circumstances: of one’s father or mother; of two or more individuals; of a pregnant woman; by a way which is dangerous to the life of many people; in an especially brutal manner; in the course of the commission of another grave crime; for the purpose of hiding another grave crime; on selfish motives; on hooligan motives; in connection with exercising the state or citizen duty by the victim; in case this was committed (save Articles 106 and 107) by an

especially dangerous recidivist; in case this has been committed by a person who committed a murder before as provided for by Articles 104 and 105 of this Code; of a child or an individual in a helpless condition. The commission of these deeds is punishable by imprisonment for ten to twenty years or the death penalty.

2. The petitioner doubts whether the sanction of Article 105 of the CC which provides that an individual may be imposed the death penalty for murder with aggravating circumstances is in compliance with Articles 18, 19 and Part 3 of Article 21 of the Constitution.

It is noteworthy that after the petitioner had filed his petition to requesting to investigate the constitutionality of the disputed norm, on 21 April 1998, the Seimas passed the Republic of Lithuania Law on Supplementing the Criminal Code by Articles 62 (1), 71 and Amending and Supplementing Articles 8 (1), 24, 25, 26, 35, 49, 54 (1), 89 Thereof (Official Gazette Valstybes zinios, No. 42-1140, 1998) whereby the CC was supplemented by Article 71 which provides for responsibility for genocide.

As the petitioner does not raise the question of the compliance of the death penalty specified by the sanction of Article 71 of the CC with the Constitution, the Constitutional Court will only investigate whether the death penalty as established by the sanction of Article 105 of the CC is in conformity with Articles 18, 19 and Part 3 of Article 21 of the Constitution. Alongside, the Constitutional Court notes that the sanction of Article 105 of the CC is directly linked with the norms established by Articles 22 and 24 of the general part of the said Code. Therefore the conformity of the death penalty as established by the sanction of Article 105 of the CC with the Constitution will be investigated by one taking account of the said norms of the general part of the CC.

3. Deciding the issue whether this punishment as provided in the sanction of Article 105 of the CC is in compliance with the Constitution, one has to take account of the fact that the Constitution is an integral act in various articles whereof the protection of human life has been consolidated. It is also important to assess corresponding trends of the attitude of the international community regarding the death penalty, the international obligations of the State of Lithuania, and the experience of historical development of the State of Lithuania in establishing this punishment in criminal laws. Thus the problem of the lawfulness of the death penalty must be investigated from various aspects.

3.1. The preamble of the Constitution promulgates that the Lithuanian nation strives for an open, just, and harmonious civil society and law-governed state. One of the most important ways to implement this striving is consolidation of a democratic, humanistic legal order on the basis of constitutional provisions and principles.

A just and harmonious civil society and law-governed state is decided, among other features, by security of every individual and society on the whole from criminal attempts. To ensure such security is one of the priority tasks of our modern state. In order to implement it, measures are prepared which help to create pre-conditions to restrain crime as a social phenomenon.

It is unequivocally recognised by the doctrine of criminology that any measure intended for crime restraint (a criminal punishment, a moral or preventive measure, or that of

educating nature, activities of courts or other institutions of law and order, etc.), if taken separately, does not produce the intended effect, i.e. it does not ensure people's security. Besides, it should be noted that even though it is attempted to reduce crime by united measures, the visible changes become evident not at once. Social upheavals, distortion of moral values and other negative factors may continue to influence the anti-social behaviour of people.

In attempt to bar the way to crimes, the most important is an effectively implemented system of various preventive measures. However, it is impossible to block all crimes. A person who has committed a crime must be found and respectively punished. Just and prompt punishment is of preventive significance also. A criminal punishment, however, has its specific features. A criminal punishment is a reaction of the state to the crime which has already been committed. This is a coercive measure by the state, which is imposed on a person who has committed a crime by an incriminating sentence and which restricts the rights and liberties of the convict. According to the doctrine of criminal law, the essence of punishment is a punishment of an individual who has committed a crime, while its content is restriction of certain rights and liberties of the convict. The restrictions and hindrances experienced by the convict are objective features of punishment, or else they would lose their meaning.

It is emphasised in criminal law that severity of punishment (the degree of the punishment) must correspond with the nature of the crime committed and the degree of its danger, as well as the personality of the criminal and the circumstances of the case which either extenuate or aggravate the responsibility. In a certain respect, the restrictions and hindrances which are established to the convicted person is a retribution for the crime that he has committed. The modern theory of criminal law, however, categorically dissociates itself from the talion principle (an eye for an eye, a tooth for a tooth) which existed in ancient societies and states.

By a criminal punishment it is attempted to influence an individual who has committed a crime so that he would never commit new crimes, i.e. to correct the criminal, as well as to influence the other members of society so that they would not commit crimes. Alongside, the violated law and order are restored. To achieve these ends, a corresponding system of punishments is established in criminal laws, and sometimes very severe punishments dominate in this system. Among them the death penalty takes an exceptional place which, by its cruelty, should deter potential criminals from commission of crimes. The death penalty is a physical termination of an individual, it is deprivation of his life irrespective of the way this is done: by shooting, hanging, lethal injection or any other way. However, this punishment is more and more controversially assessed in the modern society. The opinion that the establishment of the death penalty in criminal laws virtually means that the state devalues human life has a sufficiently strong support. Meanwhile, such devaluation of life influences the whole society, it makes it more brutal, while in morality revenge is comprehended as an appropriate measure by which the unlawful behaviour is responded. This is also manifested by a constant dissatisfaction of people in cases when too mild punishments are given and by the demand that punishments be made more and more severe. However, as the experience of foreign countries and Lithuania shows, the establishment of severe punishments in itself does not block the way to crimes. One of the results of the policy of making punishments more severe of late years was that for more than 40 per cent of the convicts the actual punishment of imprisonment has been given, however this did not put a

stop to the increase of crime (see Crime and the Activity of the Institutions of Law and Order, Vilnius, 1998, pp. 11-20, Lithuanian version). In this connection one should recall the founder of the classical criminal law C. Beccaria who more than 200 years ago maintained that severe punishments make society itself more severe.

Finally, deciding the question of lawfulness of the death penalty one has to take into consideration the fact that the CC provides for other very severe punishments as well: imprisonment for up to twenty five years or for life. These punishments are provided for a much wider circle of crimes and, in this respect, may make a greater impact on blocking the way to crimes.

3.2. It is established in Part 1 of Article 135 of the Constitution that in conducting foreign policy, the Republic of Lithuania shall pursue the universally recognised principles and norms of international law, shall strive to safeguard national security and independence as well as the basic rights, freedoms and welfare of its citizens, and shall take part in the creation of order based on law and justice.

Part 3 of Article 138 of the Constitution provides that international agreements which are ratified by the Seimas of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania.

Interpreting these articles of the Constitution, it needs to be noted that the State of Lithuania, recognising the principles and norms of international norms, may not apply virtually different standards to the people of this country. Holding that it is a member of the international community possessing equal rights, the State of Lithuania, of its own free will, adopts and recognises these principles and norms, the customs of the international community, and naturally integrates itself into the world culture and becomes its natural part.

Deciding the issue of life protection and the question of the death penalty linked with the latter, the international community has had to go along a difficult and controversial path.

Under the influence of humanistic ideas, some states began to abolish the death penalty as early as the end of the 19th and the beginning of the 20th century. International agreements on restriction of the death penalty and its final abolition were began to be prepared after World War II.

One of the first international documents which raised the issue of the death penalty on the universal level was the Universal Declaration of Human Rights which was adopted on 10 December 1948 at the General Assembly of the United Nations. It is specified in Article 3 of the Declaration that everyone has the right to life, liberty and security of person. Even though this was not a direct indication to the restriction or abolition of the death penalty, however it is evident that the right to life is inseparably linked with the death penalty. In other words, it is possible to assert that Article 3 of the Declaration predicts a perspective of the refusal of the death penalty. This is also confirmed by the account rendered by UN Secretary General in 1973 wherein it was maintained that it is from Article 3 of the Declaration that the restriction and, finally, abolition of the death penalty are advanced. In the 18th UN General Assembly many states approved the thesis that Article 3 of the Declaration and the abolition of the death penalty were to be considered inseparable subjects. It is noteworthy that at the time of the drafting of the Declaration, attention was drawn to the fact that the death penalty abolition

issue may also be linked with its Article 5 which prohibits torture and cruel, inhuman treatment or punishment.

In 1966 the UN General Assembly adopted the International Covenant on Civil and Political Rights which was joined by Lithuania on 20 November 1991. In Lithuania it came into force on 20 February 1992. This Covenant is assessed as an international agreement and attributed to the category of agreements of action as it obligates the states which have recognised it to take concrete actions to implement its provisions. Article 6 of the Covenant includes more issues and, furthermore, is directly devoted to the death penalty. It provides:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for most serious crimes in accordance with law in force at the time of the commission of the crime.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Thus the Covenant is oriented towards 2 essential provisions: (1) the death penalty may only be applied for the most serious crimes and by strict adherence to the procedure established by law; (2) the abolition of the death penalty is an objective of the international model of human rights.

In 1989 the UN General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights. Article 1 of the said Protocol provides: (1) no one within the jurisdiction of a State Party to the present Protocol shall be executed; (2) Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

The said Protocol permits no reservations for the states in providing for the death penalty except for a most serious crime committed in time of war. Besides, under the Protocol the notion war must be construed in a more narrow sense, i.e. it does not include conflicts of non-international nature.

The Second Optional Protocol to the Covenant finished a certain stage of the evolutionary process regarding the issue of the abolition of the death penalty on a world scale.

Even though the ratification process of the Second Optional Protocol which became effective on 11 July 1991 is not very fast, it reflects the principal attitude of the international community towards the death penalty.

It is necessary to note that a similar process concerning the abolition of the death penalty took place in Europe as well. Since its establishment, the Council of Europe has held that one of the most important directions of its activity is ensuring the respect for human rights, as well as particularisation and more resolute implementation of the documents adopted by the UN.

On 4 November 1950, ten member states of the Council of Europe signed the European Convention for the Protection of Human Rights and Fundamental Freedoms which went into effect on 3 September 1953.

Article 2 of the Convention provides:

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

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

(a) in defence of any person from unlawful violence;

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

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

The Convention and its Article 2 was orienting the member states of the Council of Europe to the abolition of the death penalty, while Protocol No. 6 concerning the death penalty which was adopted on 28 April 1983 already categorically prescribed:

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

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

3. No derogation from the provisions of this Protocol shall be made under Article 15 of the convention.

4. No reservation may be made under Article 64 of the Convention in respect of the provisions of this Protocol.

Thus the Council of Europe unequivocally urges the member states of this Council to abolish the death penalty.

It is noteworthy that on 27 April 1995 the Seimas of the Republic of Lithuania ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms. Alongside, it ratified the First Protocol, Protocols Nos. 4, 7 and 11 to the Convention. However Protocol No. 6 to the Convention has not been ratified which, as mentioned, demands that the death penalty be abolished without reservations.

The Council of Europe has discussed the death penalty issue for many a time, and every time it more vigorously demanded that the death penalty should be abolished. On 4 October 1994 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1246 on the abolition of capital punishment wherein it pointed out: the Assembly considers that the death penalty has no legitimate place in the penal systems of modern civilised societies, and that its application may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the European Convention on Human Rights.

In addition, the Assembly recalled that the imposition of the death penalty had proved ineffective as a deterrent, and, owing to the possible fallibility of human justice, also tragic through the execution of innocent people. The Assembly held that there was no reason why capital punishment should be inflicted in wartime, when it was not inflicted in peacetime. On the contrary, the Assembly was of the opinion that there were weighty reasons why the death penalty should never be inflicted in wartime: wartime death sentences, meant to deter others from committing similar crimes, are usually carried out speedily so as not to lose their deterrent effect. The consequence, in the emotionally charged atmosphere of war, is a lack of legal safeguard and a high increase in the risk of executing an innocent prisoner.

On 4 October 1994, the Parliamentary Assembly of the Council of Europe adopted Resolution 1044 wherein the following essential provisions were set down:

“[...]3. In view of the irrefutable arguments against the imposition of capital punishment, it calls on the parliaments of all member states of the Council of Europe, and of all states whose legislative assemblies enjoy special guest status at the Assembly, which retain capital punishment for crimes committed in peacetime and/or in wartime, to strike it from their statute books completely.

5. It invites all member states of the Council of Europe who have not yet done so, to sign and ratify Protocol No. 6 to the European Convention on Human Rights without delay. [...]

6. The adequate implementation of the additional protocol to the European Convention on Human Rights should be a matter of continuous concern to the Assembly and the willingness to ratify the protocol be made a prerequisite for membership of the Council of Europe.”

The Parliamentary Assembly of the Council of Europe was debating on the question of the abolition of the death penalty once again in 1996 and adopted Resolution 1047 and Recommendation 1302 wherein virtually analogous requirements were set down.

On 13 June 1997, the European Parliament was deliberating on the question of the abolition of the death penalty and adopted a Resolution wherein it was pointed out:

"1. Reaffirms its strong opposition to use of the death penalty anywhere in the world and calls on all countries to adopt a moratorium on executions and abolish the death penalty. [...]

3. Calls on those European states that retain the death penalty, without having recourse to it, to abolish it definitively for all crimes as rapidly as possible. [...]

8. Considers that the abolition of the death penalty must be taken into account in all negotiations concerning partnership and cooperation agreements."

An analysis of the documents of the Council of Europe and the European Union shows that the abolition of the death penalty is becoming a universally recognised norm, while Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is signed by all member states of the Council of Europe except Albania, Bulgaria, Cyprus, Lithuania and Turkey. It was signed but has not been ratified by Belgium, Latvia, Russia and Ukraine. In reality, the requirement to abolish the death penalty has been implemented. At present the death penalty is not carried out in any European state.

Thus there is an evident trend in contemporary criminal law of European countries: a criminal punishment ought to combine punishment with preservation of humaneness, respect towards an individual and his dignity, while the aim of punishment would be to restore the violated order and to ensure security of people. Social reintegration of a person who has committed a crime, his education to respect laws during the service of the sentence, are of importance. The significant principle of criminal laws is that the punishments provided for therein should not be more severe than necessary for correction of a person who has committed a crime so that he would not commit another crime in the future.

3.3. Reviewing the historical practice of the legal regulation of the death penalty in Lithuania it needs to be noted that the most prominent monument of Lithuanian law—the Statutes of the Great Duchy of Lithuania (the First Statute of 1529, the Second Statute of 1566 and the Third Statute of 1588)—provided for restrictions of application of the death penalty. It could be imposed by a court only. The execution was the concern of either the court or the aggrieved party.

Under the Statutes, the death penalty was not to be imposed when the crime was committed in case of unavoidable necessity or indispensable defence. This penalty was not applied to servants who committed a crime following the order of their master, as well as persons who killed a traitor or an outlaw.

At that time minors, pregnant women or persons who had committed crimes out of foolishness or madness were pardoned from the application of the death penalty. In addition, the law permitted the parties to the case to become reconciled at any time: they could do so prior to a court decision or after it.

In the State of Lithuania, the death penalty abolition issue was discussed at the beginning of the 20th century right after the declaration of the independence of Lithuania in 1918. On 16 January 1919, the Presidium of the State Council of Lithuania adopted the Provisional Law on Courts of Lithuania and Settling of Activities Thereof (Official Gazette Vyriausybes zinios, Nos. 2-3, 1919) whereby the 1903 Criminal Statute of Russia was transferred into the legal system of Lithuania. Making it effective in Lithuania, virtually all articles providing for the death penalty save Article 108 (treason) were abolished. However, the death penalty could not be applied by this article either, as by the introduced provisions of the law it was established that instead of the death penalty an individual was to be sent to prison of hard labour. Thus, in the absence of extreme circumstances in the state, during the restoration period of the independence of Lithuania, the death penalty was abolished de jure, and it reflected its clear orientation to creation of a progressive democratic state. Alongside, it should be noted that due to certain historical circumstances this attempt was not implemented entirely.

The Constituent Seimas deliberated on the death penalty abolition issue in Lithuania once again. On 28 May 1920 it passed the Law on the Moratorium on the Death Penalty whereby suspended executions until the adoption of the amnesty law and constitutional decision of this issue. On 10 June 1920, after the Provisional Constitution of the State of Lithuania had been adopted, its Article 16 provided: “The death penalty shall be abolished.” In the note to this article it was indicated that “in time of war, as well in order to eliminate a threat to the State, the constitutional guarantees may be suspended by law.”

The 1922 Constitution of the State of Lithuania did not regulate the death penalty issue. It was left to be decided by ordinary laws. Taking account of the fact that in 1920-1940 during the independence period in the greater part of the territory of the State of Lithuania there was the state of emergency, the death penalty was provided for in laws and actually applied.

After the Soviet Union had occupied Lithuania in 1940, in its territory the Criminal Code of the Russian Soviet Federative Socialist Republic was made effective which provided for the death penalty for a great number of the so-called counter-revolutionary, state and other crimes. After the retroactive effect of the law of the foreign state had been established, under the CC of the Russian Soviet Federative Socialist Republic thousands of people of Lithuania were punished by death.

3.4. On restoration of the independence of Lithuania on 11 March 1990, the Criminal Code which had been adopted during the occupation time, was left to be in effect which provided for the death penalty for eighteen state and criminal crimes and sixteen military crimes. It is noteworthy that the Lithuanian supreme institutions of power have considered the death penalty issue for many a time and adopted essential decisions on restrictions of its application.

As early as in the 3 December 1991 Law “On Amending and Supplementing the Republic of Lithuania Criminal Code, the Code of Criminal Proceedings and the Code of Correctional Labour”, the number of crimes for which the death penalty was provided for was diminished to 1 which was for the finished purposeful murder with aggravating circumstances which was provided for by Article 105 of the CC.

The 19 July 1994 Law “On Amending and Supplementing the Republic of Lithuania Criminal Code, the Code of Correctional Labour, and the Code of Criminal Proceedings” provided that the death penalty might not be imposed, and if imposed, it might not be carried out for women, persons who were under the age of eighteen at the time of the commission of the crime, as well as persons who were recognised partially insane. Furthermore, it was established that a court, sentencing a person to death, may replace this punishment by life imprisonment. The death penalty may also be replaced by life imprisonment under the clemency procedure.

The President of the Republic, by his decree of 25 July 1996, submitted to the Seimas for debating a draft law on the moratorium on carrying out the death penalty. In the opinion of the President of the Republic, upon the adoption of such a law, temporarily, until a new Republic of Lithuania Criminal Code is approved wherein the necessity of the death penalty might be decided finally, carrying out of this punishment would be suspended. Although the draft law submitted by the President of the Republic has not been passed, however, since 1996 the death penalty which is imposed by courts has not been carried out as the President of the Republic has not considered the appeals for clemency of these persons. Without this procedure the death penalty may not by carried out.

In 1996 the Government submitted to the Seimas for debating a new draft Republic of Lithuania Criminal Code wherein the death penalty is not provided for.

On 27 April 1997 the death penalty issue was discussed by the Baltic Assembly. In the adopted resolution it recommended that the parliaments of the three Baltic states and their governments prepare to ratify Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Alongside the Baltic Assembly recognised that the inevitable preconditions for the adoption of such a decision are:

considerable decline in the crime rate as compared to the present state, especially with respect to grievous crimes against the person;

the introduction of life imprisonment into the legal acts which at present allow to impose the death penalty;

essential reorganisation and reform of the prison system by bringing it into line with standards accepted in Europe and creating possibilities for separate detention of persons having committed criminal offences of different degrees.

On 24 June 1997, the Seimas considered a draft resolution of analogous content, and its subsequent adoption is on the agenda of the Seimas. It is noteworthy that the 22 September 1997 Recommendation 1339 of the Parliamentary Assembly of the Council of Europe assessed it as providing a legal basis for the current moratorium and meeting a pre-condition for ratification of Protocol No. 6 of the European Convention on Human Rights.

4. On the compliance of the sanction provided for by Article 105 of the CC with Article 18 of the Constitution.

Article 18 of the Constitution provides: “The rights and freedoms of individuals shall be inborn.” The inborn nature of human rights means that they are inseparable of an

individual, that they are linked with neither a territory nor a nation. An individual possesses his inborn rights regardless of whether they are entrenched in legal acts of the state or not. These rights are enjoyed by every individual, and it means that they are enjoyed by the best and worst people alike.

The Constitutional Court notes that human life and dignity are distinguished from among the inborn rights by the international community. The International Covenant on Civil and Political Rights recognises the inherent dignity of all members of the human family and that the human dignity is the main source of rights as the rights of an individual "derive from the inherent dignity of the human person."

Human life and dignity constitute the integrity of a personality and they denote the essence of an individual. Life and dignity are inalienable properties of an individual, therefore they may not be treated separately. The inborn human rights are inborn opportunities of an individual which ensure his human dignity in the spheres of social life. They constitute that minimum, that starting point from which all the other rights are developed and supplemented, and which constitute the values which are unquestionably recognised by the international community.

Thus human life and dignity, as expressing the integrity and unique essence of the human being, are above law. Taking account of this, human life and dignity are to be assessed as exceptional values. In such a case, the aim of the Constitution is to ensure the protection and respect of these values. These requirements are, first of all, raised for the state in the first place.

The Constitutional Court, treating the human rights and freedoms which are entrenched in Chapter 2 of the Constitution as an integral catalogue, draws one's attention to the peculiarities of the wording of these rights and freedoms. As a rule, the fundamental rights listed in this chapter of the Constitution, are presented as a common norm. However, when there are exceptions to this norm, they are pointed out. For example, Article 20 of the Constitution provides: "Personal freedom shall be inviolable." Part 2 thereof establishes a prohibition arbitrarily to arrest or detain a person except on the bases, and according to the procedures, which have been established in laws. Article 23 of the Constitution provides: "Property shall be inviolable," while Part 3 thereof stipulates that property may only be seized for the needs of society according to the procedure established by law and must be adequately compensated for. Article 21 of the Constitution establishing that "human dignity shall be protected by law," later in its Part 2 specifies that it shall be prohibited to degrade, or maltreat a person, as well as to establish such punishments. In like manner the constitutional articles on the inviolability of the private life of an individual (Article 22), the inviolability of a person's dwelling place etc. are formulated. Meanwhile, Article 19 of the Constitution contains only one common norm: "The right to life of individuals shall be protected by law." Thus it is to be assumed that the norm of Article 19 provides for no exception permitting to deprive life on behalf of the state.

Therefore it is possible to assert that the exceptional protection of the inborn rights as provided for by Article 18 of the Constitution blocks the way to the establishment of the death penalty in the sanction of Article 105 of the CC.

5. On the compliance of the sanction provided for by Article 105 of the CC with Article 19 of the Constitution.

Article 19 of the Constitution provides: “The right to life of individuals shall be protected by law.” As mentioned, human life is recognised as the highest value by law of democratic countries. This is perceived from the notions which are employed to denote it: “one of the main rights”, “the main of all rights”, “the foundation and cornerstone of all the other rights”, “the necessary pre-condition of all the other rights”, “the most fundamental of all human rights” etc. Such a legal assessment is absolutely understandable. The rights of a particular individual exist as long as he is alive, as rights in general are devoted for harmonisation of relations among individuals. One has to draw attention to the fact that the Constitution demands that the right to life but not life itself be protected by laws.

The right to life of an individual is ensured by a rather broad system of legal means which is established by the Constitution itself as well as a number of other laws. The legal regulation together with moral, religious and other social norms is, first of all, devoted for the protection of the right to life of an individual.

The norms of the criminal law which provide for a responsibility for commission of unlawful actions by which human life has been attempted at constitute a separate group. These are, first of all, the legal norms which provide for a responsibility for murder with aggravating circumstances. Article 105 of the CC provides that murder with aggravating circumstances shall be punished by life imprisonment or the death penalty. Thus the law provides that human life is protected by threatening that the culprit who has committed such a murder may be deprived of his life as well. Therefore the question arises whether such a protection of the right to life by the criminal law is in compliance with the protection of such a right which is established by the Constitution.

The Constitutional Court has noted that the protection of common interests in a democratic state under the rule of law may not deny a concrete human right in general. Such a solution of the problem is linked by the doctrine of human rights and freedoms, as well as by international and domestic law which are based on it, with a rational proportion ensuring that the restrictions will not violate the essence of a respective human right. As noted above, the right to life is an inborn right of every individual. It is indivisible. Either there is life, or there is not life. Either the accused may be deprived of his life or not by a court sentence. In the latter case another punishment is given. After imposition of the death penalty and upon the execution, a human life is ceased. Alongside, the inborn right to life of that individual which is protected by the norm of the Constitution is denied.

Article 105 of the CC establishes a sanction providing for an alternative between the death penalty and imprisonment, which also raises an additional constitutional problem deriving from the said indivisible nature of the death penalty. It is noteworthy that all the sanctions provided for by the CC have been constructed in such a way that a court could choose its appropriate interval and give a just punishment. Thus a court, conforming to the basics of impositions of punishments which are established by criminal laws, chooses an optimal punishment provided for by the sanction and gives it to the prisoner at the bar. There occurs an essential difference when the death penalty is imposed. In such a case a court has only an option that it may either impose it or not to impose it. However, the law does not indicate unequivocally as to when the death penalty must be imposed. Therefore it is possible

to assert that in such a case the final decision concerning the imposition of the death penalty depends not on the law but on the court as well. Thus, the decision whether to impose the death penalty or not may depend on the psychological state of the judges (compassion, or, on the contrary, strictness, fear to adopt a wrong decision etc.), the professionalism and activity of the defence or the prosecution, as well as a number of other subjective circumstances.

Finally, attention should be drawn to the circumstance that the court may face a difficulty to judge on the basis of objective criteria as to what individual deserves to be punished by death and what to be imprisoned for life. Besides, no matter what guarantees are ensured in the criminal proceedings of a state under the rule of law, one should not reject a possibility of a mistake. As it is evident from the judicial practice of various states, it is impossible to protect courts from such mistakes, meanwhile, after the death penalty has been carried out, there exist no opportunities to rectify such a mistake. The possibility itself that a person who does not deserve it or who is innocent may be sentenced to death is not in line with the right to life which is guaranteed by the Constitution.

6. On the compliance of the sanction provided for by Article 105 of the CC with Part 3 of Article 21 of the Constitution.

Part 3 of Article 21 of the Constitution provides: “It shall be prohibited to torture, injure, degrade, or maltreat a person, as well as to establish such punishments.” The prohibition to torture, injure, degrade or maltreat an individual is also entrenched in a number of international documents: the International Covenant on Civil and Political Rights (1966), the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987). The latter was ratified by the Seimas of the Republic of Lithuania on 15 September 1998.

The European Court of Human Rights, investigating the Case of Ireland v. the United Kingdom (1978), defined the types of prohibited treatment as follows:

torture—deliberate inhuman treatment causing very serious and cruel suffering;

inhuman treatment or punishment—infliction of severe mental or physical suffering;

degrading treatment or punishment—treatment such as to arouse in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. However, “degrading” may not be interpreted only as disagreeable or unacceptable.

First of all, it should be noted that, like international documents, Part 3 of Article 21 of the Constitution first of all links the prohibition to torture, injure, degrade, maltreat a person, as well as that to establish such punishments, with the activities of the state and its respective institutions. It means that such prohibitions are established in attempt to protect an individual from unlawful actions of a state official or any other person authorised by the state.

Analysing the treatment which is prohibited by the Constitution, it needs to be noted that not every action of an official which has unpleasant effects for an individual may be recognised as unlawful. For instance, there are negative consequences and, in certain respect, suffering after the sanctions which are provided for in the criminal law and which are recognised by the international community have been applied (for example, imprisonment, a fine, restriction of rights, etc.) and which determine a certain restriction for a person. They constitute a compulsory element of punishment and there never arise problems as to their lawfulness. It means that such cases when, for instance, a suspect is detained or a person is punished by imprisonment following a court decision, and due to this the person suffers or experiences certain inconveniences, may not be treated as punishments prohibited by the Constitution.

The death penalty is to be assessed differently. It is commonly recognised that it is cruel. However, it is impossible not to mention this aspect: it is provided for murder committed under aggravating circumstances. Thus, one is to hold that in such a case two aspects of cruelty come into collision: the cruelty of the crime and that of the punishment. Still, one has to recognise that the cruelty of the crime by itself does not counterbalance the cruelty of the death penalty. Meanwhile, constantly repeated acts of cruelty cannot not exert influence over the socio-psychological state of society and the tolerance for constant promotion of cruelty.

Assessing the death penalty through the prism of the treatment which is prohibited by the Constitution, its specific aspect is revealed. Degradation of the dignity of the convict derives essentially from the cruelty of the death penalty itself. The cruelty manifests itself by the fact that after the death sentence has been carried out, the human essence of the criminal is negated as well, he is deprived of any human dignity, as the state in that case treats the person as a mere object to be eliminated from the human community.

7. Assessing the protection of human life which is entrenched in the Constitution, it needs to be noted that a comparatively great number of grave crimes committed are one of the most important arguments of not only people but also institutions that think that at present it is too early to abolish the death penalty in the criminal laws of Lithuania.

One should not avoid assessing the criminogenic situation, as it is complicated indeed. However, the death penalty can influence only the dynamics of those crimes for which the death penalty is provided for, i.e. murders with aggravating circumstances, as it is known that such punishment is not provided for for other criminal offences. The direct correlative link between the death penalty and the number of murders, however, has not been established anywhere. Besides, in Lithuania, during the time period of 1996-1998 when the death penalty was not carried out, there was no increase in the number of registered murders.

On the other hand, people’s security is reflected not only by a greater or smaller number of murders, although it is these crimes that cause people greatest fear. The growth of crime rate and the increase of violent crimes of late years is not only linked with the damage inflicted to the victims and their violated dignity but also shows the actual degree of security. This is to be assessed as one of the most important preconditions why most people demand punishments of maximum severity, and tend to approve of the death penalty which, in their opinion, is a necessary means ensuring security.

It needs to be noted that in case people's security is not sufficiently taken care of, even though the death penalty is abolished, a psychological need may arise to reintroduce it. This is confirmed by cases when in European countries the criminal laws of which have not contained the death penalty for a long time, the people who have experienced a stress due to a very grave murder begin promptly to demand to reintroduce it. It means that it is important not only to decide the issue of whether it is or it is not possible to abolish the death penalty but also actually to ensure people's security.

8. Taking account of the arguments set forth in the stating part of the present Ruling, as well as the entirety of the norms of the Constitution adopted by a referendum of the People and which protects the right of individuals to life and dignity, the Constitutional Court holds that the Constitution does not contain any prerequisites permitting to establish the death penalty in the norm of the law. Therefore a conclusion is to be drawn that the death penalty for murder with aggravating circumstances provided for by the sanction of Article 105 of the Republic of Lithuania Criminal Code contradicts Articles 18, 19 and Part 3 of Article 21 of the Constitution.

Conforming to Article 102 of the Constitution of the Republic of Lithuania and Articles 53, 54, 55 and 56 of the Republic of Lithuania Law on the Constitutional Court, the Constitutional Court has passed the following

ruling:

To recognise that the death penalty for murder with aggravating circumstances provided for by the sanction of Article 105 of the Republic of Lithuania Criminal Code contradicts Articles 18, 19 and Part 3 of Article 21 of the Constitution of the Republic of Lithuania.

This Constitutional Court ruling is final and not subject to appeal.

The ruling is promulgated on behalf of the Republic of Lithuania.

Judges of the Constitutional Court:

Egidijus Jarasiunas	Kestutis Lapinskas	Zigmas Levickis
Augustinas Normantas	Vladas Pavilonis	Jonas Prapiestis
Pranas Vytautas Rasimavicius	Teodora Staugaitiene	Juozas Zilys