Review of Central and East European Law

Published in Cooperation with the Institute of East European Law and Russian Studies of Leiden University

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1. Introduction

During the second part of the twentieth century, when legal dogmatism gave way to legal pluralism, it became clear that the content of and the attitude towards judicial decisions (and legal reasoning in general) had to be changed. The “internal” method of interpreting a legal norm was no longer sufficient; especially after H.L.A. Hart’s *The Concept of Law*, the external method of interpretation became more and more popular in Europe. Furthermore, the hermeneutic way of interpretation – taking into account both (internal and external) methods of interpretation – was developed by legal theory. It is interesting to note here that legal theory developed the paradigm of external/empirical validity not only as a kind of consistence with social “reality” (e.g., effectivity/efficacy), but also as an axiologial (moral) consistency of the norm. Of course, the idea of external validity (empirical and moral) did not replace formal validity, as these three types of legal validity coexist with each other. I believe that one of the aims of legal theory in contemporary society is to try to reconcile all these three types of legal validity. So, I would refer to the situation in our modern society not only as legally and culturally pluralistic, but also as a return to morality in law which increasingly tries to regain its lost place within the legal domain. This statement can also be confirmed by the recent idea of *legal reasoning* which, primarily, I understand as an attempt to justify certain legal (judicial) decisions.

The most popular Wittgenstein notion concerning communication and discourse was adopted not only by modern philosophy but also by social and legal science. It means that it is now not enough for a judge to use “pure”

1. The external validity of the norm is sometimes also called the legitimation of a certain rule.
formal syllogism – logical deduction (which, from my point of view, is in any event necessary as a form of every judgment) in order to arrive at the decision/conclusion; he/she also has to justify it rationally. On the one hand, it is a difficult task for lawyers because the judicial decision tends to lose its claim to “objective truth”; but on the other hand, this kind of reasoning is more democratic and creative.

In this article I will analyze a decision of the Lithuanian Constitutional Court of December 1998 concerning the constitutionality of the death penalty regulated by the former Lithuanian Criminal Code. I have chosen this judgment for two reasons: (1) the legal argumentation here resulted in a relatively longer chain of reasoning than in other judgments; (2) the court used many arguments which were not purely legal ones in order to arrive at its conclusion. Unfortunately, the “pure” deductive method of reasoning is still very popular among Lithuanian judges in the ordinary courts. Fifty years of Soviet occupation have resulted in the judicial branch being seen as an instrument of the will of the legislator (legal positivism and étatisme were very useful for the Soviet system in order to enforce its policy), and it naturally takes some time to change these attitudes and paradigms. One of the main tools in changing this attitude and adopting a modern (hermeneutic) way of legal argumentation was the establishment in 1993 of the institution of constitutional (judicial) review by the Lithuanian Constitutional Court. Rational justification as the main notion underlying modern legal reasoning is, we believe, becoming an increasingly familiar tool for the Lithuanian Constitutional Court and has also influenced the Supreme Court’s reasoning which, in turn, extends to the lower (civil/criminal and administrative) courts.

2. The Death Penalty as a Political Question in Lithuania

The desire to resolve the sensitive question of the death penalty has been more of a political rather than a legal problem in Lithuania. The death penalty in the Lithuanian legal system – after independence in 1990 – came from the former Soviet Criminal Code (1969) which, together with other Codes, was taken on by the Lithuanian Parliament with various amendments. And the text of the new Lithuanian Constitution (1992) failed to abolish the death penalty (unlike, for example, the new Czech Constitution). True, in 1993 Lithuania ratified the European Convention on Human Rights and became a Member of the Council of Europe. Yet the parliament did not take up the process of ratifying Protocol 6 of the ECHR because, according to sociological polls, the majority of the population was still against the idea of abolishing capital punishment. The politicians then found another way to solve this problem: a certain number of MPs (according to the Constitution, this must be at least one-fifth of all MPs) brought the provision in the Criminal Code concerning death penalty before the Constitutional Court, asking the Court to determine whether or not this punishment contradicts Article 18 (“The rights and freedoms of individuals are natural”), Article 19 (“The Statute should protect an individual’s right to life”) and Article 21(3) (“Torture, degrading one’s dignity, and cruel treatment or punishment should be prohibited”) of the Lithuanian Constitution.4

3. The Establishment of a Common Lieu in the Judgment

It is interesting to note here that because of the political and moral sensitivity of the case (and, of course, in order to better justify its decision), the Constitutional Court attempted to “hear” as many different opinions as possible. Furthermore, it included these opinions in the text of its decision. In its introductory part, the Court included the opinions of the following “experts”: the President of the Episcopal Conference of Lithuania, the President of the Center of Human Rights in Lithuania, the Dean of the Department of Sociology and Philosophy at Vilnius University, the Director of the Law Institute of Lithuania, the Dean of the Law Academy, the President of the Association of (former) Political Resistance, the President of the Lithuanian Association of Physicians, the Chairman of the Parliamentary Committee of Human Rights, the General Procurator of the Republic of Lithuania, the General Director of the European Law Department and some others.

Serious consideration was given by the Constitutional Court to the arguments concerning the death penalty in order to establish a common topos with all the possible parties concerned. It should be stressed here that, normally, the Constitutional Court only mentions the names of the institutions from which it has received opinions; rarely (if ever) does it present the full text of all the opinions. This case was different, however. The deliberation and discussion of the parties’ opinions occupied a prominent place in the Court’s judgment. Only two opinions (by the Dean of the Law Academy and the President of the Association of Physicians) were clearly against abolition of the death penalty, while other representatives of governmental organizations and NGOs – in one form or another – took sides against capital punishment.

4. An English translation of the Lithuanian Constitution can be found at www.lrs.lt.
5. The difficulty surrounding this judgment was that there was no clear majority in favor of the abolition of the death penalty either in society or in the legal community.
The Dean of the Faculty of Sociology and Philosophy stated that the death penalty would not contradict the right to life if it could be proved that this penalty protects the lives of other persons. However, he then went on to argue that no clear causality or correlation between the death penalty and the protection of human life has been established. Here we can see that the Dean only accepts the main type of validity of a norm. Thereafter, he raised the problem of penalties in general, saying that penalties in a democratic society have direct links with the legitimation of political (public) power. One of the most relevant factors of a penalty’s legitimacy, in his view, is consistency with popular opinion. But he did not rely on “purely” popular opinion in order to arrive at his conclusion (because the majority of society was “pro” death penalty). Here he relied on another “sociological” premise to change his conclusion concerning the death penalty: his argument was that the majority of respondents feel that if public power could prevent criminals from committing further crimes, then the existence of the death penalty would not be necessary (here we can see the importance of formulating the question in a sociological poll). Therefore, the Dean argued that people support justice and order in society. From these arguments, we can see how he has made use of the argumentation of the empirical/sociological validity of the norm, believing in certain Habermasian “procedural justice” (the conviction that the majority in society makes use of democratic discourse and, by respecting the rules of discussion, always arrives at a “rational” decision).

Another important expert in this case was the Director of the European Law Department. In order to back up his arguments, he made use of legal documents of the Council of Europe and the European Community/Union. He argued not only on behalf of the European Court of Human Rights but also mentioned: (1) certain Resolutions of the Parliamentary Assembly of the Council of Europe which call upon Member States to abolish the death penalty and to ratify Protocol No. 6; and (2) the 1997 summit of the Member States of the Council of Europe which encouraged this abolition. As far as the EU is concerned, the Director argued that – even if there is no document within the framework of the EC/EU expressly abolishing the death penalty – a Declaration to this effect was adopted during the Amsterdam Conference (1997). Finally, he stated that the death penalty contradicts Article 21(3) of the Lithuanian Constitution (“torture, degrading one’s dignity, and cruel treatment or punishment should be prohibited”), as well as Article 3 of the ECHR (a similar provision) and Lithuanian membership in the Council of Europe as such.

The next expert – the Director of the Lithuanian Institute of Law – started by arguing that the death penalty contradicts not only the Lithuanian Constitution, but also Article 21 of the Criminal Code which defines the aims of criminal penalties (the teleological argument on behalf of coherence in the legal system). One of the main aims of a criminal penalty, as set forth in Article 21, is to correct and improve one’s attitudes and behavior. According to the Institute’s Director, the death penalty is merely a means (instrument) to annihilate a person. As a criminologist, he also used the following empirical (psychological) arguments against this penalty: (1) a large percentage of murders are committed by persons who are involved in a familial (or other close) relationship with their victims; and (2) very often criminals cease to be dangerous to society after the crime has been committed, as the motive for the crime has then disappeared.

The Constitutional Court – in order to establish the common “lieu” of the discussion – also made room for opposing opinions. For example, an expert from the Academy of Law argued that persons who commit dangerous crimes fall “outside” the normal legal order which regulates normal human relationships. Accordingly, he argued that being against capital punishment would mean that one grants a certain privilege to a murderer as opposed to his victim. Another expert (from the Association of Physicians) stated that he was against the abolition of the death penalty because of the recent unstable criminal situation in Lithuania. Therefore, in these arguments we can recognize the conviction that: (1) capital punishment can reduce criminality in society; (2) human rights are only those regulated in positive law and do not apply to those who commit murder; and (3) the principle of “an eye for an eye” and “a tooth for a tooth” is an appropriate policy in contemporary criminal law.

4. The Arguments by Representatives of Parliament (The Applicants)

Representatives of Parliament (the applicants) argued in this case that the right to life forms the background of all other human rights, without which they cannot exist. If a right to life is not guaranteed, the subject of the law (a person) cannot exist as such. They were basically saying that according to Article 18 of the Constitution, the State has a duty to safeguard and guarantee naturally existing human rights (a jusnaturalistic approach). As far as Article 6. The strict positivist approach of members of this academic institution can be explained, in part, by the fact that it was formerly the Police Academy.

7. The representatives of Parliament in the Constitutional Court were not only Members of Parliament (Seimas) but also legal advisors from the Law Department of the Seimas. The main “representative”, whose arguments formed the greatest part of the opinion, was the Chairman of the Law Committee. It is also important to stress here that, in this case, there were no traditional two competing parties, as MP’s themselves were contesting the constitutionality of the Act of Parliament.
19 ("One's right to life should be protected by statute [įstatymas]") was concerned, they argued that it is not possible to protect a human life as long as the possibility to take (extinguish) it exists (a logical linguistic interpretation). They also used psychological/sociological/criminalological arguments (already mentioned) stating that the death penalty can be considered as an instrument to "quiet" a not well-informed part of society, because people committing such a crime do not think a priori about the punishment; furthermore, there is always a possibility that a judge can make an erroneous decision.

In addition to these arguments, the petitioners sought to interpret the death penalty from the point of view of the reform of criminal policy in Lithuania. The declared aim of the reform is to examine where it is possible to change "strict" criminal punishments (especially imprisonment) into "softer" ones (e.g., fines). They argued that the existence of the death penalty in a Criminal Code conflicts with such a policy. Another argument was that because the death penalty is a "harsh" and "savage" treatment of a human being, this punishment falls outside the concept and boundaries of the law.⁸

According to the petitioners, the death penalty essentially differs from other criminal punishments and from the concept of legal liability in general. They argued that the aims of criminal punishment are not only to isolate criminals and to provide for the safety of society, but rather are primarily directed towards reforming, improving, or resocializing a person; in short, of integrating him into society. All these aims rely on a legal subject – a human being – by imposing on him certain restrictions (social, material, etc.).⁹ Therefore, in the view of the applicants, the death penalty "serves" not as a restriction of one's rights but as an annihilation thereof. Moreover, the death penalty is an ultimate and absolute punishment, which is not possible to change after execution has taken place and, therefore, is unjust in this sense.¹⁰

Finally, the applicants argued that the death penalty is not only a legal but also a moral problem: it is not the State which gives life to a person, so it does not have the right to take it away.

So, in classifying the petitioners' arguments against the death penalty, mention can be made of the following:

8. Compare the opinion of the expert that the offender, by committing a murder, falls outside the framework of the law.
9. Here one can say that, in a modern society, it is not possible to identify only one right function or aim of criminal punishment (e.g., imprisonment); but, at least in this matter, we can rely on the "majority", asserting that in contemporary society the majority of people agree on such a criminal penalty system.
10. The principle of justice is provided in Art. 109 of the Lithuanian Constitution; "The courts shall have the exclusive right to administer justice" and in Art. 135: "Lithuania [...] shall take part in the creation of sound international order based on law and justice".

Of course, this classification of the arguments is somewhat superficial, as various concepts are interrelated with one other. I nonetheless hope that this will more fully demonstrate the specific groups of arguments, used by the petitioners. I have presented what may seem to be an overly large part of the arguments used by the petitioners and various experts in order to show more precisely how the Constitutional Court used a wide background to establish the starting point of its reasoning. Furthermore, as we have mentioned, it was clear that a majority of society (and the legal community) argued in favor of capital punishment; that is why the Court wanted to "hear" from as wide an audience as possible. In the next section, we will see that many of these arguments (and also arguments used by various experts) were accepted by the Constitutional Court.

5. The Legal Reasoning of the Constitutional Court

To begin with, I want to mention in passing the fact that the Court divided its reasoning into eight parts; since it was dealing with three articles from the Constitution and one article from the Criminal Code, it had to deal with many types of argumentation. In this part of our article, we will try sequentially to present the argumentation used in all these parts of the Court's judgment as it was numbered by the Court itself and, then, to reconstruct the arguments and to analyze their origins and consistency with one other.

1. In the first part of its reasoning, the Court actually starts its argumentation by mentioning that the Criminal Code contains four articles establishing the notion of the death penalty: Chapter III of the Code dealing with the system and aims of criminal punishments in general (Arts. 22 and 24); Article 105, establishing the death penalty for the crime of murder in aggravating circumstances; and Article 71, establishing the death penalty for the crime of genocide.
2. In the second part, the Court mentioned that after the petitioners had submitted their application concerning the constitutionality of the death penalty, the Lithuanian Parliament (Seimas) had adopted an amendment to the Criminal Code (Art. 71) (liability for genocide) in April 1998. But because the petitioners did not raise the question of the constitutionality of this article, the Court stated that it would only pass judgment on Article 105 of the Criminal Code (committing the crime of murder in aggravating circumstances). Then the court quoted the text of Article 105.11

3. Part 3 of the judgment forms the longest part of the Court’s reasoning and is itself divided into four sections or sub-parts. Basically, the Court stated that it was going to examine the problem of the death penalty by different approaches: (1) through the systematic approach of the entire text of the Constitution; (2) through the approach of the international and European community towards the death penalty; (3) through the view of the international engagements of the Republic of Lithuania; and (4) through the experience of the historical evolution of this punishment in the criminal law of Lithuania. Thus, from the very beginning the Court had established systematic-formal, international-external, policy and historical methods of interpretation.

In the first section of part 3, the Court gave its general view on the aims and functions of criminal punishment.

Here I would like to reconstruct the sequence of this section’s arguments as follows:

(1) The preamble of the Lithuanian Constitution formulates the purpose of Lithuania in becoming a democratic state under the rule of law.
(2) One of the main conditions for guaranteeing democracy is ensuring stability in society and reducing criminality.
(3) Criminal punishment is a necessary measure to achieve these objectives.
(4) Certain restrictions of one’s rights and freedoms are a necessary characteristic of criminal punishment.
(5) The death penalty is one of the possible “strict” criminal punishments.
(6) The death penalty completely annihilates (destroys) a person.
(7) This annihilation of a person could be treated as the devaluation of human life.
(8) This devaluation of human life has a grave influence on society’s morality (revenge is treated as an appropriate measure in solving conflicts) and results in people demanding stricter criminal punishments and accepting the death penalty.

(9) Stricter punishments, as such, cannot reduce criminality (for this argument, the Court presented statistics from the Ministry of Justice).
(10) Other quite strict criminal punishments already exist in Lithuanian criminal law.

So, what was the main purpose of this section of the argumentation? I think it was to stress the following:

- that the existence of the death penalty in a legal system devalues human life and has an influence upon one’s psychology and morals in such a way that one accepts revenge as an appropriate measure to solve conflicts and, as a consequence, one demands stricter criminal punishments;
- strict punishments do not reduce criminality;
- the death penalty is neither a proportionate nor appropriate criminal punishment since other severe forms of punishments exist (a life sentence or 25 years imprisonment, for example).

I think that argument (9) can be considered to be, in fact, a conclusion. The argument, which I have numbered as (10), merely serves to strengthen this conclusion. From arguments/premises (1) to (9), it can be deduced that the death penalty does not promote the stability of society nor the creation of a democratic State, as foreseen in the Preamble of the Constitution. Premise (10) also confirms this conclusion by relying on the principle of proportionality.

The Court did not attempt to formulate any conclusions concerning unconstitutionality in this section (as in all of part 3), for here it did not consider the death penalty’s relationship with Articles 18, 19, and 21(3). It merely sought to demonstrate that the death penalty can have certain contradictions as far as the Preamble of the Constitution is concerned. But it did not do so explicitly, because of three possible arguments: (a) it is not possible to deduce this from this set of premises; (b) the Court normally only considers the constitutionality of those articles of the Constitution which are mentioned in the application; (c) the Preamble of the Constitution is understood by the Court only as a source of the Constitution, not as a part thereof with direct effect.

The main obstacle in determining the death penalty’s contradiction with the Preamble – in the framework of the Court’s argumentation – is that in premises (5)-(8) the Court talks about the “death penalty”, while in conclusion (9) it mentions “strict punishments” in general. In order to escape this uncertainty, the Court could have used statistics (of course, if they exist) concerning the death penalty’s possible influence on criminality. To garner such statistics together, of course, is a difficult task in light of the fact that the
application of capital punishment has almost never been suspended in Lithuanian legal history. So, the Court stated that although the punishment of imprisonment was imposed in about 40% of all criminal convictions in Lithuania, criminality has not reduced as a result. But such statistics do not inform us whether the existence of the death penalty (or its application by the courts) has had any influence on criminality because the death penalty can only relate to murder, not to all criminality as such. Here we can distinguish between the influence of the existence of the death penalty as a sanction in the Criminal Code and the possible influence of its implementation. So, concerning the first case, the Court could compare the number of murders committed before and after the 1991 amendment, when the possibility to apply the death penalty was reduced to only one crime. As far as the second case is concerned, the Court mentioned (although not here but rather in part 7 of the judgment) that during 1996–1998, when the death penalty was not applied in Lithuania, there was no increase in the number of murders.

My conclusion pertaining to this section is that the Court failed to provide sufficient empirical/statistical arguments in order to demonstrate the limited value and disproportionality of the death penalty and its contradictions with the Preamble of the Constitution. For reasons that are not totally clear, most of the empirical arguments contained in this section are presented at the end of the judgment (part 7), which leads to a certain degree of inconsistency in the judgment.

Here I would like to discuss another argument (8) where we can recognize what is called the court’s ratio which, in common law countries, would be possible to extend to later judgments. For me, it is an interesting question whether this ratio could be extended to the case of abortion and/or euthanasia. The ratio of argument (8) is that the Court has established a direct causation between the death penalty, on the one hand, and distortion of society’s morality and a demand for stricter penalties, on the other. And this causation is linked through the nexus of devaluation of human life. It is important that this statement, as formulated by the Court, is unconditional and absolute, for the Court does not consider any other competing values or principles in relation to the value of life. The value of life, according to the Court, is an unconditional and superior value. And accordingly, any devaluation thereof is per se a bad influence on people’s morality and increases criminality.

If, within the framework of the Court’s ratio, the “death penalty” could be replaced with “euthanasia”, I think, that we would then arrive at the same conclusion, for here the idea of the devaluation of human life could play the same role in the case of euthanasia as it does in the death penalty debates. One could argue that in the case of euthanasia, a right to life competes with another right, which could be called a “right to a painless death”, but if we follow the ratio of the Court in this particular case, we are compelled to conclude that the right to life is unconditional and superior to all other possible rights.

In the case of abortion, we would only arrive at the same conclusion if we could extend the concept of “life” to the “right to be born”. Yet it seems to me that the concept of “life” or a “right to life” includes the right to be born for if we do not guarantee the latter right, the former has no sense. Arguments in this case about the competing right of choice should be superseded by the right to life, if we follow the Court’s ratio.

Following this ratio of the judgment, one can conclude that euthanasia and abortion have a direct link with the rise of a more brutal society, a higher average level of criminality, and demands for stricter criminal punishments.

4. In this section, the Court presented the following arguments on the death penalty within the perspective of International and European Law:

(1) Article 135 of the Constitution states: “In conducting foreign policy Lithuania shall pursue the universally recognized principles and norms of international law and shall take part in the creation of sound international order based on law and justice”. Article 138 of the Constitution says that “international agreements, ratified by Seimas, constitute a part of the Lithuanian legal system”.

(2) The recognition of international norms and principles should be applied not only within the domain of foreign policy, but also in other spheres of social life.

(3) International treaties and agreements (e.g., the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights) and institutions (e.g., the UN General Assembly) encourage the abolition of the death penalty.

(4) The EU, the Council of Europe, and the ECHR also encourage the abolition of the death penalty. Protocol No.6 of the Convention contains a provision stating that it should be abolished.

(5) Lithuania ratified the ECHR in 1995, but not the Protocol.

(6) An analysis of EU and Council of Europe documents shows that the abolition of the death penalty is becoming a universally (generally) recognized norm.

12. It should be noted that here I am not arguing, one way or the other as to whether this statement is (in)sufficient for concluding that those two phenomena have to be deemed as unconstitutional ones.
(7) The Council of Europe’s requirement that its members should abolish capital punishment has almost been realized, as only eight countries (out of 40) have failed to ratify said Protocol.

(8) The death penalty is not imposed anywhere in Europe.

(9) It is a changing tendency in the criminal law of European countries to recognize that:
   - criminal punishment should respect human dignity;
   - the main objective of a criminal penalty should not be punishment as such, but rather the resocialization of the convicted person;
   - the principle of proportionality in criminal law should be guaranteed (criminal punishments should not be any more severe than is necessary).

For me, the most interesting premise in this part of the argumentation is point (6). Here the court uses the word “becoming” and, therefore, formulates a certain process “becoming a universally recognized norm”. 13 On the one hand, the members of the Lithuanian Constitutional Court used “soft” terminology and attempted to escape from the statement that the abolition of the death penalty is a universally recognized principle or norm in the sense of Article 135 of the Constitution; on the other hand, by using the term “becoming” they are attempting to foresee the fact that, in the future, this norm will become universally recognized.

If the Court had used, for instance, a term “became” (or “is”), then from premises (1) and (2) one could argue that Lithuania had to abolish the death penalty. But by using the present tense to strengthen its argument (6), the Constitutional Court justices used the other premises/arguments (7) and (8) in order to arrive at the conclusion (9) that punishment is no longer considered as the main aim of the criminal sanction within the criminal law of a contemporary democratic European country.

So here, the Court wanted to say that the problem of the death penalty should be interpreted in the light of international and European law.

5.1. The Legal History of the Death Penalty in Lithuania

In that portion of the judgment devoted to legal history, the judges presented the following statements:

(1) Already in the 16th century, Lithuanian Statutes (1528, 1566, 1588) established certain restrictions on the application of the death penalty.
(2) The Constituent Assembly of the First Republic (1918-1940) abolished capital punishment de jure in 1920 and only because of the state of emergency during the time of the First Republic was the death penalty applied de facto.

(3) After Soviet occupation (1940), the Russian Soviet Criminal Code was retroactively imposed containing more than thirty “counter-revolutionary” and other state crimes for which the death penalty could be imposed and by which thousands of innocent Lithuanians were executed.

The Court here wanted to say that Lithuanian history shows a distinct tendency to abolish the death penalty. Another important “message” contained in this brief part demonstrates that the death penalty could be considered as an instrument of arbitrariness, aggression, and a product of a totalitarian regime.

5.2. Legislative History of the Death Penalty under Article 105 of the Criminal Code

In this section, the Court sought to provide a legislative overview concerning capital punishment after the re-establishment of independence on 11 March 1990. It made the following statements:

(1) After March 1990 the Soviet Criminal Code was taken on in Lithuania, a code which contained thirty-four state and military crimes for which the death penalty could be imposed.
(2) In 1991 Parliament (Seimas) adopted an amendment to the Criminal Code, by which the death penalty was reduced to only one article – Article 105, providing for the death penalty for the crime of murder commitment in aggravating circumstances.
(3) In 1994 the Seimas adopted an Act, under which the death penalty was prohibited for women, minors, and persons with limited responsibility.
(4) The President of the Republic suspended the execution of death penalty in 1996.
(5) The new Criminal Code does not include the death penalty.
(6) The text of a resolution concerning the abolition of the death penalty was included in the parliamentary agenda, which was considered by the Council of Europe as the accomplishment of the preliminary condition for ratifying the Protocol No.6.

The fact that the Court uses the concept of “will (or intent) of the legislator” as a method of interpretation shows its distinct continental approach. In legal theory, one usually distinguishes between historical and hypothetical intent. In this section, the Court used the former method. But this method is here somewhat artificial for two reasons: (a) during such a
short period (eight years), it is very difficult to find and reconstruct the historical intent of the legislator; and (b) the "historical" intent of the legislator concerning the death penalty can be considered as best to be ambiguous. Nevertheless, in this part, the Court sought to point out that legislative history in fact does show all the attempts to abolish the death penalty. But it is relevant here to stress that the Court did not consider the 1998 Amendment to the Criminal Code concerning genocide. Unlike the Court, several experts ventured forth the opinion that this amendment demonstrates the Seimas' position as finally accepting the death penalty in the Lithuanian legal system. From this argument, we can see that if the Court had included this example in its sequence of arguments, it would have required creativity from the justices in order to avoid an undesirable conclusion. In the event, they decided not to even mention it here. This shows that the final conclusion concerning the constitutionality of the death penalty cannot be attained by weighing and balancing all the arguments; rather a teleological construction of the arguments is necessary in order to arrive at the desired conclusion.14

5.3. The Constitutionality of the Death Penalty in Respect of Article 18 of the Constitution

In this part, the Court moved to the main part of its interpretation in considering the constitutionality of the death penalty in relation to specific articles of the Constitution. It started with Article 18. The points made in this part can be reconstructed in the following way:

(1) Article 18 states: "Rights and freedoms of the person are natural".
(2) Human rights are universal/natural and do not depend on whether they are regulated by positive law or not.
(3) The right to life and human dignity is the primary source of all other human rights and constitutes a moral minimum for all legal systems.
(4) Article 19 of the Constitution does not contain any exceptions which, for instance, are formulated in Article 23, by regulating the right to private property (e.g., nationalization).
(5) From the latter argument, it can be concluded that the right to life, as formulated in Article 18 of the Constitution, precludes the possibility for the Criminal Code to contain any sanction whatsoever of the death penalty.

14. We could also say that this act of balancing the arguments was carried out earlier or that it was influenced by the convictions of the justices of the Court.

In this part, the Court used two types of argumentation: the jusnaturalistic concept of human rights (2), (3), and the systematic/literal argument, concerning the literal formulation of Article 19, in stating that the Constitution does not contain any exceptions to the right to life (4). The interesting thing here is that the Court — in order to prove the unconstitutionality of Article 18 — relies on the formulations of articles from the whole of Chapter II of the Constitution ("The individual and the State"), where different human rights are regulated. The main argument here is that this Chapter begins with the statement that human rights are natural. Then in twenty articles, the Constitution specifies all the possible types of human rights. According to the Court, the main notion in this Chapter is to say that all human rights are unconditional and superior to positive law. They can only be limited where a specific article formulates possible restrictions to these rights. For instance, although Article 23(1) states that private property shall be inviolable, in Article 23(3) it is formulated that property "can be seized (nationalized) for the needs of society according to the procedure established by law and must be adequately compensated". So, according to the Court, this article imposes certain limits on the right to property. But the text of Article 19, concerning the right to life, does not contain any exception ("One's right to life should be protected by statute"). The only problem concerning these arguments is, we believe, that it leads to a certain degree of inconsistency in the Court's reasoning because the unconstitutionality of Article 19 is considered in the next part of the judgment.

From the argumentation contained in this part, we can see that the Court found it difficult to reach the conclusion (5) concerning Article 18 by merely relying on the pure conceptual argumentation of human rights. In order to strengthen its conclusion that the death penalty is not consistent with Article 18, the Court also relied on a systematic/literal interpretation of the whole of Chapter II of the Constitution and especially Article 19.

5.4. Conformity with Article 19

This part of the argumentation can be restated as follows:

(1) Article 19 states: "One's right to life should be protected by statute".
(2) Rights exist for the individual so far as s/he is alive.
(3) The right to life is not only regulated by law but also by moral, religious, and other social norms.
(4) The Lithuanian Criminal Code protects human life by threatening to take away the life of one who commits murder.
(5) The principle of rationality shows that human rights cannot be violated in the name of common interests.
confusion into its reasoning and causes definite problems for the reader in understanding the sequence from arguments to the conclusion.

5.5. The Correspondence of the Death Penalty with Article 21 (3)
("Torture, Degrading One’s Dignity, Cruel Treatment or Punishment Should Be Prohibited")

At the beginning of this part, we would like to stress that the text of Article 21(3) of the Lithuanian Constitution is very similar to – although formulated more broadly than – Article 3 of the ECHR; the Constitution contains two additional concepts: “dignity” and “cruelty” which are not expressed in the Convention. It is very important to mention this here in order to more fully understand the reasoning of this part. I will now try to reconstruct this last substantial part of the judgment:

(1) Article 21(3) states that "torture, degrading one’s dignity, cruel treatment or punishment should be prohibited".

(2) A similar norm is formulated in the Article 5 of UDHR (1948), Article 3 of the ECHR (1950), Article 7 of the International Covenant on Civil and Political Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).

(3) The ECHR, in its judgment in Ireland v. United Kingdom (1978), provided the definitions of torture (as severe pain or suffering), “inhuman treatment or punishment”, and “degrading treatment or punishment”, which are primarily applied to possible infringements of said rights by a public power.

(4) It is universally (generally) recognized that the death penalty is cruel.

(5) The cruelty of the death penalty cannot be justified by relying on the cruelty of murder.

(6) The cruelty used by the state is a detrimental influence on social psychology and morals.

(7) The cruelty of the death penalty consists of the fact that the State treats a person as an object that can be eliminated from society.

The specificity of this part of the reasoning is that, unlike the fifth and sixth parts, it does not formulate any conclusion! I think that this is one of the most glaring defects of this part.

So, in premise (2) the Court implies that the notions of "torture", "degradation" and "cruelty" should be interpreted in the light of the ECHR
judgments, since Lithuania has ratified the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and, according to Article 138 of the Lithuanian Constitution, international treaties which have been ratified form part of the Lithuanian legal system.

In premise (3), the Court quotes the ECHR's definitions of "torture", "inhuman treatment or punishment" and "degrading treatment or punishment" Ireland v. United Kingdom. Some comments on this case are in order:

- This case did not concern the death penalty or even criminal punishment.
- In this case, the ECHR only considered the concepts of "torture" and "inhuman or degrading treatment", excluding the concept of "inhuman or degrading punishment" as not being relevant.  
- In its judgment, the ECHR separated the notions of "torture" and "inhuman or degrading treatment". According to the ECHR, the main difference between the two should be that the first of these terms "attaches a special stigma to deliberate inhuman treatment causing very serious and cruel...". Accordingly, torture needs to deal with violence which is more serious than inhuman or degrading treatment. It is significant that the focus here has been firmly laid on the severity of physical and/or mental pain or suffering.
- According to the ECHR definition of said concepts, we can imply that a link between the death penalty and Article 3 of the Convention (within the framework of said ECHR judgment, of course) is possible in order to establish the concept of "torture" because of the latter's severity. The ECHR in dealing with the definition of "torture" also relied on Article 1 of Resolution 3452 (XXX) adopted by the General Assembly of the UN (1975), which declares: "For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official... Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".  

It is curious indeed that the Lithuanian Constitutional Court did not provide this reference and argumentation in its judgment and, therefore, failed to demonstrate why in the later premises it relied only on the notion of "cruelty" but not, for instance, on the concept of "torture". Furthermore, the

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17. See paragraph 164 of the ECHR judgment. Actually, the case concerned the conformity with Art. 3 and other ECHR articles of different interrogation measures (especially, the so-called five techniques) used by the Royal Ulster Constabulary (RUC) against suspects. 
18. Paragraph 167 of the judgement. See also the Separate opinion of Judge Zekia, part B.
19. The Court uses the adjective "cruel" (šiaurė). We can (most likely) assume that it implies both concepts: "cruel treatment" and "cruel punishment" contained in the Constitution.
8. In its resolitional part of the judgment, the Constitutional Court expressly stressed that human rights in Lithuania were guaranteed with the adoption of the Constitution by referendum. Then the justices concluded that a systematic analysis of the constitutional provisions concerning a person’s right to life and human dignity shows that the Constitution does not provide possibility to include the death penalty in the Lithuanian legal order. Consequently, this penalty contradicts Articles 18, 19, and 21(3) of the Constitution.

6. Conclusion

One can say that the present judgment by the Lithuanian Constitutional Court should be considered as a hard case (in the Hartian sense), for here we find more the interpretation of notions — expressed in the text of Constitution — than the interpretation of the text as such. In order to reach the conclusion that it did, the main arguments of the Court could be considered as arguments of external validity (social, psychological, and moral). These arguments are the following: the right to life has a superior value to positive law; the possibility of a mistake by a judge always exists; and the death penalty amounts to cruel treatment or punishment of a person. Even the arguments, which could be considered as legal ones are also policy arguments: e.g., that the death penalty cannot be considered as a criminal punishment or that European law calls for capital punishment to be abolished.

This judgment shows that the consideration of, and “listening” to, different social groups in order to provide better justification for the decision becomes more and more a matter not only for traditional public bodies (Parliament and Government), but also for the judicial branch as well. On the other hand, this case also shows that the Constitutional Court seeks to follow certain implicit “political signs” which have been made by the political bodies mentioned above.

In this case, we can also see that the syllogistic way of reasoning (deduction from the constitutional general norm) composes only a small part of the Court’s judgment. The judgment in its entirety can be divided into three main parts: (1) opinions by experts and the applicants; (2) the Court’s consideration of the death penalty from the point of view of European/international law, the will of the legislators and the aims of criminal punishment; and (3) deductive reasoning from certain articles of the Constitution. The last mentioned forms less than one-fifth of all the judgment.

The judgment also demonstrates the importance of consistency and coherence in legal argumentation. I agree that judicial discretion entails (among other things) the freedom for judges to choose starting point argu-

ments and to use so-called nonmonotonical reasoning. But what we can require from them is that their conclusion should be a logical sequence of the arguments. In our view, making a “jump” in reasoning cannot be considered an appropriate way of judicial argumentation.

Two main legal paradigms in continental Europe have been “established” since the end of the eighteenth century: (1) the sovereignty of the nation (people); and (2) the concept of the will (intent) of the legislator, also used as a method for judicial interpretation. The December 1998 Lithuanian Constitutional Court judgment shows a certain “movement” in changing the paradigms. As far as the first paradigm is concerned, in the absence of majority assent, concerning the abolition of the death penalty, the Court uses the concept of the constitutional legislator (implicit) or nation in referendum (part 8 of the judgment) in order to justify its decision. So, we can say that the social and political situation here plays a major role. As far as the will of the legislator as a method of interpretation is concerned, we have to conclude that it plays only a marginal role in this judgment.

On the other hand, one does not need to give way to temptation by saying that these two legal paradigms are not valid in contemporary European legal theory and practice. Although influenced by the ideas of legal pluralism, interdisciplinarity, economic efficiency, law as a network, procedural justice/democratic discourse, etc., these two paradigms still lie at the core of legal thinking.

Part 6 of the judgment and its claim to refer to ECHR case law has “provoked” me to stress some points on the matter of precedents in this particular case. Firstly, one of the problems of this case is that the Court did not attempt to justify the judgment using its own case law. Secondly, the Court does not explain why it referred to the judgment of the ECtHR in Ireland v. United Kingdom. Thirdly, the Court merely quotes some definitions from this ECHR judgement, but does not try to extract its ratio (the

20. By nonmonotonic reasoning, I mean reasoning when “logical” conclusion from certain premises is changed (or invalidated) by adding some arguments of external validity (e.g., general principles, exception clauses, teleological interpretation, etc.). For more see H. Prakken, Logical Tools for Modelling Legal Argument. A Study of Defeasible Reasoning in Law, Dordrecht 1997, 43.

21. Here, with the concept of a “jump” I do not mean in the sense of “transformation in law” as described by A. Peczenik (see A. Peczenik, R. Alexy, A. Aarnio, “The Foundation of Legal Reasoning,” Rechtstheorie 1981, 136-158), which means to “jump” to a conclusion. In this article, I use this term in the sense of a “jump” from one premise to another, i.e., when these premises do not constitute a logical sequence.


23. It is interesting to speculate which arguments could be used and which conclusions could be drawn if there was no strong political wish for European integration in Lithuania.
relevance of said ECtHR judgment for this case is also highly questionable). My conclusion would be that in later judgments, the Constitutional Court should make more attempts to use caselaw in order to more fully justify its decision and, of course, to explain why they cite or rely on (or move away from) certain precedents.24

Finally, I would like to end this article by referring to three criteria or definitions for coherent interpretation, already formulated by Aarnio in 1981:25

1. A norm contention (interpretation contention) is true if there is coherence between the contention and the interpretative materials presented in support thereof (by the latter he understands travaux préparatoires, precedents, legal science, etc.).
2. The interpretation with the greatest rational acceptability has the greatest societal relevance (by this he means common language, empirical evidence, sufficient amount of values and rational discourse).
3. The interpretation for which one can achieve the rational acceptance of the widest audience has the greatest societal relevance.

As far as the first definition is concerned, I would conclude that the present judgment is only consistent as regards the travaux préparatoires. For the second criterion, I would say that the judgment is only consistent as regards reservations concerning certain “jumps” in reasoning. Consistency with the third criterion is a rather controversial matter for we know that in 1998 there was neither societal nor legal professional consensus as regards the abolition of the death penalty. But on the other hand, over the last two years there have been no major disagreements with the present decision within the legal community or in society at large. It seems that this decision has finally been accepted and has served as a useful instrument for changing old-fashioned legal mentality into one more appropriate for an open and democratic state under the rule of law.

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24. For more about the difference between civil law and common law judicial reasoning, see D.N. MacCormick and R.S. Summers, Interpreting Precedents: A Comparative Study, Aldershot 1997, Ch.3, 529-548.
25. A. Arno, R. Alexy, A. Peczenik, op.cit. note 20, 436-444.