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The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts

Report of
the Constitutional Court
of the Republic of Lithuania

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1. Preface

The preamble of the Constitution of the Republic of Lithuania, which was adopted by the referendum on the 25th of October, 1992, provides that one of the aims of the Lithuanian nation is to strive for an open, just, and harmonious civil society and State ruled by Law. This aim means that the Republic of Lithuania must be under the rule of Law, that the most important values are the human being and his rights in this state. Moreover, Article 18 of the Constitution consolidates: "The rights and freedoms of individuals shall be inborn." Other articles of the Constitution proclaim the inviolability of respective inborn human rights and freedoms and provide for the ways of their protection. The aim mentioned above also expresses that justice is one of the main objectives and grounds of law as means to regulate social life. Justice is one of the basic moral values, as well as that of basic foundations of state under the rule of law. Justice may be implemented by ensuring a certain equilibrium of interests, by escaping fortuity and arbitrariness, instability of social life and conflict of interests. It is impossible to attain justice by recognizing the interests of only one group or one person and by denying the interests of others at the same time.

However, it needs to ascertain that it is not enough to adopt a new Constitution which would be based on the values of the democratic Western countries and on the democratic national constitutional traditions of Lithuania. It is also necessary to create a new constitutional order and a mechanism of the protection of human rights and other basic principles and an apparatus of the "cleaning" of positive law from illegal norms. Positive law is such a diverse and constantly changing phenomenon that there must be levers and guaranties which would limit arbitrariness of the powers.

Formation of the Lithuanian law is one of the most vivid peculiarities of the present. This process is predetermined by many factors, i. e. by the priorities of Lithuanian internal and foreign politics, the political and legal ideas spread in society, the programs and aims of political parties, the subjective views of prominent personalities of science and politics, in other words, objective and subjective factors. Observing the process how Lithuanian law is being created, one may say that it is a complicated and often contradictive phenomenon. While the inner and outer functions of the State are being realized, and legal norms are actively being created, there can be found inadequacy between individual statutes or legal norms, hierarchical discrepancy between legal norms, the inner logic of the system and its regularities. Sometimes, while incorporating the legal institutions, known in comparative law, into the Lithuanian legal system, not enough regard is paid how those legal phenomena correspond to the local legal system and legal traditions. Though some units in the legal system are being corrected, others are left forgotten. Therefore, the institutions applying legal norms undergoe not only the legal discomfort. Maybe here lies the reason why courts of general competence, while confronted with the defects of legal regulation, often make mistakes, and that evokes a negative reaction from people.

Thus, the main institutions of the protection of human rights – courts of general competence and administrative courts, while applying legal norms, meet with "unlawful" statutes and other acts, adopted by the central institutions of the state, which they cannot recognise as unlawful. The Constitutional Court of the Republic of Lithuania is the main (and the only) "cleaner" of statutes mentioned above. So the principle of the rule of law could be guarantied only when: 1) positive law is cleaned from „illegal" (unconstitutional) norms constantly and 2) there are courts, which protect and defend human rights and freedoms from unlawful acts

of the third persons (including the institutions of the state) in the concrete cases. The first function mentioned above is realised by the Constitutional Court and the second one – by courts of general jurisdiction and administrative courts in Lithuania.

It must be stressed that the history of the world civilization knows several systems of the guaranty of the constitutionalism (as well as the principle of the rule of law), but we would like to mention only the main two ones. The first system provides that courts of general jurisdiction not only protect human rights in the concrete cases, but also can decide that some statutes and other acts are illegal and unconstitutional (the USA model) and they must be not applied from that moment when they are recognized as such. This system is called as the concrete constitutional review (control). Thus, it has been created by the courts themselves through the succession of individual (concrete) cases. The main goal of this review is to try an individual case, and the decision recognizing some acts illegal is second-rate goal; so, in our opinion, this system is not efficient for the perfect legal regulation. The concrete constitutional control eliminates illegal acts only applying them in concrete cases. Thus it seems necessary to have a proper system of the constitutional review when illegal acts could be removed from the legal system while some subjects (including political subjects) doubt about their compliance with the Constitution or about their legality and fairness. This control system is called as the abstract constitutional review. Such system was established in most of European countries and is also called as „European" system. The abstract constitutional review is provided by the Lithuanian Constitution. It means that the specific institution – the Constitutional Court of the Republic of Lithuania – exists alongside courts of general jurisdiction and administrative courts.

2. Role of the Constitutional Court in the legal system of Lithuania

The Constitutional Court is established by the Constitution of Lithuania. It's Section VIII „The Constitutional Court" (Articles 102-108) provides for basic issues concerning the shape of the Constitutional Court. The detailed regulation of the competence of this Court, it's organization and proceedings before it is provided by the ordinary Law on the Constitutional Court of the Republic of Lithuania which was passed by the Seimas (the Parliament of Lithuania) on the 3rd of February, 1993. Internal questions of the Constitutional Court, the rules of the professional conduct of judges, the structure of the Court apparatus, clerical work and other issues are regulated by the Rules of the Constitutional Court which are approved by this Court.

Part 3 of Article 1 of the Law on the Constitutional Court of the Republic of Lithuania provides that the Constitutional Court shall be an independent court which executes judicial power according to the procedure established by the Constitution of the Republic of Lithuania and the Law on the Constitutional Court. The Constitutional Court is a specific court which doesn't belong to the general system of courts (this system is provided by the ordinary Law on Courts), so its competence is specific, too. The Constitutional Court of the Republic of Lithuania shall ensure the supremacy of the Constitution of the Republic of Lithuania in the legal system as well as constitutional legality by deciding, according to the established procedure, whether the laws and other legal acts adopted by the Seimas are in conformity with the Constitution, and whether the acts adopted by the President or the Government of the Republic correspond with the Constitution and laws. Laws (parts thereof) of the Republic of Lithuania or any other acts (parts thereof) of the Seimas, acts of the President of the Republic of Lithuania, and acts (parts thereof) of the Government may not be applied from the day of

official promulgation of the decision of the Constitutional Court that the act in question (part thereof) is inconsistent with the Constitution. However, although this function (“cleaning“ the legal system from illegal norms) of the Court is the mainone, one has to pay heed to the fact that the role of the Constitutional Court does not confine itself only to recognition of non-conformity of legal norms with the Constitution. The Constitutional Court also construes and interprets the content of constitutional norms. In other words, the main aim of the powers of the Constitutional Court as established by the Constitution is to secure the protection of the constitutional principles, provisions and norms or the supremacy of the Constitution in the legal system. The main constitutional form of implementation of this aim is investigation and assessment whether a legal act (legal norm) is in conformity to the Constitution. This function of the Constitutional Court reflects the philosophy, the meaning and the nature of the constitutional review. While implementing it, the Court, of its own accord, interprets the content of the Constitution. Even though neither the Constitution, nor the Law on the Constitutional Court (differently than in other states) formulates such a task for the Constitutional Court, however, in every legal case wherein the issue of the constitutionality of a legal act is being decided, inevitably one has to elucidate the content of the constitutional norm, the meaning of constitutional principles, their relation with the legal act the lawfulness whereof is doubted. This is a phenomenon which is dependent on the objective conditions, as unless the content of a norm of the Constitution has been elucidated, it is impossible to state that a particular law (part thereof) contradicts the Constitution. The rulings of the Constitutional Court are based not only on the grammatical but also on the systemic and historical method of construction of constitutional norms. This will be confirmed, indeed, by a more attentive analysis.

While understanding that construction of the content of the Constitution is, in general, a dynamic phenomenon, alongside it is necessary to emphasize that the prerogatives of the Constitutional Court in construction of the Constitution partly eliminate, too, the pre-conditions to change it. Most of the problems regarding the improvement of the Constitution, which are being discussed at present, may be decided by construing the valid constitutional norms and their essence by the Constitutional Court. This is noted not only by lawyers but also by the people who participate actively in the political life and exert influence on the political process.

The stabile Constitution and the Constitutional Court functioning on the basis of the latter are legal pre-conditions to form political and legal culture, as well as the traditions of statehood. Such Constitution is also an important factor of the institution of constitutional review as, during a longer period of time, experience is accumulated which creates conditions for further development.

Thus, first of all, the Constitutional Court is a “cleaner” of the Lithuanian system of law. The rulings passed by the Constitutional Court, and the arguments formulated therein tell about the aspiration of the Court to estimate the norm of the created law with regard to a wide panorama of constitutional values. Not doubting positive intentions of the legislator, the Constitutional Court fulfilled its duty and eliminated from the legal system those norms the form or content of which contradicted the Constitution, its principles or provisions. Secondly, the Constitutional Court interprets the content of constitutional norms and creates the constitutional doctrine of Lithuania. Thirdly, the Constitutional Court in its rulings is not only eliminating the legal norms contradicting the Constitution. Quite often the legislator is "prompted" which norms are improper, where the gaps are, and what legal values cannot be forgotten or ignored.

It must be emphasized that the abstract constitutional control doesn't defend human rights and freedoms of an individual (his subjective rights). However, it protects inborn human rights and freedoms as the ground and substantive essence of positive law. In other words, the abstract control makes a large impact on all legal regulation, but not on the subjective rights of a concrete human being. There is a possibility of filing neither individual (*actio popularis*), nor constitutional complaint in Lithuania.

The review made by the Lithuanian Constitutional Court may be concrete in some cases. For example, Article 73 of the Law on the Constitutional Court of the Republic of Lithuania provides that the Constitutional Court can pass the following rulings: 1) whether violations of the laws on elections occurred during the elections of the President of the Republic or the Seimas; 2) whether the President of the Republic's capacity to continue in office is limited by reasons of health; 3) whether the concrete actions of the Seimas members or state officials to whom impeachment proceedings have been initiated contradict the Constitution. Of course, such conclusions which could be made by the Constitutional Court are concrete by their essence, but there has been only one such decision adopted. It is the conclusion "On elections to the Seimas of the Republic of Lithuania" which was adopted on the 23rd of November, 1996.

The Constitutional Court of the Republic of Lithuania cannot institute proceedings on it's own accord (*ex officio*). It is not obliged to collect the information on shortcomings and gaps in laws and to respond to them in order to assure the coherency of the legal system in the state. The initiative of the instituting proceedings before the Constitutional Court remains with the group of the members of the Seimas, the Government, the President and the courts of general competence or administrative courts: 1) the Government, no less than one-fifth of the members of the Seimas, and the courts shall have the right to address the Constitutional Court concerning the statutes and the other legal acts adopted by the Seimas; 2) no less than one-fifth of the members of the Seimas and the courts shall have the right to address the Constitutional Court concerning the conformity of acts of the President with the Constitution and the statutes; 3) no less than one-fifth of the members of the Seimas, the courts, and the President of the Republic of Lithuania shall have the right to address the Constitutional Court concerning the conformity of an act of the Government with the Constitution and the statutes. Thus, we can make a conclusion that the Constitutional Court of the Republic of Lithuania mainly executes the abstract constitutional control and the Court's role while initiating proceedings is passive.

Statutes and the other legal acts (part thereof) shall not be applicable from the day that a ruling of the Constitutional Court, that the appropriate act (part thereof) contradicts the Constitution, is published. The decisions of the Constitutional Court shall be officially published in a separate chapter of the official gazette "News of the State" of the Republic of Lithuania. Rulings of the Constitutional Court shall become effective on the day they are published in the above mentioned publication. Rulings adopted by the Constitutional Court shall have the power of statute and shall be binding to all institutions of the State, public organizations as well as to all officials and citizens. All institutions of the State, as well as their officials, must revise the acts and the provisions thereof which they have adopted and which are based on the act which has been recognised as unconstitutional. Decisions based on legal acts which have been recognised as being contradictory to the Constitution or statutes must not be executed if they were not executed prior to the appropriate ruling of the Constitutional Court becomes effective. The power of the Constitutional Court to recognize a

legal act or a part thereof as unconstitutional may not be overruled by a repeated adoption of a like legal act or part thereof.

3. The Constitutional Court and other courts of Lithuania

The main guarantors of concrete human subjective rights and freedoms are courts of general jurisdiction and administrative courts. The courts, while judging the cases, cannot apply illegal statutes and other illegal acts; on the other hand, such a thing would mean that the principle of the rule of law would be violated. Part 1 of Article 7 of the Constitution of the Republic of Lithuania provides that "any law or other statute which contradicts the Constitution shall be invalid." This provision must be interpreted as the constitutional principle. Part 1 of Article 110 of the Constitution provides that "Judges may not apply laws which contradict the Constitution". Thus, the constitutional power (the People) directly provided in the Constitution that the third power – the courts – has the imperative duty to apply only just and legal statutes and other acts. If a court of general jurisdiction or an administrative court would base its decision upon illegal norms and acts, it would be a illegal act, too.

It is truth, that there can be such a situation that the Constitutional Court may recognize some norms as unconstitutional (unjust and illegal), but the legislative power would not be in a hurry while preparing a new, just and lawful act and there would be a gap of the legal regulation. So courts of general jurisdiction and administrative courts can and must apply the constitutional norms in such a case. Of course, the legal analogy could be used only in civil cases, but not in criminal or administrative ones; in this situation the process must be ended in the latter cases.

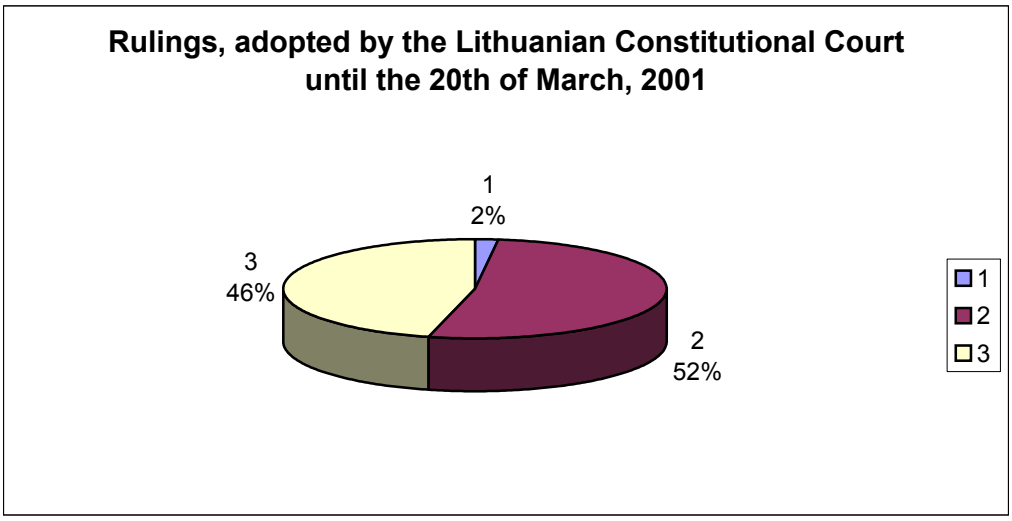
Part 2 of Article 110 of the Constitution of the Republic of Lithuania provides that "in cases when there are grounds to believe that the law or other legal act applicable in a certain case contradicts the Constitution, the judge shall suspend the investigation and shall appeal to the Constitutional Court to decide whether the law or other legal act in question complies with the Constitution". This norm shows the relation between the Constitutional Court and other courts. The constitutional power, while formulating this norm, didn't establish the precise grounds on which the court could doubt about the legality of the act. However, the court must base its decision on the legal arguments while applying to the Constitutional Court. Moreover, the Constitutional Court has the right to refuse to accept the applications if they are not based on legal motives. It is so because the petition of a court of general jurisdiction or of an administrative court is not only the precondition for the adoption of the ruling of the Constitutional Court; it is also a factor which has an impact on the whole legal system. Of course, such influence is indirect: if the Constitutional Court recognizes that some norms or acts are unconstitutional, a court of general jurisdiction or an administrative court defends not only subjective rights of the human being in the concrete case, but also the human rights and freedoms (as the ground of positive law) of all people.

Thus, an individual can reach the Constitutional Court when his constitutional rights are violated. For instance, when a court of general jurisdiction is investigating either a civil, criminal or administrative case, one of the parties to the case has an uncontested right to raise the question of lawfulness of either the law or another legal act which is to be applied in that case. Of course, neither the Constitution, the Law on the Constitutional Court, nor procedural

laws mention this directly. Only the prerogative of the court to suspend the investigation of the case and to appeal to the Constitutional Court has been consolidated. Thus, in all cases it is the judge who has the final word, i. e., his decision will be decisive in whether the request of an individual taking part in the case to appeal to the Constitutional Court reaches the latter institution. In this sense, the legal situation is both undefined and delicate. Not without reason this problem is being solved by various legal forms in other European states, as well.

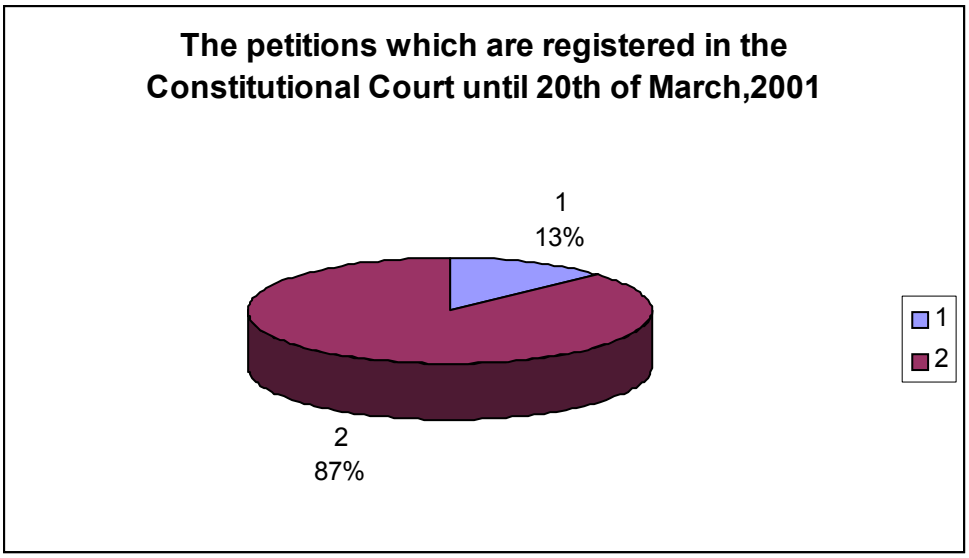
At present we only could note that judges, investigating concrete cases, should act very wisely, and in case of raising a constitutionality issue of a legal norm by one of the parties to the case, they should not block the way to an opportunity to settle this question in the Constitutional Court. Of course, the judge should always make sure that there are at least minimal arguments which give grounds to doubt the lawfulness of the legal norm. One can presume that in this sense the legislator has enough reasons and motives to make respective procedural laws more precise. For example, there might be a specified opportunity for the parties to the case to appeal against the court's (the judge's) refusal to suspend the investigation of the case and appeal to the Constitutional Court.

It must be emphasized that arguments of the petitions are formal and meagre in the most cases in the practice: courts only note that they doubt about the legality of some norms. Moreover, although the representatives of the petitioners have the right to participate in the proceedings of the Constitutional Court, but they don't use such a right. So the Constitutional Court loses its chance to get some more additional arguments if it would need them. But it is truth that the Constitutional Court accepts the requests of the courts in most cases, although the problem of sufficient presentation of the legal motives is becoming more accute. For example, 104 rulings by the Lithuanian Constitutional Court were adopted until the 20th of March, 2001, and 54 rulings from among all the rulings were adopted after the courts had applied to the Constitutional Court:



1. The petitioner to the Constitutional Court – the Government;
2. The petitioner to the Constitutional Court – the courts;
3. The petitioner to the Constitutional Court – the Seimas or a group of members of the Seimas.

Besides, 69 new petitions were registered in the Constitutional Court until the 20th of March, 2001 and 60 from among all the petitions were filed by the courts:



1. The petitions which are filed by the Seimas or a group of members of the Seimas;
2. The petitions which are filed by the courts.

So we could see that the judges are not afraid of applying to the Constitutional Court, they often express their doubts about the legality of some acts. This could be possibly explained that the consciousness of judges has changed, they don't think that the legislature is unmistaken. Such a phenomenon gives grounds for thinking that human rights and freedoms are defended sufficiently in Lithuania.

4. The constitutional significance of 1999 12 21 ruling of the Constitutional Court

While discussing the relation between the Constitutional Court and other courts, it needs to be noted that the Constitutional Court often investigates legal acts which regulate activities of courts, and it also interprets some constitutional principles which are directly related with activities of courts, with their formation and composition (for example, independence of the courts and etc.). On the 21st of December, 1999 the Constitutional Court adopted the ruling where it investigated if some provisions of the Law on Courts were in compliance with the constitution. The Constitutional Court analysed powers and rights of the executive authority (specifically powers of the Ministry of Justice and it's head) which related with courts in this ruling. The Constitutional Court recognized that disputable norms in the scope whereby the proposal of the Minister of Justice regarding appointment of judges of district and regional courts, regarding appointment of chairpersons of district and regional courts, regarding appointment of judges of the Court of Appeal and its Chairperson from among them, regarding dismissal of the Chairperson and other judges of the Court of Appeal from office, regarding dismissal of chairpersons and other judges of other courts from office, in the scope whereby the number of judges in the divisions of civil and criminal cases of regional courts and the Court of Appeal shall be set by the Minister of Justice on the proposal of the Director of the Department of Courts under the Ministry of Justice, in the scope whereby the proposal of the Minister of Justice regarding appointment of judges after his five-year term of office has expired, in the scope whereby a judge of a district or regional court, that of the Court of Appeal and the Supreme Court of Lithuania, in case he agrees, may, by a decree of the

President of the Republic, be delegated for the term of up to one year to the structures of the Ministry of Justice or those of the Department of Courts and that for the term of the delegation the powers of the delegated judge shall be suspended, in the scope whereby the proposal of the Minister of Justice regarding appointment of judges to the Court of Honour of Judges, in the scope whereby disciplinary action against the chairperson of a district or regional court and the Court of Appeal, their deputies, division chairpersons and other judges may be instituted by the Minister of Justice on the proposal of the Director of the Department of Courts or on his own initiative and that the judge against whom disciplinary action has been instituted may be removed from office on the proposal of the Minister of Justice until the outcome of the case becomes clear, in the scope whereby the competence of the Minister of Justice to arrange for the financial supply of district, regional courts and the Court of Appeal, contradicted the Constitution of the Republic of Lithuania. The constitutional significance of this ruling for the guarantees of the principle of the independence of courts is undoubted: this ruling fixed the interpretations (of the Constitutional Court) which drew the limits for the executive authorities in their relations with the judicial authorities.

5. The constitutional significance of 2000 04 05 ruling of the Constitutional Court

Part 4 of Article 69 of the Law on the Constitutional Court provides that the annulment of a disputable legal act shall be grounds to adopt a decision to dismiss the initiated legal proceedings. However, it needs to be noted that the courts of general jurisdiction and administrative courts try cases applying legal acts which regulate (or even regulated) relations of the disputable situation; so the courts apply even annulated acts. On the 5th of April, 2000 the Constitutional Court adopted the ruling where it emphasyzed that the wording "shall be grounds to adopt a decision to dismiss the initiated legal proceedings" is to be construed as establishing the right of the Constitutional Court to dismiss the initiated legal proceedings while taking account of the circumstances of the case under investigation, but not as establishing that in every case when the disputed legal act is annulled the initiated legal proceedings are to be dismissed. The Constitutional Court noted that unless the Constitutional Court decides the question in essence, the doubts of the court regarding the constitutionality of the legal act will not be removed. Unless the doubts regarding the constitutionality of the applicable legal act are removed and upon application of the legal act wherein this question has not been decided in the decision of the case, the constitutional rights and freedoms of the individual might be violated.

6. Conclusions

1. The adoption of a democratic Constitution in Lithuania predetermined the establishment of the Constitutional Court of the Republic of Lithuania. The “European” system of the constitutional review was chosen.

2. The principle of the rule of law could be guarantied only when: 1) positive law is cleaned from “illegal” (unconstitutional) norms constantly and 2) there are courts, which protect and defend human rights and freedoms from unlawful acts of the third persons (including the institutions of the state) in concrete cases. The first function mentioned above is realised by

the Constitutional Court and the second one – by courts of general jurisdiction and administrative courts in Lithuania.

3. The courts, while applying to the Constitutional Court, become much more active. This could be possibly explained that the consciousness of judges has changed, they don't think that the legislature is unmistaken. Such a phenomenon gives grounds for thinking that human rights and freedoms are defended sufficiently in Lithuania.