

# The Dialogue of the Constitutional Court with the Ordinary Courts: The Developments in Thirty Years

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Straipsnyje aptariama Lietuvos Respublikos Konstitucinio Teismo ir ordinarinių teismų sąveika per trisdešimt metų. Konkrečių bylų pagrindu aptariamos trys probleminės šios sąveikos grupės. Visų pirma, tai ordinariniams teismams nustatytos teisės ir pareigos kreiptis į Lietuvos Respublikos Konstitucinį Teismą įgyvendinimas. Taip pat su individualaus konstitucinio skundo atsiradimu siejama galimybė Lietuvos Respublikos Konstituciniam Teismui sustabdyti ordinarinio teismo sprendimo vykdymą. Galiausiai aptariama ordinarinio teismo proceso atnaujinimo po Lietuvos Respublikos Konstitucinio Teismo nutarimo, priimto pagal individualų konstitucinį skundą ir pripažįstančio tam tikrą aktą (jo dalį) prieštaraujančiu Konstitucijai, problematika. Svarstoma, kuriais atvejais teismų sąveiką galima įvardyti teismų dialogu.

**Pagrindiniai žodžiai:** Lietuvos Respublikos Konstitucinis Teismas, ordinariniai teismai, teismai, teismų dialogas, individualus konstitucinis skundas

## Introduction

Constitutional courts never act in a vacuum. They are a part of the State's institutional framework. Their status is prescribed by the Constitution, national laws and customs, administrative practices, and legal culture. The Constitutional Court of the Republic of Lithuania (hereafter – the *Constitutional Court* or the *Court*) is not an exception.

The principal function of all courts concerns justice. However, the competence prescribed by the Constitution of the Republic of Lithuania (hereafter – the *Constitution*) and the laws delineates the exact functions and discretionary limits of all courts. All courts have their respective roles in the State. The State designs its justice system with the utmost focus on achieving its primary objective of dispensing justice effectively.

The Constitution and the national laws prescribe a variety of interactions between the Constitutional Court and ordinary courts. For example, every judge in ordinary courts possesses the authority and responsibility to refer to the Constitutional Court regarding the compliance of legal provisions directly relevant to the specific case with the Constitution (see Article 110 § 2 of the Constitution). The question of the content of this responsibility depends on individual circumstances.

The interactions between the Constitutional Court and ordinary courts could have a different nature. They might be more open, identified as a dialogue between these courts. Yet, in some cases, the Constitutional Court could be constituting in a more monologue way. The courts may even compete in terms of their competence in some specific instances. We decided to look for some illustrative examples of interactions between the Constitutional Court and ordinary courts during the last thirty years, aiming to identify the nature of this cooperation and delineating issues that may arise in the future.

On methods. This is an empirical type of paper. We used a database of the Constitutional Court<sup>1</sup> and the legal database *Infoplex* to find relevant judicial decisions of the Constitutional Court and the relevant laws. We analyzed the decisions adopted by the Constitutional Court from 1993 to 2022, by which the petitions submitted by courts were refused to consider or returned to the courts<sup>2</sup>. We also searched for the case law of the Constitutional Court applying Article 67<sup>2</sup> § 1 of the Law on the Constitutional Court. We searched for the decisions on the reopening of judicial proceedings of ordinary courts after the rulings of the Constitutional Court in individual constitutional cases on the *Infoplex* database.

1 See: <https://lrkt.lt/lt/teismo-aktai/nutarimai-isvados-ir-sprendimai/138/y2023>

2 See Articles 69 and 70 of the Law on the Constitutional Court of the Republic of Lithuania.

In our paper we address three specific forms of the interaction between the Constitutional Court and ordinary courts: (1) The constitutional right and duty of ordinary courts to apply to the Constitutional Court regarding the compliance of the legal act applicable in the particular case before them with the Constitution; (2) The Constitutional Court's competence to suspend the execution of the decision of the ordinary court in case of the constitutional complaint procedure; (3) The powers of the ordinary courts to renew (reopen) the proceedings based on the Constitutional Court's ruling after a successful individual constitutional complaint. We start with some conceptual discussion of the interaction between the Constitutional Court and ordinary courts.

## 1. The Dialogue with Ordinary Courts

Since its establishment, the Court and ordinary courts have been developing the model of coexistence. Over the past thirty years, this model has acquired tangible outlines. As the analysis confirms, the *modus vivendi* between the Constitutional Court and ordinary courts is based on various principles of mutual dialogue. Also, within thirty years, certain tensions become apparent between the Constitutional Court and ordinary courts. Our analysis seeks to reveal the above-mentioned principles, the importance of coping with the existing tensions, and future challenges for a reasonable dialogue between the Constitutional Court and ordinary courts.

Looking through the lens of the Constitution of the Republic of Lithuania<sup>3</sup> (hereafter – *Constitution*) and the laws adopted on its basis, there are currently three systems of courts implementing the judicial power in Lithuania: 1) Constitutional Court, 2) courts of general competence, and 3) administrative courts (see the Constitutional Court, the ruling of 6 June 2006)<sup>4</sup>.

According to the Constitution, the Constitutional Court is entrusted with the exclusive role, i.e. to administer constitutional justice, to guarantee the supremacy of the Constitution in the legal system of the country and constitutional legality (see the Constitutional Court rulings of 6 June 2006 and 12 June 2020). By carrying out its constitutional mission, the Constitutional Court decides whether any legal act passed by the Seimas, the President of the Republic, or the Government, or adopted by referendum, is in conflict with the Constitution (or other higher-ranking legal acts)<sup>5</sup>. Under Article 105 § 3 of the Constitution, the Consti-

3 For the text in English see <https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192>.

4 All the acts of the Constitutional Court are available in English at the official website of the Constitutional Court: <https://lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2023>.

5 See Article 102 § 1 of the Constitution.

tutional Court also has powers to give conclusions on the specified issues<sup>6</sup>. According to the Constitution, the Constitutional Court exclusively holds the constitutional authority to authoritatively interpret the Constitution. This interpretation serves as a guiding framework for all legislative and judicial bodies, including ordinary courts<sup>7</sup>. Thus, all acts of the Constitutional Court in which the Constitution is interpreted by their content are binding on ordinary courts.

The role of the Constitutional Court remained the same following the introduction of the institution of individual constitutional complaints in the Lithuanian legal system<sup>8</sup>. The limited model of the individual constitutional complaint was established in 2019. It is based on the right of every person to apply to the Constitutional Court regarding the compliance of the legal acts assigned to the competence of the Constitutional Court with the Constitution, when a decision adopted on the basis of such acts may have violated his or her constitutional rights or freedoms (see Article 106 § 4 of the Constitution)<sup>9</sup>. This implies that the Constitutional Court did not acquire the powers to assess (review) the decisions of ordinary courts and (or) to overrule (amend) them<sup>10</sup>.

The supremacy of the Constitution implies that the judges of ordinary courts may not apply any law that is in conflict with the Constitution (Article 110 § 1 of the Constitution). To ensure this constitutional imperative, each judge of ordinary courts has the right and duty to address the Constitutional Court regarding the conformance with the Constitution of legal provisions that are directly applicable in the case before him or her<sup>11</sup>.

With the above in mind, the competence of the Constitutional Court and the constitutional duty of ordinary courts to respect and follow the Constitution itself determines the inevitable intersection and interaction between the Constitutional Court and ordinary courts. As Garlicki pointed out, while constitution-

6 i.e. whether election laws were violated during the elections of the President or the elections of the members of the Parliament, whether the state of health of the President allows him/her to continue to hold office, whether the international treaties of the Republic of Lithuania are in conflict with the Constitution; and whether concrete actions of the members of the Parliament and State officials against whom an impeachment case has been instituted are in conflict with the Constitution.

7 See the Constitutional Court decision of 20 September 2005, the rulings of 28 March 2006 and 29 June 2010.

8 The Law Amending Articles 106 and 107 of the Constitution of the Republic of Lithuania (TAR, 2019-04-02, No. 5330) came into effect on 1 September 2019.

9 More about the Lithuanian model of the individual constitutional complaint, see e.g. Danėlienė, 2021; Pūraitė-Andrikienė, 2022a; Pūraitė-Andrikienė, 2022b.

10 See the Constitutional Court decisions of 9 October 2019 (No. KT27-A-S16/2019) and of 1 March 2023 (No. KT19-A-S17/2023).

11 See Article 110 § 2 of the Constitution; the Constitutional Court's rulings of 30 December 2003 and of 28 March 2006.

al law permeates the entire structure of the legal system, it has become impossible to maintain a firm delimitation between the functions of the Constitutional Court and those of ordinary courts (Garlicki, 2007, p. 44). From the perspective of the Constitutional Court's thirty years of activities, it can be evaluated that the above-mentioned interaction has gradually become an effective and respectful dialogue. After the implementation of individual constitutional complaints in Lithuania's legal system, it led to new ways in which the Court and ordinary courts interact. This presented fresh challenges for the legal system requiring the establishment of principles for maintaining respectful communication and preventing competition between the Constitutional Court and ordinary courts.

We ground these insights on our further analysis which focuses on the following forms of the interaction between the Constitutional Court and ordinary courts:

1. The constitutional right and duty of ordinary courts to apply to the Constitutional Court regarding the compliance of the legal act applicable in the particular case before them with the Constitution (Article 110 of the Constitution);
2. The Constitutional Court's competence to suspend the execution of the decision of the ordinary court in case of a constitutional complaint procedure (see Article 67<sup>2</sup> of the Law on Constitutional Court of the Republic of Lithuania);
3. The powers of the ordinary courts to renew (reopen) the proceedings based on the Constitutional Court's ruling after a successful individual constitutional complaint (see Paragraph 3 of Article 107 of the Constitution, Article 156 § 2(13) of the Law on Administrative Proceedings, Article 366 § 1(10) of the Code of Civil Procedure of the Republic of Lithuania, Article 456 § 1(2) of the Code of Criminal Procedure of the Republic of Lithuania).

By examining specific examples, the analysis highlights the significance of establishing a genuine and effective dialogue between the Court and ordinary courts. It underscores the necessity of establishing principles as the foundation for this dialogue and identifies the potential issues and threats that can arise when such communication is not ensured.

## 2. The Right and Duty of Ordinary Courts to Initiate Constitutional Proceedings

Let us begin with the most obvious interaction between the Court and ordinary courts – the application of an ordinary court to the Constitutional Court in doubt as to the constitutionality of the law. According to Article 110 of the Constitution, in cases when there are grounds to believe that a law or another legal act which

should be applied in a particular case is in conflict with the Constitution, the judge shall suspend the consideration of the case and shall apply to the Constitutional Court requesting it to decide whether the law or any other legal act in question is in compliance with the Constitution. Thus, if there are doubts about the constitutionality of the legal act involved in a particular case, the judge of an ordinary court must refer to the Constitutional Court. In other words, this is a constitutional duty placed on ordinary courts (see e.g. the Constitutional Court rulings of 30 December 2003 and of 28 March 2006). After the Constitutional Court's ruling, the matter is returned to the ordinary court from which it came. The judge must then adjudicate the administrative, criminal or civil case at hand by applying the ruling of the Constitutional Court.

Looking from the perspective of the Constitutional Court's thirty years of activity, for more than 25 years, ordinary courts were the subjects that most often initiated constitutional proceedings before the Constitutional Court<sup>12</sup>. The introduction of the institution of individual constitutional complaints changed this trend. Currently, individual constitutional complaints make up the majority of applications submitted to the Constitutional Court<sup>13</sup>. However, if we look at the number of accepted applications, ordinary courts continue to submit the majority of this kind of requests, i.e. the requests raising serious doubts about the constitutionality of legal acts<sup>14</sup>. Considering the number of the Constitutional Court's rulings that were adopted in the constitutional justice cases initiated by ordinary courts, in which legal

12 In 1993-2022, the ordinary courts submitted 938 petitions regarding the review of the constitutionality of legal acts. In 1993-2018 (i.e. before the individual constitutional complaint was introduced in the Lithuanian legal system), the highest number of applications was filed with the Constitutional Court by courts (78 percent, or 885 petitions). Following the introduction of the individual complaint, this tendency has changed. In 2019-2022, only 8 percent of applications were filed by courts (53 petitions). See the annual reports of the Constitutional Court. They are available in English at the official website of the Constitutional Court: <https://lrkt.lt/en/about-the-court/activity/annual-reports/183>.

13 In 2022, persons referred to in Paragraph 4 of Article 106 of the Constitution filed with the Constitutional Court 118 petitions, i.e. individual constitutional complaints. In 2021, they filed 150 individual constitutional complaints. In 2020, they submitted 231 individual constitutional complaints. In comparison, 15 applications were filed with the Constitutional Court by courts in 2022, 17 – in 2021, and 8 – in 2020. See the annual reports of the Constitutional Court.

14 In 2022, the Constitutional Court accepted 6 individual constitutional complaints (3 of them concerned the same constitutional matter), 9 petitions filed by courts (2 of them concerned the same constitutional matter) and 3 petitions filed by groups of members of the Seimas. In 2021, the Constitutional Court accepted 10 individual constitutional complaints (6 of them concerned the same constitutional matter), 10 petitions filed by courts and 4 petitions filed by groups of members of the Seimas. In general, the admissibility rate of courts' petitions submitted to the Constitutional Court remains pretty stable: in 2015 the Constitutional Court accepted 56 percent of applications filed by courts, in 2016 – 63, in 2017 – 88, in 2018 – 50, in 2019 – 77, in 2020 – 38, in 2021 – 59, in 2022 – 60.

acts were recognized as not in compliance with the Constitution, it can be concluded that ordinary courts significantly contribute to ensuring the constitutional quality of legal acts. The ordinary courts play a significant role in that the legal acts inconsistent with the Constitution (or the doubts of such inconsistency) would be removed from the legal framework (system). This is especially so as the Constitutional Court develops the official constitutional doctrine and formulates the constitutional guidelines for future legal acts in all decisions, including those in which the legal acts are recognised to be in compliance with the Constitution.

After a systematic analysis of the Constitutional Court's decisions regarding the admissibility of petitions filed by courts, it can be noted that the dialogue between the Constitutional Court and other courts, especially its quality, has developed gradually.

At the beginning of the activity of the Constitutional Court, we consider the communication between the Constitutional Court and the ordinary courts as a monologue rather than a dialogue. First, this period of the activity of the Constitutional Court was distinguished by the Constitutional Court's more formal approach to the admissibility of courts' petitions. For instance, the Constitutional Court returned the applications filed by courts stating only formal reasons such as the impugned legal act was not attached, the wrong legal act was attached, or the required number of copies was not submitted. In such decisions, the Constitutional Court did not provide any comments on the reasoning related to the doubts of the constitutionality of the legal act raised in a petition (see e.g. the Constitutional Court decision of 17 March 2004<sup>15</sup>). Secondly, this period was also distinguished by the necessity and the need for the Constitutional Court to formulate the new practice regarding the admissibility of petitions step by step.

However, the approach of the Constitutional Court towards the admissibility of petitions, and the dialogue with the ordinary courts changed over time. For instance, after ten years of activity, mere non-compliance with the formal requirements was no longer treated as a sufficient reason to return the petition or refuse to consider it<sup>16</sup>. Also, after developing a solid doctrine of the admissibility of petitions, the decisions of the Constitutional Court regarding the admissibility of petitions changed fundamentally. The Constitutional Court started to present the detailed legal reasons and counterarguments to the statements made by courts in their petitions<sup>17</sup>.

15 Another example of the purely formalistic approach is the initial practice of the Constitutional Court refusing to consider the court's petition if the court asked to review the constitutionality of a legal act which is not valid (see e.g. the Constitutional Court decisions of 25 January 1995).

16 See e.g. the Constitutional Court decisions of 29 March 2006, 6 September 2007, and 4 March 2009.

17 See e.g. the decisions of 4 November 2014, 2 September 2014 (No. KT40-S29/2014), 16 January 2015 (No. KT5-S4/2015), and 15 March 2023 (No. KT29-S27/2023).

As a result, the doubts raised by the ordinary court regarding the constitutionality of the legal act are dispelled as soon as possible (if these doubts are not serious or insufficiently substantiated). The new approach of the Constitutional Court ensures that the constitutional matter to be examined in the constitutional justice case becomes clearer at the initial stages of constitutional proceedings. This also implies that the persons participating in the constitutional justice case can adequately prepare for the constitutional proceedings. When the Court justifies its decision to send a petition back to the ordinary court due to deficiencies in the legal reasoning, it enables the ordinary court to revise the petition based on the Constitutional Court's position and resubmit it accordingly. Thus, it could be said that this new approach of the Constitutional Court marks the beginning of an effective and productive dialogue between the Constitutional Court and ordinary courts.

Summarizing the analysis of the Constitutional Court's decisions regarding the admissibility of petitions filed by ordinary courts, we distinguish basic principles on which the dialogue between the Constitutional Court and ordinary courts is based (or should be based).

1. The dialogue between the Constitutional Court and ordinary courts is not *per se* objective. On the contrary, it must be based on a specific goal – the administration of justice, which can only be achieved by resolving the issue of compliance of the impugned legal act with the Constitution. This means that, firstly, the petition of the ordinary court to the Constitutional Court must seek to resolve a legal dispute between the parties in a particular case and thereby administer justice; secondly, it is not possible for the ordinary court to achieve this goal without the Constitutional Court's decision assessing the constitutionality of the impugned legal act. These aspects, among other things, mean that the ordinary court has the right to apply to the Constitutional Court only for the conformity of such a legal act with the Constitution, the application of which is necessary in order to decide the case and, accordingly, to administer justice<sup>18</sup>. If the application of the impugned legal provision is not necessary (or possible) in a case under consideration by an ordinary court, a petition to the Constitutional Court regarding the constitutionality of such a provision has no meaning for resolving a case before the ordinary court. As a result, such a petition is *not* within the jurisdiction of the Constitutional Court<sup>19</sup>.

2. The dialogue between the Constitutional Court and ordinary courts is based on the proactive roles of each participant in this dialogue. This means that ordinary courts must take active steps already at the time of preparing to apply to the

18 See the Constitutional Court decisions of 22 May 2007, 16 November 2010, 27 August 2013, 7 July 2016 (No. KT21-S11/2016), and 21 February 2023 (No. KT15-S13/2023).

19 See e.g. the Constitutional Court's decision of 15 December 2015 (No. KT32-S12/2015).



Constitutional Court. According to the admissibility practice of the Constitutional Court, before submitting the petition to the Constitutional Court (at the preparation stage), the active actions of the ordinary court must, among other things, include:

- 1) the investigation and assessment of the factual circumstances that are relevant to the petition regarding the constitutionality of the legal act under consideration<sup>20</sup> and
- 2) comprehensive analysis of the official constitutional doctrine and its assessment in the context of the question to be raised in the petition<sup>21</sup>.

The legal reasoning underlying the submitted petition should reflect the proactive approach of the ordinary court. The ordinary court must substantiate both the need to apply the impugned legal provision in the case under its consideration and the doubts regarding the constitutionality of such a legal provision with clear, sound, and non-contradictory legal arguments (see e.g. the Constitutional Court decisions of 23 January 2019 (No. KT5-S4/2019), 27 November 2019 (No. KT55-S41/2019) and 12 March 2020 (No. KT48-S44/2020). Rewriting the legal arguments of the parties (in the administrative, civil, or criminal case) or simply raising doubts regarding the constitutionality of an impugned legal provision cannot be considered a suitable basis for establishing a dialogue with the Constitutional Court and, accordingly, for the Constitutional Court to accept a petition filed by an ordinary court (see e.g. the Constitutional Court's decision of 31 August 2022 (No. KT99-S90/2022)). Also, an ordinary court that initiated the constitutional justice case by filing the petition with the Constitutional Court becomes one of the parties participating in the constitutional justice case (see Article 31 of the Law on the Constitutional Court). This status also presupposes active involvement in the constitutional proceedings (see e.g. Article 31 § 2, Articles 44 and 51 of the Law on the Constitutional Court).

3. The dialogue between the Constitutional Court and ordinary courts should be built upon the principles of fairness and non-abuse of the process. The courts' petitions not complying with these principles cannot be the basis for initiating a dialogue with the Constitutional Court. According to the admissibility practice of the Constitutional Court, petitions not complying with the indicated principles are artificial (fictitious). Such petitions include requests in which the doubt regarding the constitutionality of the legal act is based not on the reasons the applicant precisely (explicitly) indicates. They also encompass petitions in which the applicant conceals the relevant legal regulation and/or official constitutional doctrine<sup>22</sup>. A petition for reconsideration filed by an ordinary court, which does not fully take into account and does not respond to the legal reasoning of

20 See e.g. the Constitutional Court's decisions of 10 November 2011 and 10 July 2019 (No. KT20-S11/2019).

21 See e.g. the Constitutional Court's decision of 10 July 2019 (No. KT20-S11/2019).

22 See e.g. the Constitutional Court's decision of 31 January 2007, 14 October 2008, 5 November 2008, 12 April 2012, and 25 June 2012.

the Constitutional Court stated in its decision to return the initial petition to this ordinary court, is also considered as an application with signs of abuse (see the Constitutional Court's decision of 2 April 2019 (No. KT11-S8/2019))<sup>23</sup>. This again confirms that the courts' petitions should be based on honest cooperation and a mutual dialogue. At the same time, it should be highlighted that the abusive petitions filed by courts are seen as an exception: most of the applications filed by courts comply with the principle of fairness.

4. The dialogue between the Constitutional Court and ordinary courts is principally based on the separation of powers (jurisdictions). This means that the Constitutional Court respects the powers assigned to ordinary courts and, respectively, cannot take them over (or interfere with them). In this regard, the Constitutional Court cannot become an instrument for resolving internal disputes within an ordinary court, inconsistencies in the jurisprudence of the ordinary courts, and uncertainties in applying and interpreting the legal provisions in practice. According to the Constitutional Court, the petitions aiming for the above-mentioned goals are beyond the jurisdiction of the Constitutional Court<sup>24</sup>.

However, sometimes, the limits of the powers of the Constitutional Court and ordinary courts are unclear. For instance, from time to time, the Constitutional Court tries to avoid the rulings of unconstitutionality. In doing so, the Constitutional Court develops interpretativerulings which are based on the interpretation of the impugned legal regulation, i.e., the constitutionally correct interpretation<sup>25</sup>.

23 In this decision, the Constitutional Court, among other things, noted: the petition for reconsideration filed by the applicant does not include the removal of the deficiencies indicated in the Constitutional Court's decision of 1 January 2019; in the petition, no legal arguments were stated to substantiate the doubts regarding the constitutionality of the impugned legal acts, only general statements and reasonings were presented, which *inter alia* questioned the admissibility practice of the Constitutional Court, and widely cited provisions of the official constitutional doctrine without presenting new legal arguments. Thus, this petition can be seen as having signs of abuse of the court's right to apply to the Constitutional Court.

24 For instance, see the Constitutional Court's decision of 17 March 2022 (No. KT39-S38/2022). As noted by the Constitutional Court, although the administrative court claims in its petition that the impugned legal provision is not clear, it is evident that the administrative court would like to interpret the impugned legal provision differently than this provision was interpreted in the previous jurisprudence of this court. Therefore, the court had doubts not about the constitutionality of the impugned provision but about its application and interpretation in the practice of the administrative court itself. As a result, the Constitutional Court returned the petition to the administrative court. Also, see the Constitutional Court's decision of 31 July 2020 (No. KT140-S129/2020). By returning the petition to the Supreme Administrative Court of Lithuania, the Constitutional Court noted that the petition and the material of the administrative case under consideration indicated that the applicant had doubts not about the conformity of the impugned legal regulation with the Constitution, but rather about its interpretation and application in practice, including in the jurisprudence of the Supreme Administrative Court itself, which is not uniform. See also the Constitutional Court's decisions of 5 September 2019 (No. KT23-S13/2019) and 18 September 2015 (No. KT23-S10/2015).

25 See e.g. the Constitutional Court's ruling of 11 January 2019; Garlicki, 2007, p. 48-49, 54.

By choosing the ‘right’ interpretation of the impugned legal regulation, the Constitutional Court steps into the domain of ordinary courts. Also, from time to time, the Constitutional Court, by dismissing the request of an ordinary court at the admissibility stage, gives the answers to this court on how to interpret and apply the laws and, respectively, adjudicate the individual case (see e.g. the Constitutional Court’s decision of 22 March 2018 (No. KT5-S2/2018)).

It should be noted that not only the Constitutional Court, but also ordinary courts must follow the principle of the separation of powers (jurisdictions). The ordinary courts must decide cases without overstepping the limits of their jurisdiction. As the practice confirms, this task can be challenging. Each time an ordinary judge refuses to refer the constitutional question to the Constitutional Court, this judge interprets the Constitution without the Constitutional Court’s interference<sup>26</sup>. Issues arise when a judge wrongly decides that no constitutional question (doubt) appears in the individual case or decides wrongly that the constitutional argument is unlikely to succeed. Under the Constitution, ordinary courts cannot ignore existing doubts or take over the powers of the Constitutional Court and solve the question of constitutionality without the Constitutional Court. The non-willingness of ordinary courts to refer constitutional questions to the Constitutional Court is the main tension apparent in the coexistence of the Constitutional Court and ordinary courts, which can result in unfair decisions of the ordinary court. Also, the situation can become complicated if the ordinary court, which applied to the Constitutional Court and received its ruling, refuses to follow it (see the Constitutional Court’s decision of 20 November 2009<sup>27</sup>). However, it should be admitted that an open refusal to follow the Constitutional Court is exceptional.

Lithuania’s experience shows that the above-mentioned tensions can be eliminated through the instance system of ordinary courts or by activating other branches of State powers (i.e., with the involvement of the Parliament).

In this context, we would like to mention the Constitutional Court’s ruling of 9 March 2020 adopted in the constitutional justice case that was initiated by the Parliament. By this ruling, the Constitutional Court recognised that Article 47 § 2 of the Law on Courts conflicted with the Constitution because the legislature, having established the impugned legal regulation, consolidated the broader immunity of judges than that entrenched in the Constitution. Importantly, the Supreme Court of Lithuania, without referring to the Constitutional Court, provided basically the op-

26 According to Garlicki, “no genuine separation of constitutional jurisdiction and ordinary jurisdiction is possible in a modern Rechtsstaat.” See Garlicki, 2007, p. 49.

27 This decision describes the situation when the Court of Appeal of Lithuania refused to follow the Constitutional Court’s legal position which the Court of Appeal received after applying to the Constitutional Court. However, this error of the Court of Appeal was corrected by the Supreme Court of Lithuania.

posite interpretation (see its order of 25 November 2019). This order of the Supreme Court of Lithuania was the main reason why the Parliament applied to the Constitutional Court. In the ruling of 9 March 2020, the Constitutional Court also held that the order of the Supreme Court of Lithuania of 25 November 2019 should not be considered a court precedent to the extent that this order provided the interpretation of Article 47 § 2 of the Law on Courts. Thus, in this case, the Constitutional Court preserved the last word with the assistance of the Parliament.

Considering the future prospects for the dialogue between the Court and ordinary courts, it can be anticipated that the introduction of individual constitutional complaints will serve as a catalyst for fostering further advancements in this dialogue. From September 2019 to March 2023, the Constitutional Court adopted 14 rulings in constitutional justice cases initiated by persons who submitted individual constitutional complaints. Non-compliance with the Constitution was found in 6 of these rulings<sup>28</sup>. Before submitting the individual constitutional complaint to the Constitutional Court, the persons tried to convince the ordinary courts which were hearing their cases to file the petitions regarding the constitutionality of the relevant legal provision with the Constitutional Court. These endeavors were without success. As a result, in even 4 (out of 6) cases, the parties asked the courts to apply to the Constitutional Court regarding the constitutionality of the legal provisions which were later recognized as unconstitutional by the Constitutional Court following the individual constitutional complaints<sup>29</sup>.

These numbers indicate that ordinary courts do not always ensure a proper assessment of the parties' requests regarding the constitutionality of the legal provision applicable in the case. This also demonstrates that ordinary courts should more carefully consider and assess the requests of the involved parties to apply to the Constitutional Court, and, should any doubts arise regarding the constitutionality of the applicable legal provision, initiate the dialogue with the Constitutional Court with the aim of removing or confirming these doubts as soon as possible. Otherwise, when the courts avoid initiating the dialogue with the Constitutional Court, this task and burden falls on the persons filing individual constitutional complaints.

28 The Constitutional Court, the ruling of 27 April 2022, the ruling of 10 February 2022, the ruling of 22 December 2021, the ruling of 14 April 2021, the ruling of 19 March 2021, and the ruling of 11 September 2020.

29 1. The Constitutional Court, the ruling of 22 December 2021, and the Supreme Administrative Court of Lithuania, the decision of 7 October 2020 (administrative case No. eA-4122-492/2020). 2. The Constitutional Court, the ruling of 14 April 2021 and the Supreme Administrative Court of Lithuania (administrative case No. eA-3336-662-2020). 3. The Constitutional Court, the ruling of 11 September 2020 and the Supreme Administrative Court of Lithuania, the decision of 29 October 2019 (administrative case No. eA-4571-968/2019). 4. The Constitutional Court, the ruling of 19 March 2021 and the Supreme Administrative Court of Lithuania, the decision of 29 October of 2019 (administrative case No. A-766-556/2019).

After receiving the positive ruling of the Constitutional Court, such a person has the right to request to reopen the proceedings before an ordinary court. As a result, this person and the entire legal system face threats related to, among others, the excessive length of proceedings and delayed justice, potential violations of international obligations in the field of human rights protection, tensions over legal certainty and stability, and eroding public trust in the courts.

### 3. Suspension of Execution of Decisions of the Ordinary Court by the Constitutional Court

The requirement to exhaust all other remedies before applying to the Constitutional Court with the individual complaint (Article 106 § 4 of the Constitution) implies potential risks of opposing outcomes of ordinary and Constitutional Court cases or even difficulties to restore justice after the Constitutional Court ruling. There could be a judicial decision of an ordinary court that is already being executed and an ongoing Constitutional Court case related to the constitutionality of the law applied therein. To mitigate such risks, following the introduction of individual constitutional complaints, another form of potential interaction emerged between the Constitutional Court and ordinary courts: the possibility of the Court to suspend the execution of an ordinary court decision.

This power of the Constitutional Court is enshrined in Article 67<sup>2</sup> of the Law on the Constitutional Court. As a general rule, filing an individual constitutional complaint with the Constitutional Court and accepting this complaint for consideration by the Constitutional Court does not suspend the execution of the ordinary court's decision<sup>30</sup>. However, in exceptional cases, the Constitutional Court is granted the right to suspend the execution of the decision of an ordinary court. These special cases include the following options: first, when the constitutional rights or freedoms of the petitioner would be irreparably violated due to the execution of the ordinary court's decision; second, when it is necessary for reasons of public interest<sup>31</sup>.

On the one hand, these alternatives are defined through rather broad categories while providing the Constitutional Court with all the possibilities to choose the direction of their interpretation. On the other hand, the practice of the Constitutional Court, while applying this norm, confirms that the Constitutional Court understands its role and interaction with ordinary courts through the prism of the

30 See Article 67<sup>2</sup> § 1 of the Law on the Constitutional Court.

31 See Article 67<sup>2</sup> § 2 of the Law on the Constitutional Court.

principle of subsidiarity. Since the beginning of the application of Article 67<sup>2</sup> of the Law on the Constitutional Court, the Constitutional Court noted that it does not compete with ordinary courts, but rather cooperates with them by providing guidelines in the field of the application and interpretation of the Constitution.

It was already in the earliest decisions following the introduction of individual constitutional complaints in the Constitution that the Constitutional Court clarified that the suspension of the execution of the ordinary court's decision is exceptional in the practice of the Constitutional Court. In this context, the Constitutional Court also emphasized the importance of the court decisions and the necessity of enforcing them<sup>32</sup>. It should be noted that, since 2019, the Constitutional Court has accepted 26 individual constitutional complaints for consideration. The Constitutional Court did not suspend the execution of the ordinary court's decisions in any of these complaints.

In our view, by applying Article 67<sup>2</sup> of the Law on the Constitutional Court, the interaction between the Constitutional Court and ordinary courts is principally based on the monologue of the Constitutional Court. This means that the ordinary court does not actively participate in the decision-making process of the Constitutional Court in any form. If the Constitutional Court decides to suspend the execution of the ordinary court's decision, certain tensions will arise in the legal system, including, as mentioned, risks to the stability of legal relations and legal security. In our view, one way of avoiding these challenges would be to promote the active use of the ordinary courts' right to apply to the Constitutional Court at the stage of examining a concrete case.

#### 4. Renewing Procedures after Constitutional Court Ruling

The introduction of the individual constitutional complaint in Lithuania created yet another important tension between the Constitutional Court and the ordinary courts. The conclusion as to the unconstitutionality of the law in individual cases raises doubts as to the outcome of earlier decisions of the ordinary courts made in the context of the equivalent individual situation. The requirement to reinstate justice after the Constitutional Court's ruling in the individual case raises issues as to the extent to which ordinary courts should reinvestigate already adjudicated individual cases.

The Constitutional Court has so far adopted six rulings by which the legal acts were recognised to be in conflict with the Constitution (other higher-ranking

32 See e.g. the Constitutional Court decisions of 24 October 2019 (No. KT38-A-S27/2019) and 16 September 2020 (No. KT169-A-S155/2020).

acts) in the constitutional justice cases heard subsequent to the individual constitutional complaints<sup>33</sup>. Under the Constitution, such rulings are a basis for renewing, according to the procedure established by law, the proceedings regarding the implementation of the violated constitutional rights or freedoms of the person. The successful individual complaint does not automatically invalidate the decisions of ordinary courts. The person who prevailed in the constitutional complaint procedure must request the ordinary court to reopen her or his case.

Following five rulings of the Constitutional Court, the applicants filed the requests to renew the administrative proceedings with the Supreme Administrative Court of Lithuania. In three administrative cases, these requests were approved by the Supreme Administrative Court<sup>34</sup>. In two administrative cases, these requests were refused to be accepted<sup>35</sup>.

Apparently, the Supreme Administrative Court of Lithuania had the opportunity to express its approach towards the interaction between the ordinary courts and the Constitutional Court. As the Supreme Administrative Court underlined, Article 156 § 2(13) of the Law on Administrative Proceedings establishes the ground for renewing the administrative procedure following a ruling of the Constitutional Court.

The Supreme Administrative Court treats this ground as a means to implement the ruling of the Constitutional Court. Moreover, according to the Supreme Administrative Court, an administrative court has a duty to renew the administrative procedures after the Constitutional Court has established that the legal acts applied in these administrative procedures conflicted with the Constitution (or any other higher-ranking acts) and when the constitutional rights or freedoms were not defended by the administrative court before the applicant filed the individual constitutional complaint with the Constitutional Court. By renewing the administrative proceedings, the administrative court must consider the relevant ruling of the Constitutional Court<sup>36</sup>.

33 All these legal acts (or any part(s) thereof) were applied in the proceedings before administrative courts. See the Constitutional Court's rulings of 27 April 2022, 10 February 2022, 22 December 2021, 14 April 2021, 19 March 2021, and 11 September 2020.

34 See the Supreme Administrative Court of Lithuania, order of 23 March 2022, order of 14 April 2021, and order of 1 September 2021.

35 See the Supreme Administrative Court of Lithuania, order of 4 May 2022, order of 19 May 2021, order of 27 October 2021. Regarding the proceedings ending with the order of 27 October 2021, the applicant initiated the case before the European Court of Human Rights; see <http://lrv-atstovas-ezt.lt/naujienos/perduota-peticija-del-apribotos-asmens-teises-kreiptis-i-teisma-nepriteisus-pareiskejui-islaidu-patirtu-procese-pasibaigusiame-administracinio-teises-pazeidimo-bylos-nutraukimu>.

36 See the Supreme Administrative Court of Lithuania, order of 23 March 2022, order of 1 September 2021, and order of 14 April 2021.

This implies that the Supreme Administrative Court views the interaction between the administrative courts and the Constitutional Court through the two elements: (1) The respect of the Constitutional Court and its rulings, and (2) the aim of ensuring the real and full protection and defence of constitutional rights and freedoms<sup>37</sup>.

As the practice confirms, in order to follow these principles, it is crucial that the Supreme Administrative Court is proactive by assessing the applicants' requests to reopen the administrative proceedings following the respective ruling of the Constitutional Court. In such cases, the more active role of the Supreme Administrative Courts is also grounded on the principle of the active administrative court and the public interest to correct legal mistakes made by ordinary courts and to ensure the full protection of human rights and freedoms. In our view, the active role of the Supreme Administrative Court implies that this court must provide clear information to the applicant on the need to adjust the legal grounds indicated in her or his request to renew the administrative proceedings<sup>38</sup>. It is especially important when the request of the applicant clearly indicates that the applicant seeks to renew the administrative proceedings following the Constitutional Court's ruling.

Moreover, in these cases, the right of the President of the Supreme Administrative Court to initiate the renewal of the administrative proceedings should not be overlooked (see Article 157 § 2 of the Law on Administrative Proceedings). Otherwise, by taking a purely formalistic approach, the Supreme Administrative Court risks infringing the essence of the aims of individual constitutional complaints, and, respectively, the main principles on which the interaction between ordinary courts and the Constitutional Court is grounded. Building on the existing practice, such an approach can also determine delayed justice and international human rights violations.

37 This approach echoes the official constitutional doctrine regarding the individual constitutional complaint. See the Constitutional Court, ruling of 25 November 2019, 15.1.3.

38 In this regard, the order of the Supreme Administrative Court of Lithuania, adopted in the administrative case No. P-54-789/2021 on 27 October 2021 could be mentioned. By this order, the Supreme Administrative Court refused to accept the applicant's request to renew the administrative proceedings following the Constitutional Court's ruling. Unfortunately, this order is not published. However, its legal reasoning is briefly described on the website of the Agent of the Government of the Republic of Lithuania before the European Court of Human Rights (ECtHR). As the published information indicates, the Supreme Administrative Court refused to accept the applicant's request to renew the administrative proceedings after the Constitutional Court's ruling because the applicant referred to the wrong legal grounds (i.e. Paragraphs 2(2) and 2(10) of Article 156 of the Law on Administrative Proceedings instead of Paragraph 2(13) of Article 156 of this Law). After this refusal, the applicant initiated the case before the ECtHR, claiming the violation of Paragraph 1 of Article 6 of Convention for the Protection of Human Rights and Fundamental Freedoms. See <http://lrv-atstovas-eztt.lt/naujienos/perduota-peticija-del-apribotos-asmens-teises-kreiptis-i-teisma-nepriteisus-pareiskejui-islaidu-patirtu-procese-pasibaigusiame-administracinio-teises-pazeidimo-bylos-nutraukimu>.



## Conclusions

During the thirty years of activities, the Constitutional Court found its place within the judicial structures of Lithuania by developing the main principles of cohabitation and dialogue between itself and the ordinary courts. The reasonable interaction model between the Constitutional Court and the ordinary courts is based on a purposive dialogue, the proactive role of the participants of this dialogue, the principle of fairness, and mutual respect for the powers distributed to each court under the Constitution. The adherence to these imperatives ensures respectful and productive interaction between the Constitutional Court and the ordinary courts.

Not surprisingly, the introduction of individual constitutional complaints in the Lithuanian legal system brought new challenges to the interaction between the Constitutional Court and the ordinary courts. It clearly revealed the shortcomings of the dialogue between the Constitutional Court and the ordinary courts, including the resistance of the ordinary courts to apply to the Constitutional Court with questions about the constitutionality of the legal act. Thus, the most significant prospects in the future are to inspire a more proactive dialogue between the Constitutional Court and the ordinary courts at the earliest possible stage.

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