Conference EFFECTIVE JUSTICE: CHALLENGES AND PRIORITIES FOR (ADMINISTRATIVE) COURTS

in commemoration of the establishment of the Division of Administrative Courts of the Lithuanian Association of Judges, Law Institute of Lithuania and the Law Faculty of Vilnius University

Lietuvos Respublikos Seimas, 6 May 2016, Vilnius, Lithuania

ROUNDTABLE DISCUSSION

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I have an honour to represent today two different judicial systems – the European Court of Human Rights (hereinafter – the ECtHR or the Court) as a former Judge of this Court and the Constitutional Court (hereinafter – the CC) as an acting constitutional Justice. Therefore, I'll try to reflect the influence of the two aforementioned systems to the effectiveness of administrative courts, and furthermore, to demonstrate the existing [real] interrelationship between these legal systems.

I. The European Human Rights protection system.

1. The European Convention on Human Rights (hereinafter – the ECHR or the Convention), which is interpreted and applied by the ECtHR under Art. 19 of the Convention, in Art. 6 § 1 guarantees the right of everyone to an independent and impartial court in civil and criminal cases and the right to a *fair* trial. The case-law of the Court demonstrates clearly that the notion of "civil and criminal" cases has been broadly interpreted as also implying the right to apply to administrative courts. Administrative courts have also the legal duty to ensure to the applicants all procedural guarantees established by Art. 6 § 1 of the Convention (see, for example, the case of *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X, where the Court concluded that Art. 6 § 1 guarantees should be applicable to the disciplinary proceedings; the Lithuanian cases – *Pocius and Užukauskas v. Lithuania* (*Pocius v. Lithuania*, Appl. No. 35601/04, 6 July 2010; *Užukauskas v. Lithuania*, Appl. No. 16965/04, 6 July 2010) concerning the listing of the applicants' names into the operational record files and subsequent administrative proceedings raising *fair* trial issues under Art. 6 of the Convention, etc.).

2. A separate system of administrative courts was created in Lithuania in 1999. At that time the question arose whether these newly created administrative courts could be regarded as *available, effective and sufficient remedy* at domestic level under Article 13 of the Convention being capable of redressing the alleged violations of the Convention. The Strasbourg Court answered this question in the affirmative in the admissibility decision in the case of *Jankauskas v.*

Lithuania ((Dec.), no. 59304/00, 16 December 2003) concluding that the recent practice of the Lithuanian administrative courts had demonstrated clearly their effectiveness; therefore the administrative courts should primarily and effectively examine complaints *inter alia* about the general conditions of detention.

3. A very important jurisprudential step was taken by the ECtHR in the case of *Vilho Eskelinen v. Finland* (Appl. No. 63235/00, [GC], 2007- ...), where the Court broadened the so-called "Pellegrin" doctrine (*Pellegrin v. France* [GC], Appl. No. 28541/95, judgment of 8 December 1999) concerning the applicability of Article 6 of the Convention to the legal disputes arising from civil service. The Court stated that civil servants, even while exercising public power, have also the right of access to a court and all procedural guarantees of a *fair* trial under Art. 6 § 1 of the Convention. Within the framework of this Conference, it should be mentioned that the Constitutional Court of Lithuania has received and examined numerous cases concerning the salaries, career, dismissal and other issues related to civil service. The majority of those cases have been initiated by the administrative courts of Lithuania under Art. 106 § 1 of the Constitution.

4. In my opinion, the effectiveness of the Lithuanian administrative courts can perfectly be seen from the leading Decision of the Lithuanian Supreme Administrative Court of 29 November 2010[1], where the said Court directly relied on the judgment of the ECtHR in the case *L. v. Lithuania* and awarded the applicant R.S. 30.000 LT at domestic level for non-pecuniary damage. The case *L. v. Lithuania* (Appl. No. 27527/03, judgment of 11 September 2007) in Strasbourg dealt with the legal situation, the so-called existing "*legal vacuum*", when due to the inactivity of the Lithuanian Seimas the special Law on Gender Reassignment Surgery, foreseen in the Lithuanian Civil Code as from 2001 (Art. 2.27 came into force on 1 July 2003), had not been adopted for many years. Therefore, the applicants had no possibility of such surgical operations in Lithuania. The Decision of 29 November 2010 of the Supreme Administrative Court has played a significant role for the national courts in starting to rely directly not only on the Convention provisions but also on the judgments of the Court adopted in the cases against Lithuania. On the other hand, even having created such importance practice, the Supreme Administrative Court decided not to rely on the judgment adopted by the ECtHR in another – *Varnas v. Lithuania* case (appl. No. 42615/06, judgment of 9 July 2013) concerning the discrimination of people placed on detention on remand as regards their right to have the long term visits foreseen by national laws. This administrative case was sent to the Constitutional Court, however, the CC on 6 May 2016 refused to examine the case sending it back to the Supreme Administrative Court with the view that the Administrative courts should rely on the judgment of the ECtHR in the discussed case.

5. The case of *Savickas v. Lithuania* ((Dec), Appl. No. 66365/09, 15 October 2013) could be regarded as the most important achievement of the Lithuanian courts, when the ECtHR had finally recognised the existing effective remedy at the national level for the length of proceedings cases. The applicants have now the right to apply to the Lithuanian courts under Art. 6.272 § 1 of the Civil Code requesting compensation for damage for the long-lasting judicial proceedings of all kinds.

[1] Administrative case No. A(858)-1452/2010, judgment of the Supreme Administrative Court of 29 November 2010, Reporting judge I. Jarukaitis.

II. The Constitutional Court of the Republic of Lithuania.

6. **According to Art. 102,** the Constitutional Court shall decide whether the laws and other acts of the Seimas are in conflict with the Constitution, and whether the acts of the President of the Republic and the Government are in conflict with the Constitution or laws. Under **Article 106 of the Constitution,** the Government, not less than 1/5 of all the Members of the Seimas, the President of the Republic and courts have the right to apply to the Constitutional Court.

7. The individual right to apply to the Constitutional Court (so-called constitutional complaint) does not exist in Lithuania; to some extent such a right has partially been "realised" through the Lithuanian courts, including administrative courts, when courts, examining concrete cases, apply to the CC for constitutional review.

8. The administrative courts of Lithuania are very active "suppliers" of cases to the CC. In 2015, the CC has started 10 constitutional cases initiated by the Lithuanian courts; half of such requests were submitted by administrative courts. A similar situation could also be seen in 2014, when 21 requests to initiate constitutional cases were received from administrative courts and all said requests were related to the reduced salaries of prosecutors and other civil servants due to the financial crisis; the other 16 requests from administrative courts were related to the establishment of a compensational mechanism for reduced salaries of civil servants and the belated entry into force of the respective Law.

9. For example, some constitutional cases initiated by administrative courts raised interesting constitutional and human rights issues: i.e., the legal regulation prohibiting correspondence between convicts detained in pretrial detention, arrest, and correctional facilities in the cases where they were not related by marriage or close family ties was ruled to be in conflict with the Constitution (Ruling of 26 February 2015, the case was initiated by the Supreme Administrative Court); the case concerning the discrimination of family members as regards taxation with the immovable property tax (Ruling of 22 September 2015, the case was initiated by the Vilnius Regional Administrative Court); numerous other cases concerning the right to receive the state pensions, the conditions of their payment, etc. The CC has also a lot of cases initiated exclusively by administrative courts concerning social security provided by the state, which is one of the constitutional principles of the Lithuanian State, including cases concerning maternity allowances, etc.

10. The administrative courts of Lithuania actively rely on the official doctrine of the CC, apply the interpretation of a particular legal regulation as interpreted by the CC, in realising the constitutional principles and rules in their administrative cases.

III. The interplay between the European Court of Human Rights, the Constitutional Court of the Republic of Lithuania and administrative courts.

11. In the Declaration of the Interlaken Conference (February 2010) concerning the Effectiveness of the ECtHR it has been clearly stated the principle of the "shared responsibility", which means that both actors – the European Court under Art. 19 of the Convention and the

domestic authorities, especially the courts under Art. 1 of the Convention – have the "shared" responsibility for the effective implementation of the Convention.

12. In its jurisprudence, the CC has clearly defined the legal position of the European Convention on Human Rights as "a source of interpretation of law that is also important for the interpretation and application of Lithuanian law (see Rulings of 08/05/2000; 29/09/2005; 15/11/2013; 09/05/2014; etc.). According to the CC, the interpretation of the compatibility (relation) of the norms of the Constitution and the Convention must be semantic, logical and not only literal. Literal interpretation of human rights alone is not acceptable for the nature of the protection of human rights. The Convention is a constituent part of the legal system of the Republic of Lithuania and has been applied in the same way as laws of the Republic of Lithuania.

13. Furthermore, international law, including the European Convention on Human Rights, has been regarded by the CC as *the constitutional minimum* for the protection of human rights (Ruling of 18/03/2014).

14. Even though the jurisprudence of the European Court of Human Rights, as a source for interpretation of law that is also important for the interpretation and application of Lithuanian law, […] does NOT replace the powers of the Constitutional Court to officially interpret the Constitution, however, the provisions of the European Convention on Human Rights, which define human rights and freedoms, may be applied along with the constitutional provisions provided they do not contradict the latter.

15. As such, a judgment of the ECtHR may not serve as constitutional grounds for reinterpretation (correction) of the official constitutional doctrine; nevertheless, the judgments of the ECtHR can serve *as the background de facto to change the Constitution* in order to eliminate the incompatibility of the Convention with the Lithuanian Constitution (the judgment of the ECtHR in *Paksas* case, Ruling of the CC of 12 09 2012).

16. The CC relies often on the case-law of the ECtHR and the Court of Justice of the EU. From September 1993 until May 2015, different international documents, European Union law, the judgments of the European Court of Human Rights and the Court of Justice of the European Union were mentioned/applied in 122 Rulings out of 339 of the Constitutional Court, i.e., in more than one third of all its cases (approx. 35.98 %); this fact in itself is very important and illustrates that the constitutional doctrine has been influenced and formulated according to the international and EU law standards.

17. The ECtHR case-law was mentioned/applied in 48 Rulings out of 341 of the Constitutional Court (14%). The European Convention on Human Rights has not only been applied in the so-called "classical cases" of the CC (the right to a court, procedural guarantees or the protection of private life, etc.), but also in cases when the CC analyses new and more modern legal aspects such as the protection of environment (Rulings of 09/05/2014, 05/03/2015); elections to the European Parliament (Ruling of 13/10/2014, the case initiated by an administrative court concerning the possibility of indicating the full name of the electoral commission in its documents); social housing issues (Ruling of 26/05/2015), etc.

18. The dialogue between three aforementioned legal systems will be strengthened upon the entry into force of the Additional Protocol No. 16 of the Convention, which will allow the highest

courts and tribunals of High Contracting Parties to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. In Lithuania, the Constitutional Court as well as the Supreme Administrative Court will be given this opportunity to refer to the ECtHR for an advisory opinion.