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# The European Convention on Human Rights and the Lithuanian Constitutional Court: the ECHR's Formal Status, Impact and Interaction Between the Court and the ECtHR

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## Abstract

The article explores the attitude of the Lithuanian Constitutional Court to the European Convention on Human Rights, revealing its evolution from the establishment of the Court in 1993 until today. It is assumed that the most significant impact of the Convention was perceived in earlier constitutional jurisprudence, while its increased quality and quantity brought changes in the Court's attitude to the Convention, also influencing its relationship with the European Court of Human Rights. The author undertakes the following tasks: 1) to define the formal legal status of the Convention within the Lithuanian legal system; 2) to reveal the impact of the Convention on Lithuanian constitutional jurisprudence and to identify related changes; 3) to discuss the relationship between the Constitutional Court and the European Court of Human Rights as it has evolved and 4) to find out whether there is room for domestic development of the rights guaranteed under the Convention and how this manifests.

## Keywords

Lithuanian Constitutional Court – European Convention on Human Rights – European Court of Human Rights

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## 1 Introduction: the Constitutional Court – between the Conventionalization of the Constitution and the Internalization of the Convention

The rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention/ECHR) not only overlap with some of those guaranteed by the Lithuanian Constitution of 1992[1] but also served as one of the sources of inspiration when the Constitution was being drafted.[2] This notwithstanding (and despite the monist approach of the Constitution to international ratified treaties),[3] a clear distinction remains between the Convention and the Constitution.

The Lithuanian Constitutional Court,[4] as an institution of constitutional justice, first and foremost protects the supremacy of the Lithuanian Constitution when implementing constitutional judicial control[5] – even when it internalizes the Convention. Here, 'internalizes' means that the provisions of the Convention are nationalized by the Court simultaneously as it transfers them into national constitutional law, while at the same time the provisions of the Constitution are internationalized (or conventionalized) when supplementing them with the Convention standards.[6] On the other hand, the supremacy of the Constitution is balanced against the *pacta sunt servanda principle*, being a legal tradition and a constitutional principle of the restored independent state of Lithuania.[7]

To explain this phenomenon properly, a closer look must be taken at the relationship between the Convention and the Constitution and the interaction between the Court and the European Court of Human Rights (ECtHR). It is only after a careful analysis of the evolution of that relationship and interaction – revealing how it has evolved over the years – that one may grasp a more complete picture of the significance of the Convention within the Lithuanian

1 The Constitution of the Republic of Lithuania was adopted by referendum on 25 October 1992 and entered into force on 2 November 1992.

2 For more, *see* Egidijus Kūris, "Ekstranacionaliniai veiksniai Lietuvos Respublikos Konstituciniam Teismui aiškinant Konstituciją", 50 *Teisė* (2004), 78–93.

3 Art. 138 § 3 of the Lithuanian Constitution: "International treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania".

4 Hereinafter also referred to as the Constitutional Court or the Court.

5 Constitutional Court ruling of 6 June 2006. TAR, No. 1061000NUTARG063877.

6 For more, *see* Karolina Bubnytė, "Žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos poveikis Lietuvos konstitucinei jurisprudencijai – jo būdai ir leistinos ribos", 89 *Teisė* (2013), 136–158.

7 Constitutional Court ruling of 14 March 2006. TAR, No. 1061000NUTARG061662.

constitutional landscape and explain related changes. It will be argued that, with the growth of internalization of the Convention, instances of its consistent interpretation (that is, where the provisions of the Convention are harmonized with the Constitution) in constitutional jurisprudence have decreased. At the same time, this has not diminished the importance of the Convention before the Constitutional Court.

## 2 Formal Legal Status of the Convention in the Lithuanian Legal System

The formal legal status of the Convention was defined by the Constitutional Court when performing *ex ante* constitutional review[8] of the compatibility with the Constitution of certain provisions of the Convention before ratification of the Convention.[9] To this end the Court gave its affirmative conclusion on 24 January 1995, where – referring to Article 138 § 3 of the Constitution[10] – the Court declared that

> upon its ratification and enforcement, the Convention will become a constituent part of the legal system of the Republic of Lithuania and will be applied in the same way as laws of the Republic of Lithuania. The provisions of the Convention in the system of legal sources of the Republic of Lithuania are equaled to laws […].[11]

Several doctrinal postulates in this conclusion are worth mentioning as they laid down the constitutional basis for further application of the Convention by the Constitutional Court (and other courts), namely, that:

8 Art. 105 § 2 of the Lithuanian Constitution: "The Constitutional Court shall also consider whether the following are in conflict with the Constitution and laws: […] 3) whether the international treaties of the Republic of Lithuania are in conflict with the Constitution […]".

9 After ratification the Convention entered into force with respect to Lithuania on 20 June 1995.

10 *See* note 3.

11 Constitutional Court conclusion of 24 January 1995, TAR, No. 0951000ISVARG950031. To compare, the ECHR similarly enjoys the status of a federal statute in Germany. In Austria, a signatory to the ECHR since 1958, the Convention enjoys constitutional status and features as directly applicable federal constitutional law, being equivalent to, e.g., the Basic Law of the State on the General Rights of Citizens of 1867. For more, *see* Theo Öhlinger, "Austria and Article 6 of the European Convention on Human Rights", 1 *European Journal of International Law* (1990), 286–291, at 286.

– neither the Constitution nor the Convention contain a complete and final list of human rights and freedoms;
– the incorporation of international treaties ratified by the *Seimas* (the Lithuanian parliament), in the legal system of Lithuania implies their equal application with laws;
– the provisions of the Convention may be applied along with the constitutional provisions provided they do not contradict the latter.[12]

In short, irrespective of the fact that the Convention acquired the force of law in the formal hierarchy of legal norms, by its own doctrine the Constitutional Court programmed the deep internalization of the Convention within the domestic legal system, first and foremost in constitutional jurisprudence.

When in 1995 Lithuania ratified the Convention[13] – indeed, even before that[14] – the Constitutional Court quite frequently availed itself of the relevant case law of the ECtHR in interpreting constitutional provisions on human rights,[15] especially during the first decade of the Court's activity.[16] In some constitutional justice cases of that period, the Convention was even regarded as a standard for constitutionality.[17] In 2000 the Constitutional Court coined the formula used ever since to describe the relationship between the Constitution and the Convention, reflecting the Constitution-centered concept of law[18] and stating that the Convention "as a source of construction of law is also important to construction and applicability of Lithuanian law".[19]

12 Constitutional Court conclusion of 24 January 1995, *see* note 11.

13 The Law "On Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols No. 4, No. 7 and No. 11 to the Convention". TAR, No. 0951010ISTA000I-865.

14 The first two references to the Convention in constitutional jurisprudence appeared even prior to its ratification, namely, in the rulings of 27 May 1994 and of 18 November 1994. TAR, No. 0941000NUTARG940154 and No. 0941000NUTARG940370. *See also* Kūris, *op. cit.*, note 2, 82.

15 Egidijus Jarašiūnas, "Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencija Konstitucinio Teismo praktikoje" in *Teisės reforma Lietuvoje ir Lenkijoje ir Europos žmogaus teisių konvencija: konferencijos medžiaga, Vilnius, 1998 m. spalio 2–3 d.* (Lietuvos žmogaus teisių centras, Vilnius, 1999).

16 For more, *see* Toma Birmontienė, "Intersection of the Jurisprudences: The European Convention on Human Rights and the Constitutional Doctrine Formulated by the Constitutional Court of the Republic of Lithuania", 1 (119) *Jurisprudencija* (2010), 7–27.

17 E.g., Constitutional Court ruling of 21 December 1999. TAR, No. 0991000NUTARG992554.

18 Egidijus Jarašiūnas, "Aukščiausioji ir ordinarinė teisė: požiūrio į konstituciją pokyčiai", 33 (25) *Jurisprudencija*, 2002, 30–41; Egidijus Kūris, *Konstitucinė teisė kaip jurisprudencinė teisė: Konstitucinė justicija ir konstitucinės teisės paradigmos transformacija Lietuvoje* (overview of research papers submitted for habilitation) (Vilniaus universitetas, Vilnius, 2008).

19 Constitutional Court ruling of 8 May 2000. TAR, No. 1001000NUTARG001120.

In this formula the Court expressly refers to the Convention as an auxiliary source for interpreting the Constitution; however, a comprehensive analysis of constitutional jurisprudence reveals that its real impact is much bigger, and the Convention – as will be demonstrated in the following section – in some cases may even affect the outcome of a constitutional case, becoming a *de facto* standard for constitutionality.

## 3 Impact of the Convention on Constitutional Jurisprudence

Each time when the Constitutional Court refers to the Convention it internalizes conventional provisions within domestic constitutional law, simultaneously 'conventionalizing' the Constitution itself. The purpose for which the Convention is availed of reveals that it is internalized in three basic ways, namely: 1) indicative, 2) reinforcing, and 3) harmonizing, each of which predetermines the different scope of its impact on the outcome of cases of constitutional justice.[20]

In the first type of case the Constitutional Court merely indicates the existence of a relevant provision of the Convention and/or related case law of the ECtHR, aiming to demonstrate that a particular issue falls within or is related to the scope of a particular human right/freedom. For example, In its ruling *on compliance with the Constitution of certain provisions of the Law on Waste Management*[21] the Court stated that in this particular case the jurisprudence of the ECtHR "has to be noted" and referred to the case of *Di Sarno and Others v. Italy*,[22] where the ECtHR – upon finding a violation of Article 8 of the Convention – indicated that the state's positive obligations regarding collection, treatment and disposal of waste fell within the sphere of that provision.

In the second type of case the Constitutional Court refers to a relevant provision of the Convention and/or the case law of the ECtHR aiming to reinforce its constitutional argumentation. For instance, in its ruling *on exempting priests from mandatory military service*, the Court – in briefly mentioning relevant ECtHR case law – concluded that the legal regulation authorizing automatic exemption of all priests from religious communities and associations (considered traditional in Lithuania and recognized by the

20 In some cases, two or even all three ways of internalization of the Convention may overlap.

21 Constitutional Court ruling of 30 May 2017. TAR, No. 2017-09149.

22 ECtHR, *Di Sarno and Others v. Italy,* Judgment (10 January 2012), 30765/08.

state) from mandatory military service, in the absence of any constitutionally justifiable basis violated the Constitution (more on this see section 5 below).[23] In its ruling *on the procedure for removing the immunity of a member of the Seimas* the Court 'mentioned' the jurisprudence of the ECtHR in which questions linked to removing the immunity of a member of the parliament were considered, amongst various other acts of international and EU law that were linked to the immunity of a member of the parliament, and concluded that the resolution of the *Seimas* whereby consent was given to remove the immunity of the member of the *Seimas* Mr. R.A.R. in his absence contradicted the Constitution due to substantive violations of the procedure for adopting the resolution.[24] Systemic analysis of both mentioned types of internalization of the Convention in constitutional jurisprudence reveals that ECtHR case law did not affect the outcome of these constitutional justice cases but was used as an auxiliary source of construing law in its true sense.

In the third type of case, those provisions of the Convention that are consistently interpreted (that is, harmonized with the Constitution) and transferred to constitutional jurisprudence, then indeed affect the outcome in the case of constitutional justice concerned, while constitutional provisions acquire a new meaning borrowed from the ECtHR. Indeed, the content of many constitutional rights has been harmonized with conventional requirements, just to mention some of them:

- the rights to life and human dignity (Articles 19 and 21 of the Constitution),[25]
- the right to protection of property (Article 23 of the Constitution),[26]
- the right to respect for private life (Article 22 of the Constitution),[27]
- protection of the family (Article 38),[28] including protection of same-sex families,[29]

23 Constitutional Court ruling of 4 July 2017. TAR, No. 2017-11471.

24 Constitutional Court ruling of 27 April 2016. TAR, No. 2016-10540.

25 Constitutional Court ruling of 21 December 1999, *see* note 17.

26 Constitutional Court rulings of 27 May 1994, 18 April 1996, 8 April 1997, 6 May 1997, 25 November 2002 and 4 July 2003. TAR, No. 0941000NUTARG940154, No. 0961000NUTARG960375, No. 0971000NUTARG970321, No. 0971000NUTARG970436, No. 1021000NUTARG024120 and No. 1031000NUTARG034478.

27 Constitutional Court rulings of 24 March 2003 and 18 April 2019. TAR, No. 1031000NUTARG031666 and No. 2019-06411.

28 Constitutional Court ruling of 28 September 2011. TAR, No. 1111000NUTARG117332.

29 Constitutional Court ruling of 11 January 2019. TAR, 2019-00439.

– freedom of assembly (Article 36),[30] and
– freedom of association (Article 35).[31]

An exceptionally great impact of the Convention and relevant ECtHR case law occurred on construal of the constitutional concept of the right to fair trial[32] when revealing its various procedural aspects[33] and, even more importantly, when interpreting the constitutional concept of justice as implying not merely formal justice administered by a court but substantive justice.[34]

The Constitutional Court has also 'borrowed' certain methodological tools from the ECtHR. For example, the Court introduced a three-step proportionality test which must be applied when examining cases regarding interference by the state with the exercise of individual rights and freedoms.[35] However, the constitutional test of proportionality is not exactly the same as that of the ECtHR. For example, the very first element – the test of lawfulness – refers particularly to 'a law', as a legal act adopted by the parliament,[36] by contrast to the case law of the ECtHR not requiring a particular form of legal act. This in fact creates a higher constitutional threshold for justifying interference with fundamental rights and freedoms, which primarily must be effectively protected at the national level.

30 Constitutional Court ruling of 7 January 2000. TAR, No. 1001000NUTARG000027.

31 Constitutional Court ruling of 7 January 2008. TAR, No. 1081000NUTARG080067; Constitutional Court ruling of 11 September 2020. TAR, No. 2020-19129.

32 Vytautas Sinkevičius, "Teisės į teisingą teisinį procesą samprata Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje", 2 *Konstitucinė jurisprudencija. Lietuvos Respublikos Konstitucinio Teismo biuletenis* (2006), 250–286.

33 E.g., Procedural guarantees related to use of a criminal conduct simulation model, Constitutional Court ruling of 8 May 2000, *see* note 19; the use of testimonies of secret witnesses at trial, Constitutional Court ruling of 19 September 2000. TAR, No. 1001000NUTARG002378; the right of self-defense, Constitutional Court ruling of 12 February 2001. TAR, No. 1011000NUTARG010396; the right not to reveal journalistic sources, Constitutional Court ruling of 23 October 2002. TAR, No. 1021000NUTARG023770; judicial independence, Constitutional Court ruling of 21 December 1999, *see* note 17; applicability of the rules of criminal procedure in respect of administrative violation cases, Constitutional Court ruling of 28 May 2008. TAR, No. 1081000NUTARG083739; presumption of innocence, Constitutional Court ruling of 15 March 2017, TAR, No. 17-04356.

34 E.g., Constitutional Court decision of 8 August 2006 and Constitutional Court rulings of 19 August 2006 and 21 January 2008. TAR, No. 1061000SPRERG060253, No. 1061000NUTARG065903 and No. 1081000NUTARG080385.

35 Constitutional Court rulings of 18 April 1996, 19 December 1996, 13 February 1997, 6 May 1997 and 7 January 2000. *See* note 26, TAR. No. 0961000NUTARG961269, No. 0971000NUTARG970137, and *see* notes 26 and 30.

36 Constitutional Court ruling of 6 May 1997, *see* note 26.

Admittedly, harmonizing internalization, which prevailed during the first two decades of the Court's activity, may be detected during the third decade on exceptional occasions.[37] The main reason for this shift is a mature and voluminous official constitutional doctrine (linked with the formation of a jurisprudential constitution[38]), especially in the sphere of constitutional rights and freedoms, already comprising previously internalized standards of the Convention.

Another factor that has also guided the Court towards exclusively Constitution-centered jurisprudence is that the Convention is a legal act with the force of law in the formal hierarchy of legal norms, so that examining the conformity of national laws with the Convention (being of the same legal force) falls outside the competence of the Constitutional Court. This stands in contrast to Poland[39] and Latvia,[40] where the Convention is a legal act of higher legal force than that of a law). On the other hand, the absence of a direct reference in the text of the Lithuanian Constitution to the principle of consistent interpretation – unlike those contained in the Constitutions of Latvia[41] and Romania –[42] was equilibrated by constitutional jurisprudence: the formula regarding the Convention and the case law of the ECtHR as an auxiliary source for interpreting the Constitution in reality also comprises a

37 Since 20 June 1995, when the Convention entered into force with respect to Lithuania, the Court has referred to it in 100 rulings (in 3 rulings references were made even before ratification of the Convention). In 1993–2013, harmonizing internalization was performed in 28 rulings out of 63 in which references to the Convention were made. To compare, it has been performed in 7 rulings as of 1 January 2013 to date.

38 For more, *see* Egidijus Jarašiūnas, "Jurisprudencinė konstitucija", 12 (90) *Jurisprudencija* (2006), 24–33, at 27.

39 Art. 188 of the Polish Constitution: "The Constitutional Tribunal shall adjudicate regarding the following matters: […] 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute".

40 Under Section 16 of the Constitutional Court Law of Latvia, the Constitutional Court examines cases with regard to, *inter alia*, "[..] 3) conformity of other laws and regulations or parts thereof with the norms (acts) of higher legal force [..]".

41 Art. 89 of the Latvian Constitution: "The State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia".

42 Art. 20 § 1 of the Romanian Constitution: "Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party ".

constitutional imperative of consistent interpretation and recognition of the *res interpretata* effect of ECtHR judgments.[43]

## 4 The Relationship Between the Constitutional Court and the ECtHR: Examples of Judicial Dialogue

The ECtHR has on numerous occasions found violations of individual rights guaranteed by the Convention stemming from constitutional legal regulation.[44] As a result, 'a balancing exercise' to be performed by the Constitutional Court is gaining currency when ensuring the supremacy of the Constitution, on the one hand, and the *pacta sunt servanda* principle, on the other. The importance of judicial dialogue[45] cannot be overstated in those cases where – in response to ECtHR judgments – the permissible limits of the impact of the Convention are set by national constitutional courts, usually referring to national particularities pertaining to politically and otherwise sensitive issues.

Turning to concrete examples of this type of judicial dialogue between the Constitutional Court and the ECtHR, it is appropriate to start with a unique example of a direct clash between the Constitution and the Convention. This arose after the Grand Chamber [GC] judgment in the case of *Paksas.*[46]

In this case the Lithuanian state was sued by Rolandas Paksas, who on 6 April 2004 was removed by the *Seimas* from the office of President of the Republic in accordance with the impeachment procedure after the conclusion of the Constitutional Court finding gross violations of the Constitution and a breach of his constitutional oath on account of the following acts:

- unlawfully granting citizenship – as a reward to a Russian businessman who supported his presidential electoral campaign,

43 The Longer-Term Future of the System of the European Convention on Human Rights. Report of the Steering Committee for Human Rights (CDDH) adopted on 11 December 2015, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680 6585d8).

44 ECtHR, *Rekvényi v. Hungary,* [GC] Judgment (20 May 1999) No. 25390/94; ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC] Judgment (22 December 2009) Nos. 27996/06 and 34836/06; ECtHR, *Zornić v. Bosnia and Herzegovina* Judgment (15 July 2014) No. 3681/06; ECtHR, *Urechean ir Pavlicenco v. Moldova*, Judgment (2 December 2014), Nos. 27756/05 and 41219/07.

45 In the present article the term 'judicial dialogue' is used not only as referring to interaction between the Lithuanian Constitutional Court and the ECtHR when resolving genuine conflict situations, but also as covering situations of indirect dialogue, where each of these courts takes into account the jurisprudence of the other.

46 ECtHR, *Paksas v. Lithuania*, [GC] Judgment (6 January 2011) No. 34932/04.

– knowingly hinting to the same businessman, in breach of the Official Secrets Act and the Constitution, that law-enforcement institutions were investigating him, and
– exploiting his official status to influence decisions by a certain private company concerning the transfer of shares.[47]

As a consequence of his removal, Paksas was disqualified permanently from standing, *inter alia*, for parliamentary elections, among the constitutional consequences revealed by the Constitutional Court in its ruling of 25 May 2004 for any constitutional office for which it is necessary to take an oath in accordance with the Constitution.[48]

The Grand Chamber in this case of exceptional political sensitivity found the permanent and irreversible nature of the applicant's disqualification from holding parliamentary office disproportionate and thus concluded that there had been a violation of Article 3 of Protocol No. 1. In fact, the ECtHR found 'a narrow violation'[49] – exclusively in respect of the permanent and irreversible nature of the measure at issue – accepting the reasons given by the Constitutional Court, namely that the measure imposed formed part of a self-protection mechanism for democracy[50] and without underplaying the seriousness of the applicant's alleged conduct in relation to his constitutional obligations or questioning the principle of his removal from office as President.[51] When the *Seimas* decided in 2012 to implement the *Paksas* judgment by amending the Law on the *Seimas* Elections,[52] and the amendment was brought before the Constitutional Court, the Court for the first time faced a genuine conflict between the Constitution and the Convention.

When resolving the conflict, the Constitutional Court in its ruling of 5 September 2012,[53] firstly looked at overall constitutional legal regulation (impeachment, the oath, electoral rights). In noting that changing any of these elements would result in changing the content of other related institutes and values, the Court availed itself of an *ultima ratio* tool: it declared the judgment of the ECtHR incompatible with the provisions of the Lithuanian Constitution. The incompatibility was declared insofar as the *Paksas* judgment implied

47 *Ibid*, § 27.
48 Constitutional Court ruling of 25 May 2004. TAR, No. 1041000NUTARG044004.
49 *See* § 12 of the Partly Dissenting Opinion of Judge Costa Joined by Judges Tsotsoria and Baka.
50 *Paksas v. Lithuania*, *see* note 46, § 100.
51 *Ibid*, § 103.
52 Law supplementing Article 2 of the Law on the *Seimas* Elections. TAR, No. 1121010ISTA0XI-1939.
53 Constitutional Court ruling of 5 September 2012. TAR, No. 1121000NUTARG125330.

the international obligation of Lithuania to guarantee the right to stand in elections for a Member of the *Seimas* of, *inter alia*, a person who has been removed from the office of President of the Republic in accordance with the impeachment procedure for gross violation of the Constitution and breach of the oath. Secondly, the Court rejected the possibility of reinterpreting official constitutional doctrine on the basis of the ECtHR judgment if that reinterpretation, in the absence of corresponding amendments to the Constitution, changed the overall constitutional regulation in essence, also if it disturbed the system of values entrenched in the Constitution and diminished the guarantees of protection of the superiority of the Constitution in the legal system. Thirdly, the Court found that from the Constitution itself a duty arose for Lithuania to remove the incompatibility of the provisions of Article 3 of Protocol No. 1 of the Convention with the Constitution, and that adoption of the corresponding amendment(s) to the Constitution was the only way to remove the incompatibility.

Thus, on the one hand, the Constitutional Court made it clear that the permissible limits of the impact of the Convention are set by overall constitutional legal regulation and values, but on the other, in the case of incompatibility, the Court admitted that the constitutional *pacta sunt servanda* principle obliged the state to amend the Constitution accordingly. This kind of 'last word' is similar to that of the German *Bundesverfassungsgericht*, under which even the 'last word' of the Constitution is not opposed to an international and European dialogue between courts but is the normative basis for this.[54]

Indeed, reconciliation of human rights set in different institutional contexts may require enormous efforts and time. In 2014 the Views ~~of 2014~~ by the UN Human Rights Committee (the ~~UN~~HRC) in the case of *Paksas*[55] were adopted, finding that the lifelong disqualification imposed from becoming Prime Minister, a minister, or to stand for the presidential elections, violated Article 25 (b) and (c) of the International Covenant on Civil and Political Rights. On 22 December 2016 the Constitutional Court[56] reaffirmed its position that 'the only way' to implement the ECtHR's *Paksas* judgment was to amend the Constitution and added that the recommendations of the ~~UN~~ HRC had to be taken into account when drafting the relevant constitutional amendments.

Despite numerous attempts, the Constitution remained unchanged until 2022, when the same constitutional sanction was applied in respect of some

54 Judgment of 4 May 2011 of the *Bundesverfassungsgericht*, No. 2 BvR 2365/09.

55 UN HRC, *Paksas v. Lithuania*, Views, (25 March 2014), CCPR/C/110/D/2155/2012.

56 Constitutional Court ruling of 22 December 2016. TAR, No. 2016-29337.

other persons.[57] Meanwhile a newly institutionalized instrument of judicial dialogue, namely, Protocol No. 16 to the Convention, entered into force[58] and in 2020 the ECtHR was addressed by the Lithuanian Supreme Administrative Court (examining the case of another person who had been impeached) requesting an advisory opinion on the question concerning the requirements and criteria implied by Article 3 of Protocol No. 1 to the Convention.[59] On 8 April 2022 the Grand Chamber delivered its advisory opinion[60] redirecting the domestic court to the national constitutional system and democracy as a whole, thereby demonstrating self-restraint and deference to the Lithuanian Constitution.[61] Finally, on 21 April 2022 the Law amending the Constitution was adopted, abolishing the permanent restriction on holding positions specified in the Constitution following impeachment, replacing it with a restriction of a fixed term of ten years.[62] As 'Paksasgate'[63] demonstrates, the Constitutional Court – even taking a principled position not to reinterpret the Constitution – managed to preserve the openness of the Lithuanian Constitution, a fact which was also appreciated by the ECtHR.

To compare, a very different story was told by those constitutional courts which refused to step into the dialogue with the ECtHR when reacting to violations of the Convention stemming from the constitutional legal regulation of a particular country. For example, in 2015 the Russian Constitutional

57 After 2004, the mandate of a Member of the *Seimas* was revoked under impeachment proceedings in respect of Linas Karalius (on 4 November 2010) and Neringa Venckienė (on 10 June 2014).

58 Protocol No. 16 came into force on 1 August 2018 in respect of the 10 member states that have signed and ratified it: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine.

59 An Advisory Opinion was requested in the context of the case, where Ms N. V., a former (impeached) member of the *Seimas*, challenged the Central Electoral Commission's refusal to register her as a candidate in the *Seimas* elections in 2020.

60 It was the third Advisory opinion delivered by the ECtHR under Protocol No. 16.

61 ECtHR, Advisory opinion, [GC] 8 April 2022, P16-2020-002.

62 Art. 74 of the Constitution was supplemented by a new paragraph: "A person removed by the *Seimas* from office under impeachment proceedings or in respect of whom the *Seimas* has revoked the mandate of a member of the *Seimas* may hold the positions specified in the Constitution, the beginning of which is linked with taking the oath laid down in the Constitution, including that of a member of the *Seimas*, when at least ten years have passed since the decision of the *Seimas* regarding their removal from office or revocation of their mandate". The amendment entered into force on 22 May 2022.

63 The term 'Paksasgate' comes from Caroline Taube, "Liability of Heads of State: 'Paksasgate'", in Åke Frändberget *et al.* (eds.), *Festskrift till Anders Fogelklou* (Iustus Förlag, Stockholm, 2008), 275–285. For more, *see* Egidijus Kūris, "On Lessons Learned and Yet to Be Learned: Reflections on the Lithuanian Cases in the Strasbourg Court's Grand Chamber", 1 *East European Yearbook on Human Rights* (2019), 17–27.

Court – when reacting to the ECtHR judgment in the case of *Anchugov and Gladkov* finding a blanket constitutional ban on convicted prisoners' voting rights incompatible with Article 3 P-1 to the Convention[64] – vested itself with the right to legitimize Russia's deviation from fulfilling obligations imposed on it under the Convention, aiming, as it was explained, to avoid violating the fundamental principles and norms of the Russian Constitution.[65] The stance taken by the Russian Constitutional Court accompanied Russia's failure to follow a number of commitments following from its membership of the Council of Europe (COE) and its constant pick-and-choose policy with regard to executing ECtHR judgments[66] until the story was discontinued with Russia's invasion of Ukraine and the ultimate exclusion of Russia from the COE and the Convention system.[67] Unfortunately, the so-called 'new direction to the discourse of European human rights law'[68] was recently followed by the Polish Constitutional Tribunal, which – when reacting to judgments finding violations of Article 6 of the Convention related with the very essence of the right to a 'tribunal established by law' pertinent to grave irregularities in appointment of judges of the Polish Constitutional Tribunal[69] and other top judicial formations[70] – uttered the 'last word', thus closing the door for any further dialogue with the ECtHR. The Constitutional Tribunal ruled out the provisions derived from Article 6-1 as interpreted by the ECtHR[71] and

64 ECtHR, *Anchugov and Gladkov v. Russia*, Judgment (4 July 2013) Nos. 11157/04 and 15162/05.

65 *See* Judgment 21-P/2015 of 15 July 2015 of the Russian Constitutional Court.

66 For more, *see* Kanstantsin Dzehtsiarou and Donald Coffey, "Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times", 68(2) *International and Comparative Law Quarterly* (2019), 443–476.

67 The Russian Federation ceased to be a High Contracting Party to the Convention on 16 September 2022 further to Resolution CM/Res(2022)2 on cessation of the membership of the Russian Federation in the Council of Europe, adopted by the Committee of Ministers on 16 March 2022, and in accordance with the Resolution on the consequences of the cessation of membership of the Russian Federation in the Council of Europe in light of Article 58 of the European Convention on Human Rights, adopted by the plenary Court on 22 March 2022. The exclusion took place due to open military aggression against Ukraine commenced by Russia on 24 February 2022.

68 *See* Lauri Mälksoo "Russia's Constitutional Court Defies the European Court of Human Rights", 12 (2) *European Constitutional Law Review* (2016), 377–395.

69 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, Judgment (7 May 2021) No. 4907/18.

70 ECtHR, *Broda and Bojara v. Poland*, Judgment (29 June 2021) Nos. 26691/18 and 27367/18; ECtHR, *Reczkowicz v. Poland*, Judgment (22 July 2021) No. 43447/19; ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, Judgment (8 November 2021) No. 49868/19 and 57511/19; ECtHR, *Advance Pharma sp. z o.o v. Poland* (3 February 2022) No. 1469/20.

71 Judgment of 24 November 2021 No. K 6/21 ruled out of the provisions derived from Article 6-1 as interpreted by the ECtHR in the judgment of 7 May 2021 in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*.

eliminated the particular judgments of the ECtHR from the legal system of Poland[72] as incompatible with its Constitution. This kind of 'last word' leads nowhere[73] in terms of further judicial dialogue.

A statement of incompatibility when setting permissible limits of the impact of the Convention on the national Constitution is an *ultima ratio* tool used by constitutional courts. In cases referring to a multi-layered legal order where human rights are functioning today, the result of systemic integration may still be achieved with the help of judicial dialogue. One of those cases was *Vasiliauskas v. Lithuania*,[74] regarding retrospective application of a broader domestic definition of the crime of genocide in respect of criminal acts targeted against Lithuanian partisans,[75] pertaining to the specific form of Lithuanian resistance against Soviet occupation during the years 1944–1953, where the Chamber relinquished its jurisdiction in favor of the Grand Chamber.

While this case was still pending before the GC, on 18 March 2014 the Constitutional Court issued its ruling[76] on whether the crime of genocide, as defined in the Criminal Code, and the possibility to administer punishment for that crime retroactively, were compatible with the Constitution. The Court referred to the Resolution of the General Assembly of the UN No. 95(I), the universal validity of the Nuremberg principles, and to the case law of the ECtHR, all of which indicated that responsibility for crimes against humanity was not limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War. Referring also to the case law of the International Criminal Tribunal for the former Yugoslavia and that of the International Court of Justice, the Constitutional Court concluded that, according to universally recognized norms of international law, actions carried out during a certain period against certain political and social groups of Lithuanian residents might be considered to constitute genocide if those actions – provided they have been proved – were aimed at destroying groups that represented a significant part of the Lithuanian nation and whose

72 Decision of 10 March 2022 No. K 7/21: the Tribunal eliminated the four judgments (*see* note 70) of the ECtHR from the legal system of Poland as incompatible with its Constitution, also discharging the state from the obligation to execute them.

73 Oliver Garner and Rick Lawson, "On a Road to Nowhere. The Polish Constitutional Tribunal assesses the European Convention on Human Rights", *Verfassungsblog: On Matters Constitutional* (23 November 2021), available at https://verfassungsblog.de/on-a-road-to-nowhere.

74 ECtHR, *Vasiliauskas v. Lithuania,* [GC] Judgment (20 October 2015) No. 35343/05.

75 For more, *see* Lauri Mälksoo, "Judging History: The European Court of Human Rights and the Qualification of Soviet Crimes in the Baltic States", 39 *Human Rights Law Journal* (2019), 19–22.

76 Constitutional Court ruling of 18 March 2014, TAR, No. 2014-03226.

destruction had an impact on the survival of the entire Lithuanian nation. The Court expressly indicated Lithuanian partisans as constituting a group of this kind, taking into account their activity during the 1944–1953 guerrilla war against Soviet occupation.[77] In this case the Constitutional Court performed the rather complicated exercise of integrating the three relevant legal systems – in fact, prioritizing the national concept of genocide, though supplemented with the relevant standards of general international law, over the conventional interpretation of *lex retro non agit* principle – which, if accepted by the ECtHR, might have influenced further development of the Convention.

However, in its judgment of 20 October 2015 the Grand Chamber (by 9 votes to 8) being indeed somewhat sympathetic to the interpretation given by the Constitutional Court, criticized the argumentation of the domestic criminal courts as lacking a firm finding, on which basis they concluded that in 1953 the Lithuanian partisans constituted a significant part of a national group, in other words, a group protected under Article II of the Genocide Convention.[78] Against this background the ECtHR was not convinced that in 1953 the applicant, a former operational agent of the MGB of the LSSR, convicted of genocide in 2004, even with the assistance of a lawyer, could have foreseen that the killing of Lithuanian partisans could constitute the offence of genocide of Lithuanian nationals or of ethnic Lithuanians and found a violation of Article 7 of the Convention.[79] Fortunately, the judicial dialogue did not end with the *Vasiliauskas* judgment. After re-opening the applicant's criminal case before the domestic courts, the Supreme Court of Lithuania in its decision of 27 October 2016[80] integrated both – constitutional jurisprudence and the case law of the ECtHR. This newly developed case law applied by the prosecution and the domestic courts resulted in closure of supervision of the execution of the *Vasiliauskas* judgment by the Committee of Ministers[81] and also in a new application in the case of *Drėlingas*[82] lodged before the ECtHR against

77 *Ibid.*

78 *Vasiliauskas v. Lithuania*, *see* note 74, § 181.

79 *Ibid*, § 191.

80 Adopting the decision of 27 October 2016 (*post mortem*, as the applicant had passed away) the Plenary Session of the Criminal Division of the Supreme Court taking into account the *Vasiliauskas* judgment, annulled his conviction.

81 Resolution of the Committee of Ministers CM/ResDH(2017)430 adopted on 7 December 2017 at the 1302nd meeting of Ministers' Deputies.

82 The Plenary Session of the Criminal Division of the Supreme Court upheld the conviction of the accused for committing genocide, taking into account both the Constitutional Court ruling of 18 March 2014 and the ECtHR *Vasiliauskas* judgment. The Plenary Session examined in detail the concept of partisans as representatives of protected groups, noting that the act of genocide can target a group of people belonging to several protected

Lithuania regarding, once again, retroactive conviction of the applicant for the crime of genocide against Lithuanian partisans. This time, the ECtHR – departing from the reasoning of the GC in the *Vasiliauskas* judgment – accepted the clarification given in domestic case law on the partisans' specific role, recognized them as a significant part of the Lithuanian nation and that systematically killing them amounted to genocide of the Lithuanian nation in part,[83] ultimately drawing the conclusion in *Drėlingas* that the applicant's conviction for genocide of the leader of the Lithuanian partisans and his spouse could be regarded as foreseeable under Article 7 of the Convention.[84]

To compare the judicial dialogue in *Vasiliauskas* with similar Latvian cases before the ECtHR also regarding retroactive criminal responsibility of the applicants for genocide, by the decision in *Tess and Larionovs* case,[85] the applications were rejected for non-exhaustion of domestic remedies, by considering an individual constitutional complaint on the issue an effective domestic remedy taking into account the scope and form of the redress afforded by constitutional review.[86] Thus *Vasiliauskas* revealed that the absence of an individual constitutional complaint (introduced only in 2019) clearly diminished the capabilities of the Lithuanian Constitutional Court to enter into more meaningful dialogue with the ECtHR.

On the other hand, the Strasbourg Court often refers to domestic constitutional jurisprudence, including in cases against Lithuania, both with the aim of strengthening its legal argumentation and in some cases aiming

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groups, also that in some instances protected groups might be interchangeable. The Plenary Session provided extensive argumentation about the significance of the resistance movement and the partisans to the survival of the Lithuanian nation. In this particular case the criminal act was committed against a partisan leader and his spouse.

83 For more, *see* Dovilė Sagatienė, "The Debate about Soviet Genocide in Lithuania in the Case Law of The European Court of Human Rights", 49, Issue 4 *Nationalities Papers, Special Issue on 1918 and the Ambiguities of "Old-New Europe"* (2021), 776–791.

84 ECtHR, *Drėlingas v. Lithuania*, Judgment (12 March 2019) No. 28859/16. On the peculiar set of circumstances in which this judgment was adopted, see Egidijus Kūris, "*Vasiliauskas*, *Drėlingas* and beyond – An Insider's View", in Dovilė Sagatienė (ed.). *Two Years after Drėlingas Case: Challenges and Perspectives for the Future: Conference Proceedings* (Mykolas Romeris University Law School, Vilnius, 2022), 7–14; e-book, available at https://repository.mruni.eu/handle/007/18718.

85 ECtHR, *Tess and Larionovs v. Latvia*, Decision (25 November 2014) Nos. 45520/04 and 19363/05. The applicants were former officials of the then Soviet Socialist Republic of Latvia. In 2003, pursuant to a provision inserted into the Latvian Criminal Code in 1993, they were convicted of crimes under Article 681 of the Criminal Code for having actively participated in the large-scale deportation of wealthy farmers, known as *kulaks* (in Russian), from the Baltic States in March 1949.

86 *Ibid.*

to demonstrate that other state institutions disregard constitutional standards themselves. Thereby the Lithuanian Constitutional Court – as also other constitutional courts in Central and Eastern Europe – found in the ECtHR a strong international ally against other state institutions.[87] Most recently the ECtHR availed itself of relevant constitutional jurisprudence related with the anti-majoritarian nature of the Constitution. For example, in the *Beizaras and Levickas* judgment of 2020[88] the ECtHR – in finding a violation of Article 14 in conjunction with Article 8 for refusal to prosecute authors of serious homophobic comments on Facebook discriminating against the applicants on the basis of their sexual orientation – the ECtHR also expressed its particularly strong reservations as to the validity of the arguments presented by national judicial institutions regarding traditional family values, that is to say, what constitutes a family, referring to the Constitutional Court ruling of 2019[89] where it also underlined not only the fact that under the Lithuanian Constitution "the concept of family [was] neutral in terms of gender" but also that "the Constitution [was] an anti-majoritarian act" and that the views of the majority could not override those of the minority.[90] Similarly, in its *Ancient Baltic religious association Romuva* judgment of 2021,[91] the ECtHR referred to, *inter alia*, the case law of the Lithuanian Constitutional Court enshrining the principle of separation of church and state as the basis of the secularism of the Lithuanian state as it was unable to accept that the existence of a religion to which the majority of the population adheres, or the opposition of an authority of that religion, could constitute objective and reasonable justification for refusing state recognition to the applicant association and found that denial of an ancient pagan religious association violated Article 14 in conjunction with Article 9 of the Convention.[92] *Romuva* also disclosed a fallacy of the individual constitutional complaint introduced in 2019, insofar it is not established that a constitutional complaint might also be submitted in cases where no remedies for protection of rights exist. Accordingly, the ECtHR, in noting that the impugned decision of the *Seimas* did not fall within the category of acts of public administration and that it could therefore have

87 Wojciech Sadurski, "Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments", 9 (3) *Human Rights Law Review* (2009), 397–453.

88 ECtHR, *Beizaras and Levickas v. Lithuania*, Judgment (14 January 2020) No. 41288/15.

89 Constitutional Court ruling of 11 January 2019, *see* note 29.

90 ECtHR, *Beizaras and Levickas v. Lithuania*, *see* note 88, § 123.

91 ECtHR *Ancient Baltic religious association Romuva v. Lithuania*, Judgment (8 June 2021) No. 48329/19.

92 *Ibid,* § 145.

been examined by the administrative courts, decided that an individual constitutional complaint could not be considered to constitute an effective remedy as domestic law does not enable lodging of a constitutional complaint in such cases.[93] By contrast, in Latvia a possibility exists not only to submit a constitutional complaint in the absence of effective remedies but also to adjudicate the complaint before any existing remedies for protection of rights have been exhausted.[94] Therefore, there is scope for further improvement of the Lithuanian model of individual constitutional complaint and, the more effective a domestic remedy it becomes, the more reasonable prospects of success it offers for the Constitutional Court to engage in a truly meaningful judicial dialogue with the ECtHR.

The significance of judicial dialogue cannot be overestimated: domestic constitutional courts may even convince the Strasbourg Court to alter its position if given a particularly solid legal argumentation. For instance, after the *Andrejeva* judgment, where the ECtHR found a violation of the Convention due to a discriminatory attitude regarding old age pension calculations towards the applicant on the basis of not having Latvian citizenship,[95] the Latvian Constitutional Court adjudicated a similar case regarding calculation of old age pensions for non-citizens for work periods accrued in the territory of the former USSR before 31 December 1990. The Constitutional Court – relying heavily upon the state continuity doctrine – gave a principled reply: these periods of years of service outside Latvia during the Soviet era for permanently resident non-citizens could not be taken into account.[96] Moreover, a clear distinction was drawn between *Andrejeva* and the constitutional case at issue, as Ms. Andrejeva had resided in the territory of Latvia over the disputed periods, while the applicants had not and could not have acquired legal ties with Latvia. This principled non-compliance based on solid legal argumentation by the Latvian Constitutional Court was accepted by the ECtHR [GC] in *Savickis and Others*,[97] where the Grand Chamber concluded that Latvia had not overstepped its margin of appreciation with regard to the applicants and that the Court had to reach a different conclusion from that of *Andrejeva*.[98]

93 *Ibid*, § 96.
94 The Constitutional Court Law of Latvia, Section 19(2) §§ 2 and 3.
95 ECtHR, *Andrejeva v. Latvia*, [GC] Judgment (18 February 2009) No. 55707/00.
96 *See* judgment of the Latvian Constitutional Court No. 2010-20-0106.
97 ECtHR, *Savickis and Others v. Latvia*, [GC] Judgment (9 June 2022) No. 49270/11.
98 *Ibid*, § 220.

## 5 Room for Domestic Development of the Rights Guaranteed under the Convention

Taking into account the primary responsibility of national courts in guaranteeing and protecting human rights at the national level[99] and the subsidiary role of the ECtHR in this regard,[100] all new issues in this sphere ideally must be adjudicated first by the domestic courts. A constitutional maximization clause worded by the Constitutional Court in 1998, under which international standards of human rights protection are perceived by the Court as a required minimum of constitutional human rights standards,[101] is particularly relevant to this end. This might suggest that if the Constitutional Court engages in development of human rights issues on which the case law of the ECtHR has not yet been established, this necessarily ensures a higher level of constitutional protection. This is particularly so in some cases. For example, in its ruling *on the different number of voters in single-member constituencies*[102] when ruling that legal regulation on forming single-member constituencies was unconstitutional insofar as it allowed the number of voters in each single-member constituency to differ from the national average by 20 percent, the Constitutional Court developed the right to free elections to the legislature provided for in Article 3 of Protocol No. 1, referring to the main principles formulated by the ECtHR, *inter alia*, equal suffrage, other international legal material,[103] also to relevant decisions of the Constitutional Court of Hungary,[104]

99 High Level Conference on the Future of the European Court of Human Rights. Interlaken Declaration, 19 February 2010; High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration, 26–27 April 2011; High Level Conference on the Future of the European Court on Human Rights. Brighton Declaration, 19–20 April 2012; High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility" Brussels Declaration, 27 March 2015.

100 Preamble to the Convention as amended by the Protocol No. 15 (as of 1 August 2021) *expressis verbis* enshrines the principle of subsidiarity.

101 In 1998 in a constitutional justice case on compliance of the death penalty with the Constitution, the Court noted that the State of Lithuania, recognizing the principles and norms of international norms, may not apply substantially different standards to the people of Lithuania. Constitutional Court ruling of 9 December 1998, TAR, No. 0981000NUTARG982054.

102 Constitutional Court ruling of 20 October 2015, *see* note 74.

103 Namely, to UN HRC General Comment 25 (57) of 1996, the views of the Committee adopted in *Mátyus v. Slovakia*, 923/2000, relevant documents of the Venice Commission and the OSCE.

104 Decision of the Constitutional Court of Hungary of 14 June 2005, No. 22/2005 (VI.17.) AB (case 4/B/2005).

*le Conseil d'État,*[105] and the Constitutional Court of Croatia.[106] In another ruling, *on conducting a mandatory referendum on two days with a break of two weeks*,[107] the Constitutional Court, in declaring unconstitutional a regulation under which the parliament may establish that a referendum is to take place on more than one day, expanded the principles developed by the ECtHR on the right to free elections to the legislature, *mutatis mutandis*, to referendums,[108] referring to relevant principles of the European Commission for Democracy through Law (Venice Commission) and jurisprudence of the Constitutional Tribunal of Poland.[109] In its ruling *on the right to apply to a court of appeal instance without the assistance of a lawyer*,[110] when ruling that legal regulation under which an appeal must be drawn up by a lawyer or an appeal of a legal person may also be drawn up by the employees of that legal person or state servants who have a university education in law or if an appellant is a natural person with a university education in law, they will have the right to draw up an appeal in person,[111] was in conflict with the right of access to a court and the constitutional principle of a state under the rule of law, the Constitutional Court referred to basic principles to be found in the case law of the ECtHR and relevant jurisprudence of the Constitutional Courts of Romania,[112] of Latvia[113] and of Moldova.[114] Apparently, when revealing new aspects of the constitutional human rights concerned but not yet developed by the ECtHR, the Constitutional Court, in aiming to reinforce the legitimacy of its argumentation, avails itself not only of other international legal norms but also of horizontal judicial dialogue, which in turn becomes a global phenomenon in the field of human rights.[115]

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105 Decision of the *Conseil d'État* of 08 January 2009, No. 2008-573 DC.

106 Notification of the Constitutional Court of Croatia of 8 December 2010, No. U-X-6472/2010.

107 Constitutional Court ruling of 15 February 2019. TAR, No. 2019-02373.

108 *Ibid.* In this ruling the Court, summarizing the jurisprudence of the ECtHR in relation to the principles of implementation of the right to free elections of the legislature, noted that: "[…] it is also possible to apply *mutatis mutandis* to referendums the principles, developed in the jurisprudence of the ECtHR, of ensuring the right to free elections of the legislature […]".

109 Judgment of the Constitutional Tribunal of Poland of 20 July 2011, No. K 9/11.

110 Constitutional Court ruling of 1 March 2019. TAR, No. 2019-03464.

111 *Ibid.*

112 Decision of the Constitutional Court of Romania of 17 September 2014, No. 462/2014.

113 Judgment of the Constitutional Court of Latvia of 27 June 2002, No. 2003-04-01.

114 Judgment of the Constitutional Court of Moldova of 19 July 2005, No. 16.

115 Amrei Müller, Hege Elisabeth Kjos "Introduction", in Amrei Müller, Hege Elisabeth Kjos (eds.), *Judicial Dialogue and Human Rights* (*Studies on International Courts and Tribunals*) (Cambridge University Press, Cambridge, 2017), 1–26.

In some cases, the Constitutional Court elaborates a truly autonomous understanding of rights and freedoms guaranteed under the Convention. Indeed, mostly because of the duty of the Constitutional Court to balance fundamental rights against all other constitutional norms, principles and values, the Court may arrive at an autonomous interpretation, in those rare cases not necessarily offering higher protection of individual rights. Difficulties in balancing the constitutional duties of the citizen against their individual rights can be illustrated by a constitutional case regarding exemption of priests from mandatory military service.[116] In that case the Constitutional Court prioritized the individual's constitutional duty to perform mandatory military service or alternative national defense service over freedom of thought, conscience, and religion and ruled that no priest (of either traditional or non-traditional religious communities) could be exempted from the constitutional duty to perform military or alternative national defense service. The Court found that exemption from the duty to defend the state is only possible on objective grounds, which does not depend on a certain social status (being a priest), at the same time underlining that those persons have the right to perform alternative national defense service instead of military service, and that fulfillment of the constitutional duty to perform military or alternative national defense service may be deferred for important reasons. The administrative courts adjudicating the case on refusal to exempt a minister of the Jehovah's Witnesses from initial military service, referring to the Constitutional Court ruling, upheld the refusal holding that the applicant's social status could not cast any doubt as to his obligation to perform military duty. When the minister addressed the Strasbourg Court, the latter in its *Teliatnikov* judgment[117] noted that the administrative court tends to emphasize the individual's constitutional obligation *vis-à-vis* the state, in contrast to that individual's right to religious freedom and conscientious objection and finding a violation of Article 9 of the Convention, criticized both options suggested for conscientious objectors by the Constitutional Court. Firstly, as regards deferral of the military obligation, the ECtHR found it a temporary and unfit solution. Furthermore, the Strasbourg Court, acting in fact as a quasi-constitutional court,[118] concluded that the Lithuanian system of alternative civilian service was not a genuine alternative civilian service (the existence of a genuine civilian service was not examined by the Constitutional

116 Constitutional Court ruling of 4 July 2017, *see* note 23.

117 ECtHR *Teliatnikov v. Lithuania*, Judgment (7 June 2022) No. 51914/19.

118 Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights?" 23 (5–7) *Human Rights Law Journal* (2002), at 162; Sadurski, *op. cit.*, note 87.

Court),[119] so that the Lithuanian system of mandatory military service as such failed to strike a fair balance between the interests of society as a whole and those of the applicant.[120] This case is an example of how the ECtHR found autonomous constitutional standards (prioritizing the right and duty of each Lithuanian citizen to perform mandatory military service over the individual right to freedom of religion of conscientious objector) inconsistent with the Convention.

## 6 Conclusion: a Two-Way Motion Relationship between the Constitutional Court and the ECtHR, Space for More Meaningful Judicial Dialogue and the Fallacy of the Constitutional Maximization Clause

In constitutional jurisprudence of recent years, the Convention was most often availed of by the Constitutional Court as an auxiliary source of interpreting the Constitution in its true sense, with the primary aim of reinforcing the argumentation of the Constitutional Court. This, however, did not diminish the importance of the Convention for constitutional jurisprudence and the constitutional principle of consistent interpretation, even if it is no longer the prevailing way of internalizing the Convention as used to be the case in the early years of constitutional jurisprudence. This shift is related primarily with the growth of internalization of the Convention, which when being internalized, becomes a constitutional standard for protection of constitutional rights and freedoms.

This shift has also influenced the relationship between the Constitutional Court and the ECtHR, which reflects a two-way motion: a higher level of conventionalizing constitutional jurisprudence (the parallel process of internalizing the Convention) also arose in references by the ECtHR to constitutional jurisprudence to strengthen its own legal argumentation. There is, however, further space for more meaningful judicial dialogue between the two courts, depending upon the effectiveness of constitutional review and the solidity of the legal argumentation provided.

Under the maximization clause, human rights standards introduced by the ECtHR serve as the required minimum of constitutional human rights protection, which may be higher; indeed, in some cases, the Constitutional Court has offered higher standards of individual rights than those required

119 ECtHR *Teliatnikov v. Lithuania*, Judgment (7 June 2022) No. 51914/19, §§ 107–108.
120 *Ibid*, § 110.

under the Convention. On the other hand, the Constitutional Court is not precluded from developing autonomous constitutional standards, which in rare cases do not necessarily offer higher protection of individual rights from the perspective of the Convention. European supervision exercised by the ECtHR is capable of adjusting balance if distorted when prioritizing other constitutional values and principles over an individual right.