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"The experience of the Constitutional Court of Lithuania"

REPORT BY

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The theme of my report is the experience of the Constitutional Court of the Republic of Lithuania related to preliminary requests to the Court on the issue of constitutionality of legal acts applicable in individual case. As a kind of preliminary remark, I have to note that we do not have in use either in the text of our Constitution or in the jurisprudence of our Court such term as 'preliminary request'; as far as I remember, we do not use this term in our books on Lithuanian constitutional law, either. However, we do have the constitutional provisions establishing not only the right, but even the duty of other courts, when they find serious grounds to doubt the constitutionality of the applicable legal act, to apply to the Constitutional Court with the request to rule on this issue. Thus in essence it is the same constitutional regulation that is referred as a 'preliminary request'; its purpose is also identical to that following from Art. 60^1(2) of the Constitution of Jordan (e.g., to ensure the protection of the rights of persons involved in judicial proceedings by excluding anti-constitutional legal acts and, by the same token, to ensure supremacy of the Constitution), although some details of Lithuanian and Jordanian constitutional regulation of preliminary request are different. Therefore hereinafter I will use this term of 'preliminary request' in dealing with the said duty of Lithuanian courts to apply to the Constitutional Court.

However, before starting to explore the issue of preliminary request, it can be worth to make a short introduction into the activities of the Constitutional Court of the Republic of Lithuania[1] – its composition, competence and acts, as well as to compare them with the regulation of the Jordanian Constitutional Court.

1. Introduction: Composition, Competence and Acts of the Constitutional Court of Lithuania

The Constitutional Court of Lithuania was established in 1993 in accordance with the current Constitution that was adopted by the referendum on 25 October 1992. The Court started to function on 5 September 1993 when it had the first public hearing.

As the Jordanian Constitutional Court, the Constitutional Court of Lithuania consists of nine members (Art. 103 of the Constitution). All of them are appointed by the Seimas (the Parliament); however the candidates to the Court have to be nominated by three different State officials representing all branches of State power – the President of the Republic (the executive), the Speaker of the Seimas (the legislative) and the President of the Supreme Court (the judiciary), each of them has to nominate by three candidates – by one on each rotation of judges). As in Jordan, we have the rotation of judges by one third at equal intervals; however, as the term of office of the members of the Court is nine years, the rotation has to take place every three years. Members of the Court can serve only one term of office, i.e. they cannot be re-appointed.

As regards requirements for candidates to the Constitutional Court, they are the following (Art. 103(3) of the Constitution): 1) nationality of the Republic of Lithuania; 2) good reputation; 3) higher legal education (in practice – a university master degree); 4) ten years of legal professional experience – either as a lawyer (including, but not exclusively, judicial experience) or in legal science and education (as a legal scholar and lecturer). Usually in practice two thirds of the members of the Court have academic background (sometimes combined with judicial or other professional experience), while one third is appointed from the judiciary.

According to the Constitution of the Republic of Lithuania, the Constitutional Court has two major powers:

1) the power to decide on matters of constitutionality of legal acts, i.e. to rule (to pass rulings) whether the (statutory) laws and other acts of the Parliament (Seimas) are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or laws passed by the Seimas (Arts. 102(1) and 105(1 and 2) of the Constitution). The issues regarding the compatibility with the Constitution of the sub-statutory legal acts of lower force (the acts adopted by ministers and

[1] More information about the Constitutional Court of the Republic of Lithuania, including its case law, is available in English at the website of the Court: <http://www.lrkt.lt/index_e.html>.

heads of other State organs as well as the acts of municipalities) do not fall within the competence of the Constitutional Court, - they have to be solved by the Supreme Administrative Court;

2) the power to conclude (to adopt the conclusions) on certain issues foreseen by the Constitution, such as whether there were violations of the electoral laws during the elections of the President of the Republic or the Seimas[2]; whether the state of health of the President of the Republic allows him to continue to hold his office[3]; whether a treaty of the Republic of Lithuania is not in conflict with the Constitution[4] and whether the concrete actions (or omission) of the members of the Seimas and some other highest officials (the President of the Republic, the President and the judges of the Constitutional Court, the Supreme Court and the Court of Appeal), against whom an impeachment case has been instituted, are in conflict with the Constitution[5] (Art. 105(3) of the Constitution). In case of the conclusions, they serve for establishment of a relevant legal fact (e.g., a breach of or non-compliance with the Constitution); however the final decision of the issue at stake (e.g., ratification or denunciation of a treaty, or removal of an official from office) belongs to the Seimas (Art. 107(3) of the Constitution).

As regards the function of interpretation of the Constitution that is expressly provided in Art. 59[1](2) of the Jordanian Constitution, it is not expressly mentioned in our Constitution (also there is no special procedure similar to advisory opinions in international tribunals). However, it is perceived in Lithuania as natural and inherent function of any judicial authority; without judicial interpretation of law (including the Constitution) it is impossible to solve the cases before any court (thus it is also a natural part of other functions – resolution of constitutional disputes and conclusions on specified matters – of the Constitutional Court[6]). From a number of cases considered by the Constitutional Court[7], it can be concluded that, apart from the text of the Constitution (that is perceived as supreme law), another and the only possible source of the Constitution (constitutional law) is the case law of the Constitutional Court, or the official

[2] There were 5 conclusions on that issue. In 4 cases the Constitutional Court presented the conclusion that the Law on Elections to the Seimas was not violated by the decisions of the Central Electoral Commission to determine or to annul the results of elections in certain single-mandate constituencies; in one case (the 10 November 2012 Conclusion) the Court found a few breaches of the Law on elections to the Seimas in determining results of elections in one single-mandate constituency and in determining the elected members of the Seimas in the multi-mandate constituency (after that Conclusion the Seimas has accordingly corrected the results of elections).

[3] There were no such cases before the Court.

[4] The conclusion regarding a treaty may be requested not only after but as well prior to the ratification thereof in the Seimas. It was only one conclusion on a treaty (requested by the President of the Republic) that was adopted in 1995 on the compliance of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution, before the President of the Republic decided to submit the Convention for ratification to the Seimas: the Convention (more precisely, its provisions indicated in the request) was found to be in compliance with the Constitution (the 24 January 1995 Conclusion on the compliance of Articles 4, 5, 9, 14 as well as Article 2 of Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania: <http://www.lrkt.lt/dokumentai/1995/i5a0124a.htm>).

[5] There were two conclusions on this issue: by the first one (of 31 March 2004: <http://www.lrkt.lt/dokumentai/2004/c040331.htm>) the Constitutional Court found that the President of the Republic had grossly violated Constitution and breached his oath (on this ground the President of the Republic was removed from his office by the Seimas), by the second conclusion (of 27 October 2010: <http://www.lrkt.lt/dokumentai/2010/c101027.htm>) the findings of the same nature were adopted with regard to two members of Seimas (but the mandate of only one of them was revoked by the Seimas).

[6] As the Constitutional Court stated in its rulings of 6 June 2006 and 5 September 2012, the powers of the Constitutional Court to officially construe the Constitution and to provide in its jurisprudence the official concept of the provisions of the Constitution arise from the Constitution itself: in order to be able to establish and adopt a decision whether the legal acts (parts thereof) being investigated are not in conflict with the legal acts of higher power, the Constitutional Court has the constitutional powers to officially construe both the legal acts under investigation and the said legal acts of higher power; a different construction of the powers of the Constitutional Court would deny the constitutional purpose of the Constitutional Court itself.

[7] E.g., the rulings of the Constitutional Court of 12 July 2001, 1 July 2004, 13 December 2004, 14 March 2006, 28 March 2006, 6 May 2006, 24 September 2009.

constitutional doctrine the formulation of which is the exclusive competence of the Constitutional Court[8]; it is understood as a kind of 'jurisprudential Constitution', a 'living instrument of interpretation of the Constitution'.

Thus deciding the cases of constitutional justice in performance of its functions, assigned by the Constitution, the Constitutional Court may adopt the acts of two types: either rulings (on constitutionality of the legal acts) or conclusions (on the said issues indicated in the Constitution)[9]. Both the rulings and the conclusions are final and binding (Art. 107(1 and 2) of the Constitution); in case of conclusions that means that the Seimas cannot challenge or alter a legal fact established by the Court.

The right to submit a petition (a complaint) to the Constitutional Court regarding the compliance with the Constitution of all of the above mentioned legal acts (statutory laws and other acts of the Seimas, the acts of the President of the Republic and the Government) is granted to courts (both of general and of administrative jurisdiction) of all instances as well as to the Seimas *in corpore* and a group of not less than 1/5 (not less than 29) of all members of the Seimas[10]; constitutionality of a statutory law may be also challenged by the Government, while the acts of the Government – also by the President of the Republic (Art. 106 of the Constitution). The institute of individual complaint is still not introduced, but the individuals have a possibility to defend their constitutional rights through the courts of general jurisdiction and special (administrative justice) competence.

According to the Constitution of the Republic of Lithuania (Art. 107(1)), a legal act (a law or other act of the Seimas, act of the President of the Republic, act of the Government) cannot be applied from the day of official promulgation of the ruling of the Constitutional Court that the act is in conflict with the Constitution of the Republic of Lithuania, i.e., as a rule, the acts of the Constitutional Court may have only prospective (*ex nunc*) effect. Thus in general the Constitutional Court has the power to recognize a disputed legal act to be in conflict with the Constitution and in such a manner *de facto* to remove it from the legal system of the State. Therefore the minimum requirement for the implementation of the acts of the Constitutional Court is a negative obligation of other State organs not to apply anymore the legal act that is recognized as not complying with the Constitution (or in case of sub-statutory acts – with the Constitution or a law). As regards positive obligations, i.e. a subsequent correction of the legal act that is in conflict with the Constitution, the Constitutional Court is not a legislator with powers to annul or amend formally that legal act (or its provision that is in conflict with the Constitution). This is a duty of the authority (State organ) that adopted that legal act in question.

In practice the main 'employers' of the Constitutional Court are other courts: out of 974 applications received by the Constitutional Court 754 (77.5 percent) were submitted by other courts. I think this statistics is the best illustration how important is the institute of preliminary request, in particular for judicial protection of human rights when the institute of individual complaint or petition is not in place.

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[8] E.g., in its 5 September 2012 Ruling the Constitutional Court stated that under the Constitution, only the Constitutional Court enjoys the powers to officially construe the Constitution; it is the Constitutional Court that formulates the official constitutional doctrine: the provisions of the Constitution—its norms and principles—are construed in the acts of the Constitutional Court; the official constitutional doctrine *inter alia* discloses the content of various constitutional provisions, their interrelations, the balance of the constitutional values, and the essence of the constitutional legal regulation as a single whole.

[9] There is also one more type of the acts of the Constitutional Court – decisions. However they have to be adopted when the Court decides not to deal with the merits of the case, i.e. when it finds procedural or other deficiencies in submission of the application or in the application itself and therefore decides either to discontinue the case or to refuse to consider the case, or to return the application. Decisions also are adopted on the requests to clarify the meaning of rulings or conclusions already adopted by the Court. This latter kind of proceedings is not understood as deliberation of a new case, but it is rather continuation of a previous one in which the corresponding ruling or conclusion has been adopted.

[10] That is different from Jordan where only the upper or the lower chamber of the Parliament *in corpore* is granted the right to apply to the Constitutional Court.

2. Preliminary Request to the Constitutional Court: Main Characteristics

The preliminary request is regulated by Art. 110 of the Constitution of the Republic of Lithuania. The basic provision here is **the prohibition for judiciary to apply anti-constitutional legal acts**: a judge cannot apply a law that is in conflict with the Constitution (Art. 110(1) of the Constitution). In turn, this prohibition logically follows from the constitutional principle of supremacy of the Constitution stated in Art. 7(1) of the Constitution, according to which any law or other act contrary to the Constitution cannot be valid[11]. While construing this principle, the Constitutional Court noted[12] that the Constitution itself consolidates the mechanism permitting to determine whether legal acts are not in conflict with the Constitution.

The preliminary request is namely such a mechanism. It follows from the said prohibition for a judge to apply anti-constitutional legal act: a judge must be given a means to apply to the Constitutional Court with the request to determine constitutionality of the applicable legal act. Art. 110(2) of the Constitution provides that "in cases, when there are grounds to believe that the law or other legal act that has to be applied in a concrete case is contrary to the Constitution, a judge shall suspend the consideration of the case and shall apply to the Constitutional Court requesting it to decide whether the law or other legal act in question is in compliance with the Constitution".

Thus one can notice **the following main characteristics** of the regulation of preliminary request (and a few differences from the regulation provided in Art. 60^1(2) of the Jordanian Constitution and Arts. 11 and 12 of the Jordanian Law on Constitutional Court):

1. The power to apply to the Constitutional Court is **granted to all courts**, whether ordinary or administrative, regardless their place in judiciary system, i.e. both to the courts of the first instance (the local courts, the regional courts in certain cases and the regional administrative courts) and to the appellate courts (the regional courts in certain cases, the Supreme Administrative Court and the Court of Appeal), and to the court of cassation (the Supreme Court). Thus the first major difference here from the Jordanian system is that all courts can apply to the Constitutional Court directly, without involvement of any superior intermediate court (the cassation court).

We think that the model of direct preliminary request could better serve for its purpose to ensure supremacy of the Constitution and, in particular, it provides more independence for judges from superior courts in deciding the matter of preliminary request; though we fully acknowledge that sometimes the control or supervision of a higher court could help to avoid less qualified or even groundless preliminary requests. However, we have functioning European model of direct requests for preliminary rulings of the European Court of Justice (the ECJ), where each court is obliged to ensure a uniform application of the EU law and therefore to submit a request for preliminary ruling directly to the ECJ when the issue of interpretation of the EU law or compatibility of national and the EU law is not enough clear. That model proved to be efficient.

As regards the time factor (length of proceedings), I do not think it is decisive to determine whether the model of direct preliminary request or the model of preliminary request via a higher court is more effective. The first model does not necessarily save time. For example, although we have the model of direct preliminary request, usually it takes around three years from the submission of preliminary request to the ruling of the Constitutional Court on this matter; that is due to a huge workload of the Constitutional Court. I see that Art. 12(C) of the Jordanian Law on Constitutional Court provides for a maximum term of 120 days (around four months) for the Constitutional Court to decide on the issue of preliminary request. That could even better guarantee quick and effective consideration of cases rather than in the model of direct preliminary requests. However, I

[11] As the Constitutional Court emphasised in its 19 December 2012 Decision, the principle of the supremacy of the Constitution is a fundamental requirement of a democratic state under the rule of law; it means that the Constitution stands in the exceptional, highest, place in the hierarchy of legal acts; no legal act may be in conflict with the Constitution; no one is permitted to violate the Constitution; the constitutional order must be protected.

[12] The 19 December 2012 Decision of the Constitutional Court.

would like to pay attention that we also have the similar term for deliberation of cases by the Constitutional Court, but our Law on Constitutional Court (Art. 12(2)) provides for the 'usual' term of four months. In practice this term became exceptional as usually the Court prolongs the term for deliberation due to practical impossibility to prepare cases in four months (this is also one of the consequences of a huge workload); indeed, sometimes when a case is difficult and complicated, the term of four months might be insufficient even if a general workload of the Court is not huge.

2. The ground to apply to the Constitutional Court is **a reasonable doubt** that appears during deliberation of the case and concerns constitutionality of a legal act applicable in this case; the court must substantiate (sufficiently motivate) this doubt. In particular, that also means that the court cannot question constitutionality of the legal act that is not applicable in the case before it. Thus, in this regard Lithuanian and Jordanian regulation of preliminary request does not seem to be different.

3. Courts are **independent from position of the parties** to the case in deciding to apply to the Constitutional Court, i.e. they can apply to the Constitutional Court both at the initiative of the parties ([that is also considered as the constitutional right of the parties13)] and at their own initiative. The power to apply to the Constitutional Court even in case when no party to the case is raising this issue (i.e., when none of the parties submits neither request nor any arguments on doubtful constitutionality of the applicable legal act) can be derived from the above mentioned constitutional prohibition for judiciary to apply anti-constitutional legal acts (established by Art. 110(1) of the Constitution): it is the duty of a court not to apply the legal act of doubtful constitutionality in all cases, including those when a court itself finds serious arguments against constitutionality of that legal act. Thus courts should be active in challenging constitutionality of the legal acts applicable in cases under consideration, provided that there are serious grounds to prove incompatibility of the act with the Constitution and regardless of positions of the parties on this issue.

That is perhaps the second major difference from the Jordanian regulation that seems to provide only for the possibility to apply to the Constitutional Court at the initiative of any of the parties to the case (Art. 60^1(2) of the Constitution of Jordan).

4. The third major difference between Lithuanian and Jordanian regulation of preliminary request is related to the second one and concerns the proceedings in the Constitutional Court. This difference lies in **the status (involvement) of the parties to the case under consideration by the applying court**: as I can see from Art. 12(A) of the Jordanian Law on Constitutional Court, the parties to that case may also participate in the proceedings in the Constitutional Court by submitting their memoranda and responses to memoranda. In Lithuania they are not involved in the proceedings in the Constitutional Court at all: there are only two parties to the case before the Constitutional Court – the applying court, as an applicant[14], and the State organ whose legal act is challenged[15], as an interested person (in fact it is a respondent). The rationale here is that the case before the Constitutional Court is not considered to be a modified prolongation of the case under consideration in the applying court; it is rather a completely new and different case of an abstract constitutional control, i.e. not only a dispute between individual parties in the concrete litigation, which has far more reaching consequences for a whole legal order than those in the case before the applying court.

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[13] In the 24 October 2007 Ruling the Constitutional Court stated that the constitutional right of each person to defend his rights on the basis of the Constitution, together with the constitutional right to complain to court of violations of constitutional rights or freedoms, also imply that each party to the case considered by a court, which has doubts about the compliance of the applicable legal act with the Constitution, has the right to request the court of general or specialised jurisdiction, which is considering the case, to suspend the consideration of the case and to apply to the Constitutional Court with the request to investigate and decide whether that legal act is not in conflict with the Constitution.

[14] Since physical appearance of the parties in hearings is not compulsory, unless the Constitutional Court so requests, usually other judges decide not to appear, and the Constitutional Court usually is satisfied by the position of the applying court stated in the preliminary request.

[15] Either the Seimas, or the President of the Republic, or the Government.

5. Thus next characteristic of the preliminary request procedure is that **it is not considered to be a substitution of the proceedings in the applying court**: the ruling of the Constitutional Court on constitutionality does not substitute a decision (judgment) of the applying court. The preliminary request procedure is of rather **subsidiary character** with regard to the proceedings before the applying court. It is only for the latter (but not for the Constitutional Court) to solve a concrete dispute between individual parties, and the ruling on the preliminary request helps in the proceedings only by answering the question of constitutionality that lies outside the scope of competence of the applying court. Therefore the applying court in essence has a certain room, according to the factual circumstances of the case before it, to decide to what extent the ruling of the Constitutional Court has an impact to the final resolution of the case; although certainly the applying court must follow and cannot alter the ruling of the Constitutional Court (i.e., it cannot apply the legal act recognised as contrary to the Constitution). Usually the final settlement of cases by the applying courts after the corresponding rulings of the Constitutional Court do not produce controversial results. However, once it happened that the ruling of the Constitutional Court had no effect to the case at all: after the 11 May 2011 Ruling whereby the rules of counting of votes casted in local elections were declared incompatible with the Constitution, the applying court (the Supreme Administrative Court), instead of ruling on legality of distribution of mandates, discontinued the proceedings on the ground that anyway applicants in the case had received mandates after the candidates who had prior places in the party list had withdrawn themselves from the distribution of mandates (if this kind of logic is applied, then the question arises what was the purpose of the preliminary request to the Constitutional Court).

6. Almost the last but perhaps the most important characteristic of the preliminary request is that it is **the duty**, not only a right or a matter of discretion, **of courts to apply to the Constitutional Court** in each case when they face serious doubts about constitutionality of the applicable legal act. This conclusion follows from the wording of Art. 110(2) of the Constitution ("a judge *shall suspend* the consideration of the case and *shall apply* to the Constitutional Court") and its interpretation by the Constitutional Court. As it was stated by the Constitutional Court[16], when the court considering the case faces doubts as to whether a statutory law (or other legal act) applicable in the case is not in conflict with the Constitution, it must apply to the Constitutional Court with the request to decide whether that law (or other legal act) is in compliance with the Constitution, and until the Constitutional Court decides on this matter, the consideration of the case in the applying court cannot continue, i.e. it must be suspended; otherwise, if the court did not suspend the consideration of the case and did not apply to the Constitutional Court, and if the legal act the compliance of which with the Constitution is doubtful was applied in the case, the court would take a risk to adopt the decision that would not be a just one; that is why the courts, in case of reasonable doubts about compliance of a legal act with the Constitution, not only may but also must apply to the Constitutional Court.

As it was further continued by the Constitutional Court in its 19 December 2012 Decision, such constitutional regulation seeks that a legal act that is in conflict with the Constitution would not be applied, that no anti-constitutional legal consequences of application of such a legal act would appear, that the rights of a person would not be violated; the contrary interpretation would undermine the principle of supremacy of the Constitution and the constitutional imperative of the rule of law, as well as it would not be compatible with some other aspects of the principle of supremacy of the Constitution, *inter alia* with the principle of direct applicability of the Constitution (Art. 6(1) of the Constitution), it would also deny the essence of the right of each person to defend his rights directly invoking the Constitution (Art. 6(2) of the Constitution) and the essence of the right of each person to apply to court defending his constitutional rights or freedoms (Art. 30(1) of the Constitution).

[16] *Inter alia* in the 24 October 2007 Ruling.

I believe that Art. 60[1](2) of the Constitution of Jordan has to be also interpreted in a similar way that it is the duty rather than only the right of a court to refer the well-grounded plea of doubtful constitutionality to the Court of Cassation and that it is the duty of the latter to apply to the Constitutional Court in case of such a referral.

7. As it is clear from the above described duty to apply to the Constitutional Court (Art. 110(2) of the Constitution and its interpretation by the Constitutional Court), the accompanying procedural duty of the applying court is **to suspend consideration of the case** at the same time when it decides to apply to the Constitutional Court with the preliminary request (both decisions are made in the same ruling of the court). It is natural that the consideration of the case cannot be continued until it is unclear whether the applicable legal act can be applied due to the existing reasonable doubts on its constitutionality. This obstacle to the proceedings can be removed only by the ruling of the Constitutional Court either confirming or denying those doubts. In practice, apart from the applying court (an applicant in the case of constitutional justice), other courts also suspend cases before them, though not always applying to the Constitutional Court, if they find that there is the preliminary request already made in a similar case regarding the same applicable acts (or its provision); they also can renew consideration of those cases only after a respective ruling of the Constitutional Court.

3. Admissibility of the Preliminary Requests to the Constitutional Court

As it follows from the above described main characteristics of preliminary request, there are certain requirements for preliminary requests to be admissible in the Constitutional Court: 1) its subject should be only the legal act *that is applicable* in the case under consideration by the applying court; 2) the preliminary request should be *well-grounded*, i.e. it should be based on *serious arguments* to prove the doubtful constitutionality of the legal act in question; 3) the preliminary request should be in line with *the principle of subsidiarity*: i.e., in light of the circumstances of the case under consideration it must be *necessary* for the applying court to apply to the Constitutional Court (after examination of both factual and legal issues, the applying court has no other alternative to ensure the final settlement that would correspond to the Constitution).

Certainly, in practice not all preliminary requests do correspond to these requirements. As from 1993 the Constitutional Court adopted 161 inadmissibility decisions (out of 974 applications), i.e. around 16.5 percent of applications have been declared inadmissible for various reasons described by law. Among them 89 decisions (around 55.3 percent) were on the lack of jurisdiction of the Constitutional Court, i.e. on absolute inadmissibility and refusal to consider an application, while 72 (44.7 percent) – relative inadmissibility decisions on return of the application to the applicant. Out of 754 applications submitted by courts 112 were declared inadmissible (around 14.9 percent): 60 of them (around 8 percent of all applications submitted by courts, 37.3 percent of all inadmissible applications, 67.4 of absolutely inadmissible applications and 53.6 percent of inadmissible applications submitted by courts) were declared absolutely inadmissible either at the preliminary stage (42 inadmissibility decisions without any further consideration of the case) or in the later stage of merits (18 inadmissibility decisions on discontinuation of the case after the Court started its examination) by the Constitutional Court, while 52 were found relatively inadmissible (around 6.9 percent of all applications submitted by courts, 32.3 percent of all inadmissible applications, 72.2 percent of relatively inadmissible applications and 46.4 percent of inadmissible applications submitted by courts). Thus these figures demonstrate that legal quality of preliminary requests is higher than that of applications submitted by other applicants (it is worth to recall here that 77.5 percent of all applications to the Constitutional Court are preliminary requests from other courts).

The Law of the Republic of Lithuania on the Constitutional Court[17] (in particular, Arts. 69 and 70 providing for refusal to consider and return of applications with requests to examine constitutionality issues) does not specify expressly the above mentioned admissibility

[17] English text of this Law is available at: <http://www.lrkt.lt/Documents3_e.html>.

requirements for preliminary requests. It rather provides for general inadmissibility grounds for all applications, included those submitted by other applicants; as it is clear from the below described practice of the Constitutional Court, the inadmissibility cases of preliminary requests do fall into the scope of general inadmissibility grounds provided by the Law.

Thus, as one can notice, there are **two kinds of inadmissibility cases**, as provided by the Law on Constitutional Court: 1) *absolute inadmissibility* – lack of jurisdiction of the Constitutional Court, when the Constitutional Court finds substantial and not repairable defects in application and therefore adopts **the decision on refusal to consider the case**; 2) *relative inadmissibility* – when the Constitutional Court finds rather technical defects or lack of argumentation, i.e. in essence repairable defects, and therefore adopts **the decision on return of the application to the applicant** (after the defects are removed it is allowed to submit the application for the second time).

3.1. Return of the Preliminary Request

Under Art. 67(2 and 3) of the Law on the Constitutional Court, there is a number of formal and other requirements for the preliminary request[18]. If at the preliminary stage of examination of the preliminary request it is found not to be in compliance with those, the President of the Constitutional Court has to return the preliminary request to the applying court either on his own initiative or on the initiative of the judge rapporteur. In case of disagreement between the President and the judge rapporteur (in particular, when the former rejects the proposal of the latter to return the preliminary request), the issues must be settled by the whole Court (Art. 25(2) of the Law on the Constitutional Court). As mentioned, the return of the preliminary request does not preclude the possibility to apply to the Constitutional Court, in accordance with the common procedure, for the second time, provided that the found deficiencies thereof are removed.

In absolute majority of cases the reason why the preliminary request or an application submitted by another applicant has to be returned is the lack of sufficiently grounded legal argument to support the doubtful constitutionality of a legal act (Art. 67(2.5) of the Law on the Constitutional Court), i.e. the above mentioned *lack of serious arguments* to support the request to the Constitutional Court. While construing the provisions of the Law on the Constitutional Court, in a number of cases[19] the Constitutional Court has held that the position of the applicant concerning the compliance of a legal act with the Constitution must be stated clearly and unambiguously; the application (preliminary request) must contain the arguments and reasoning grounding the doubt of the applicant that the legal act is in compliance with the Constitution; more specifically, the application must clearly indicate concrete provisions the compliance of which with the Constitution is regarded as doubtful by the applicant, as well as concrete provisions (norms and/or principles) of the Constitution, with which, in the opinion of the applicant, the indicated provisions of the impugned legal act might be in conflict, the application must also clearly set forth the legal reasoning as regards every concretely indicated disputable provision of the impugned legal act; otherwise the application must be considered as not meeting the necessary requirements established by the Law on the Constitutional Court (in particular, Art. 67(2.5)). The Constitutional Court has also noted[20] that, in cases when the

[18] These provisions of Art. 67 (2 and 3) of the Law on the Constitutional Court read as follows:
"The Supreme Court of Lithuania, the Court of Appeal of Lithuania, and regional and local courts shall apply to the Constitutional Court by means of a special ruling. The following must be specified in that ruling: 1) the time and place of the adoption of the ruling; 2) the name and address of the court that has adopted the ruling; 3) the composition of the court that has adopted the ruling and the parties to the case; 4) brief substance of the case and the laws by which the parties to the case support their claims or rebuttals; 5) legal arguments presenting the opinion of the court on the conflict of a law or other legal act with the Constitution; 6) a formulated request of the court to the Constitutional Court.
The following shall be attached to the court ruling: 1) the suspended case; 2) a duplicate of the whole text of the impugned legal act."

[19] The 12 December 2005 Ruling, the decisions of 16 April 2004, 29 March 2010, 19 March 2006, 5 March 2012, 11 December 2012 and 8 January 2013.

[20] The decisions of 16 April 2004, 19 March 2010, 11 December 2012 and 8 January 2013.

application fails to indicate either the concrete disputable provisions of the impugned legal act or the concrete constitutional provisions with which the impugned legal act is claimed to be in conflict or if the applicant fails to state the legal reasoning grounding his doubts about constitutionality of the impugned legal act, had the Constitutional Court declared such an application admissible, it would also restrict the rights of the another party concerned, i.e. the State organ that has passed the impugned legal act (the respondent), as it would be more difficult for that party to submit counterarguments with regard to the application and to prepare for the proceedings.

3.2. Refusal to Consider the Preliminary Request

There are five general grounds for absolute inadmissibility of applications established by Art. 69(1) of the Law on the Constitutional Court: 1) *ratione personae* – the application was filed by an institution or a person who does not have the right to apply to the Constitutional Court; 2) *ratione materiae* – the subject matter does not fall within the jurisdiction of the Court; 3) *res judicata* – the compliance of the impugned legal act with the Constitution has already been investigated by the Constitutional Court and the ruling on this issue is still in force; 4) the Constitutional Court has already commenced *the case concerning the same issue*; 5) the application is grounded on *non-legal reasoning*.

The decision of the Constitutional Court on refusal to consider an application must be substantiated (motivated); if the Court finds the grounds for refusal at the merits stage, it has to adopt the decision to discontinue the case (Art. 69(2) of the Law on the Constitutional Court). As mentioned, absolute inadmissibility (the decision on refusal) by the same token means that the same application can never be considered by the Court.

As it was also mentioned, out of 89 decisions of the Constitutional Court on refusal to consider the application 60 were adopted on the preliminary requests from other courts. 7 of them were grounded on the lack of *ratione personae* (Art. 69(1.1) of the Law on the Constitutional Court: the application was filed by an institution or a person who does not have the right to apply to the Constitutional Court); 32 – the lack of *ratione materiae* (Art. 69(1.2) of the Law on the Constitutional Court: the subject matter of the application does not fall within the jurisdiction of the Court); 12 – *res judicata* (Art. 69(1.3) of the Law on the Constitutional Court: the subject matter of the application has already been settled by a valid ruling of the Constitutional Court); 2 – the case concerning the same issue has already been commenced by Constitutional Court (Art. 69(1.4) of the Law on the Constitutional Court); 7 – non-legal reasoning of the application (Art. 69(1.5) of the Law on the Constitutional Court).

However, this statistics is quite relative. As mentioned, these grounds are common to all applications, including the preliminary requests from courts. As one can see, the most popular ground for refusal decisions is the lack of *ratione materiae* (the subject matter does not fall within the jurisdiction of the Court); it is quite abstract and broad so as to include a number of different possible situations. That is why it deserves more attention.

It should be noted also that in its case law the Constitutional Court has developed the practice of refusal on certain grounds that are not explicitly mentioned in Art. 69(1) of the Law on the Constitutional Court, although all of them can be implied from and are indeed covered by the above mentioned provision of Art. 69(1.2) of the Law – **the lack of *ratione materiae*** (the subject matter not within the jurisdiction of the Court): the issue of application of law, the issue of compatibility of legal acts with the same force, the lack of *locus standi*, fictitious request, the request with an end in itself.

As these grounds are not explicit but rather implicit and only derived from the interpretation of the Law by the Constitutional Court, sometimes they may be relevant to and covered not only by the lack of *ratione materiae*, but also by some other grounds expressly provided by the Law. In 32 cases the refusal was justified either by the ground that the application is about the issue of application of law or the issue of compatibility of legal acts with the same force, in all those cases the Court referred only to Art. 69(1.2) of the Law (lack of jurisdiction *ratione materiae*). Meanwhile in 7 cases the Court grounded the refusal decision on the lack of *locus standi* of the applying court and referred not only to the provision Art. 69(1.2)

but also to Art. 69(1.1) of the Law (lack of *ratione personae* – the application submitted by the State organ who does not have this right); in 7 cases the Court determined that the application was fictitious and in some of them referred also to Art. 69(1.3 and 1.5) of the Law (*res judicata* and non-legal reasoning). In 3 cases the Court assessed the consideration of the request as an end in itself and in the refusal decision referred only to Art. 69(1.2) of the Law (lack of jurisdiction *ratione materiae*).

These five grounds stated by the Constitutional Court can be briefly described in the following way:

1. The issue of application of law. In a number of cases[21] the Constitutional Court held that, under the Constitution and the Law on the Constitutional Court, it does not have any power to rule on the issues of interpretation and application of legal acts, as they have to be solved by the competent State organ with powers to apply the legal acts in question; if statutory laws or other legal acts have obscurities, ambiguities and gaps, it is the duty of the legislature to eliminate them. The issues of application of law not settled by the legislator are the matter of judicial practice, i.e. they may be solved by competent courts on *ad hoc* basis, when they consider disputes involving application of the respective legal acts[22]. The applications requesting to clarify how the provisions of a law should be applied do not fall within the jurisdiction of the Constitutional Court[23]. Thus one can be also claim that the preliminary requests involving the issues of application of law seem to be not in line with the principle of subsidiarity, i.e. these issues have to be settled only by the competent applying courts.

2. The issue of compatibility of legal acts with the same force. According to the Constitution, the Constitutional Court is not competent to rule on compatibility of legal acts with the same force, including the issue whether at all a certain law is compatible with another law or which legal act of the same force has priority of application in case of rivalry with another legal act. If the Constitutional Court is requested to decide the issue of compatibility of or rivalry between different legal acts with the same force, such a request falls outside the jurisdiction of the Constitutional Court[24]. Thus, as in case of the issue of application of law, one can be also claim that the preliminary requests involving the issues of compatibility of legal acts seem to be not in line with the principle of subsidiarity, i.e. these issues have to be settled only by the competent applying courts.

3. *Locus standi*. This is a specific ground for inadmissibility of preliminary requests, as according to Art. 110(2) of the Constitution a court may apply to the Constitutional Court only with the request to rule on constitutionality only of the legal act that is applicable in the case under consideration by the applying court. In this regard one may recall that other subjects having access to the Constitutional Court (the Seimas, a group of members of the Seimas, the President of the Republic and the Government) are not restricted in their right to apply to the Constitutional Court on the ground of applicability by them of the impugned legal act. If the subject of the preliminary request is the legal act other than applicable in the case before the applying court, then the applying court may not have *locus standi* in the Constitutional Court[25] and cannot be considered as having the right to apply to the latter (that is why we also have the lack of *ratione personae*) as well as the Constitutional Court may not have jurisdiction to consider that preliminary request. For example, in the 16 November 2010 Decision the Constitutional Court held that the applying court does not have *locus standi* in the civil case to apply to the Constitutional Court with the request to investigate whether the provision of the

[21] The 18 April 2012 Ruling, decisions of 23 September 2002, 20 November 2006, 6 September 2007, 12 September 2007, 16 November 2010, 5 September 2011, 11 May 2012 and 25 June 2012.

[22] Decisions of the Constitutional Court of 20 November 2006, 6 September 2007, 12 September 2007 and 25 June 2012.

[23] Decisions of the Constitutional Court of 23 September 2002, 20 November 2006, 2 July 2010, 16 November 2010, 5 September 2011 and 25 June 2012.

[24] *Inter alia* decisions of the Constitutional Court of 13 November 2006, 27 June 2007, 6 September 2007, 12 September 2007, 10 May 2012 and 25 June 2012.

[25] As it was stated in a number of cases by the Constitutional Court, no court has *locus standi* to apply to the Constitutional Court with a request to investigate whether a statutory law or another legal act that should not (or could not) be applied in the case considered by the said court is compatible with the Constitution (the 24 October 2007 Ruling, decisions of 22 May 2007, 27 June 2007, 5 July 2007, 29 October 2009 and 16 November 2010).

Criminal Code that can be applicable only in criminal cases is compatible with the Constitution. One may note also that in case of the lack of *local standi* we do have the situation when the applying court has not sufficiently examined the circumstances of the case and applicable law (i.e. not sufficiently fulfilled its duties), and therefore the preliminary request may also seem to be not in line with the principle of subsidiarity.

4. Fictitious request. These are the cases when the Constitutional Court considers the preliminary request as based on not true, artificial and fictitious arguments (e.g., the decisions of 6 September 2007 and 12 September 2007). The example of such a fictitious request is the preliminary request when the applying court does not explore or keeps silence about the relation of the impugned legal provision with other legal provisions, interprets the impugned legal provision taken out of its context, relies only on certain fragments of the constitutional doctrine while being silent about less convenient fragments of that doctrine formulated by the Constitutional Court[26]; or in addition to that, the applying court has not also examined the relevant factual circumstances[27]. When these deficiencies were found, the Constitutional Court held that there were grounds to treat the preliminary request as grounded on the reasoning other than that explicitly stated by the applying court[28] (even not on legal reasoning at all[29]), therefore, in this regard as fictitious. Fictitious arguments may be also seen in cases of absence of a true argument or statement of inconsistent and contradictory argument[30].

Fictitious character of the preliminary request results in the lack of *ratione materiae* jurisdiction of the Constitutional Court, it can also be regarded as the previously settled matter (in case of silence by the applying court on significant practice of the Constitutional Court) or as based on non-legal argument (in particular, in case of absence of any true argument, statement of inconsistent and contradictory argument). Fictitious requests can be also assessed as being not in line with the subsidiarity principle, as the applying court is not fulfilling its duties in a proper manner or even is abusing its powers.

5. The consideration of the request as an end in itself. This ground is very similar to the previous one as it also means that the applying court has not properly fulfilled its duties and the preliminary request has not been necessary taking into account circumstances of the case, i.e. the case can be settled without the preliminary request the consideration of which therefore has no meaningful purpose. That is why it would be an end in itself, and such a preliminary request is not in line with the principle of subsidiarity (therefore it cannot to be within the scope of jurisdiction of the Constitutional Court).

The Constitutional Court held[31] that the application of a court to the Constitutional Court with the request to investigate compliance of a certain legal act with another legal act of higher power, *inter alia* with the Constitution, and the investigation on this issue may not be an end in itself, and the purpose of the preliminary request by the applying court to the Constitutional Court is to ensure a proper administration of justice. For example, even in cases, when the Constitutional Court is requested by the courts facing in administration of justice doubts about compliance of a legal act with legal acts of higher power, the Constitutional Court does not have to consider the case when a respective legal act is not only in force (as the compliance of invalid legal acts may be investigated and, normally, is investigated as the issue of preliminary request), but also cannot be applied at all (i.e., it cannot be applied not only in the case considered by the applying court but by other courts and State organs as well)[32]. In addition, this circumstance should always be assessed when a law on the state budget and on municipal budgets or any other act intended for a specific budget period is impugned[33].

The newest example when the Constitutional Court refused to consider the preliminary request on the ground that its consideration would be an end in itself is the 27 August 2013

[26] The 31 January 2007 Decision of the Constitutional Court.
[27] The 14 October 2010 Decision of the Constitutional Court.
[28] That was also the case of the 5 November 2008 Decision of the Constitutional Court.
[29] The 5 July 2012 Decision of the Constitutional Court.
[30] Two decisions of the Constitutional Court of 12 April 2012.
[31] The 29 June 2012 Ruling and the 13 November 2007 Decision.
[32] *Ibidem*.
[33] The 13 November 2007 Decision of the Constitutional Court.

Decision of the Constitutional Court, whereby the Court held that it was clear from the material (in particular, factual circumstances) of the case that the applying court was able to solve the case without the request to the Constitutional Court; the question asked by the applying court was not relevant to the applicant in the administrative case before that court. Therefore the latter probably had a different reason to submit the preliminary request to the Constitutional Court, which was not relevant to that administrative case but perhaps it could be relevant for other cases already considered, under consideration or to be considered by same court.

4. Arrangements for the Introduction of Individual Complaint

On the one hand, the right and even the duty provided for the courts to apply to the Constitutional Court[34] with a preliminary request to rule on constitutionality of an applicable legal act may be considered as a sufficient guarantee for the protection of human rights. On the other hand, one may notice one major, though natural, defect of this procedure. That is the dependence of a person who is a party of the case on the court (of general or administrative jurisdiction) that is dealing that case: it is not for that person, but it is for the court to decide on expediency of a preliminary request – whether to apply to the Constitutional Court. Therefore there is always a certain room for subjective judicial discretion in assessment of the arguments provided by a party for the preliminary request; in other words, the preliminary request procedure does not necessarily guarantee that the court apply to the Constitutional Court in each case where there are reasonable doubts regarding constitutionality of the applicable legal act (when the court refuses to apply to the Constitutional Court, one may also find this situation incompatible with the constitutional guarantee for a person whose constitutional rights or freedoms are violated to complain to a competent court, as provided by Art. 30 of the Constitution). Indeed, sometimes it might happen that a judge or a court is reluctant to suspend the case before him due to either objective[35] or subjective[36] reasons.

The main measure to exclude those situations is the introduction of an individual constitutional complaint that would be the most powerful means to protect constitutional rights and would fill the said gap emerging in case of failure of a court to hear reasonable arguments regarding constitutionality of the applicable legal act. The essence of the individual complaint procedure is to grant the right to directly apply to the Constitutional Court for any person who has reasonable grounds to believe that his constitutional rights are violated due to application of ordinary law, provided that certain conditions established by law are met. However, introduction of individual complaint is rather a tendency, but not an obligation for modern constitutional courts[37].

Lithuania has made preliminary arrangements for the introduction of individual complaint: on 4 July 2007 the Seimas approved the conception of individual constitutional complaint[38]. This conception was partially amended on 17 December 2009[39]. The Conception aims at defining the model and terms of introduction of individual constitutional complaint. The main provisions of the Conception are: 1) a complaint may be submitted to the Constitutional Court by any private person, including a legal person (*inter alia* a company, political party, other organization); 2) that person has to be a victim of violation of his constitutional rights and

[34] As mentioned already, in accordance with Art. 106 of the Constitution, courts have to apply to the Constitutional Court regarding constitutionality of the applicable legal act if they find serious grounds to doubt the constitutionality of that act.

[35] E.g., application may prolong significantly the length of the proceedings, as the case may be suspended up to three or even more years (due to a huge workload of the Constitutional Court some cases may be pending there such a long time, though now this index is becoming better because of appropriate changes in the Court proceedings).

[36] E.g., subjective convictions or prejudices against involvement of the Constitutional Court as the Court that does not belong to the same judiciary system with ordinary or administrative courts.

[37] Abramavičius, A. Definition and Meaning of the Constitutional Complaint in the Constitutional Judicial Control. Jurisprudence, 2007, vol. 11(101), p. 16.

[38] The 4 July 2007 Resolution of the Seimas on Approval of the Conception of Individual Constitutional Complaint. Official Gazette, 2007, No. 77-3061.

[39] The 17 December 2009 Resolution of the Seimas on Amendment of the Resolution of the Seimas on Approval of the Conception of Individual Constitutional Complaint. Official Gazette, 2009, No. 152-6323.

freedoms, i.e. *actio popularis* would not be introduced; 3) the subject of a complaint may be the statutory law or any other legal act adopted by the Seimas, the act of the President of the Republic, the act of the Government, which served as a legal ground for adoption of individual decision allegedly violating constitutional rights or freedoms; 4) exhaustion of other legal remedies rule – a person concerned must have used all other available and effective measures of legal defence (first of all judicial proceedings in other courts); 5) *ratione temporis* rule – a person concerned must submit his complain within a relatively short period of three months from the final decision of his case; 6) special preliminary admissibility procedure – admissibility issue must be solved at a preliminary stage by a single judge or a special chamber of the Constitutional Court.

However, the implementation of the Conception is significantly delayed: it was planned to make the corresponding amendments of the Constitution in 2010, but even the draft amendments have not been registered in the Seimas; thus in reality this Conception is failed. Apart from financial reasons (a deep economic recession in that time), one may notice lack of political will to introduce individual complaint as it could increase the role of the Constitutional Court among State organs and, in particular, within the judiciary. One also can note a few possibly negative consequences of the introduction of individual complaint: significant increase of a workload of the Constitutional Court and the risk not to meet expectations of people (as the experience of the constitutional courts of neighbouring countries demonstrates, around 90 percent of individual complaints are declared inadmissible).

5. Conclusions

Although the term of 'preliminary request' is not expressly mentioned in the text of the Constitution of the Republic of Lithuania, preliminary requests submitted by other courts to the Constitutional Court when they have serious grounds to doubt constitutionality of the applicable legal act constitute the largest part (77.5 percent) of a workload of the Constitutional Court. They are important means to ensure the supremacy of the Constitution and protect constitutional rights and freedoms.

The main characteristics of the constitutional legal regulation of preliminary request procedure in Lithuania are as follows: 1) the power to apply to the Constitutional Court is granted to all courts (that is the first major difference from the regulation in Jordan); 2) the ground to apply to the Constitutional Court is a reasonable doubt that appears during deliberation of the case and concerns constitutionality of a legal act applicable in this case; 3) courts are independent from position of the parties to the case in deciding to apply to the Constitutional Court, i.e. they can apply to the Constitutional Court both at the initiative of the parties and at their own initiative (the latter is the second major difference from the regulation in Jordan); 4) the parties to the case under consideration by the applying court are not involved in the proceedings in the Constitutional Court (that is the third major difference from the regulation in Jordan); 5) the preliminary request procedure is not a substitution of the proceedings in the applying court, i.e. it has a limited purpose to answer the question regarding constitutionality of the act applicable in the case before the applying court; 6) the most important is that it is the duty, not only a right or a matter of discretion, of courts to apply to the Constitutional Court in each case when they face serious doubts about constitutionality of the applicable legal act; 7) the accompanying procedural duty of the applying court is to suspend consideration of the case at the same time when it decides to apply to the Constitutional Court with the preliminary request.

There are the following basic requirements for admissibility of preliminary requests in the Constitutional Court: 1) their subject should be only the legal act that is applicable in the case under consideration by the applying court; 2) the preliminary request should be well-grounded, i.e. based on serious arguments; 3) the preliminary request should be in line with the principle of subsidiarity: i.e., in light of the circumstances of the case under consideration it must be necessary. There are two kinds of inadmissibility cases: 1) absolute inadmissibility – lack of jurisdiction of the Constitutional Court, when the Constitutional Court finds substantial and not repairable defects in application and therefore adopts the decision on refusal to consider the case; 2) relative inadmissibility – when the Constitutional Court finds rather technical defects or

lack of argumentation, i.e. in essence repairable defects, and therefore adopts the decision on return of the application to the applicant.

As regards the latter, in absolute majority of cases the reason why the preliminary request has to be returned is the lack of sufficiently grounded legal argument to support the doubtful constitutionality of a legal act, including unclear and ambiguous arguments, failure to indicate the concrete impugned provisions or the concrete constitutional provisions in light of which the impugned legal regulation has to be assessed, or failure to state the legal reasoning as regards every concretely indicated disputable provision of the impugned legal act. As regards the former, i.e. the refusal to consider the preliminary request, most often it is the case of the lack of jurisdiction *ratione materiae* (the subject matter does not fall within the jurisdiction of the Court). This ground also covers the following more specific and concrete implicit grounds revealed in the case law of the Constitutional Court: the issue of application of law, the issue of compatibility of legal acts with the same force, the lack of *locus standi*, fictitious request, the request with an end in itself. Among them the lack of *locus standi* is a specific ground for inadmissibility of preliminary requests, as only courts are restricted in their right to apply to the Constitutional Court on the ground of applicability by them of the impugned legal act.

Perhaps the only more efficient request measure than that of the preliminary to ensure the supremacy of the Constitution and respect for human rights is the introduction of individual complaint to the Constitutional Court. It was planned in Lithuania, however all the arrangements were suspended for unspecified time due to the lack of political will.