

# THE INDIVIDUAL CONSTITUTIONAL COMPLAINT AS AN EFFECTIVE INSTRUMENT FOR THE DEVELOPMENT OF HUMAN RIGHTS PROTECTION AND CONSTITUTIONALISM

## 1. The individual constitutional complaint in the context of the development of constitutionalism

The history of Europe at the end of the 20<sup>th</sup> century—the beginning of the 21<sup>st</sup> century has witnessed the consolidation of the ideas of constitutionalism not only in legal thought, but also in the real and effective limitation of state power. To remind, constitutionalism is a political doctrine requiring that state power be limited by the Constitution while seeking to protect an individual and the whole society from possible abuses of power by the authorities formed by individuals and society themselves. Contemporary constitutionalism is inconceivable without the idea of the protection of human rights and freedoms. A Constitution, as *ius supremum*—supreme law, enshrines fundamental rights, which derive from human nature. The inherent nature of human rights is given the fundamental constitutional status, i.e. the guarantee that this nature will not be denied by any authority.

World-wide experience of democratic countries attests to the fact that the protection of the Constitution and of the values it enshrines, including human rights and freedoms, is best ensured by means of judicial constitutional review. Since the second half of the 20<sup>th</sup> century, after the democratic world universally recognised the importance of constitutional review, and constitutional courts (or analogous establishments entrusted with constitutional review) became an effective mechanism for ensuring constitutional order in the life of the states and protecting the respective societies against the abuse of power by state authorities, the institution of constitutional review has become an indispensable element of any constitutional system.<sup>1</sup>

In addition, it is important to note that constitutionalism is not a national development, but a phenomenon common to the whole Western democracy. A distinctive feature of contemporary constitutionalism is the role of international obligations in limiting state power and obligating it to protect and defend human rights and freedoms. It is frequently held that, in the context of the enlargement of the European Union, constitutionalism is gaining a new impetus insofar as, following the triumph of democracy and statehood in Middle and Eastern Europe, this region has become known as a union striving to achieve, in addition to economic welfare, the highest standards

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<sup>1</sup> JARAŠIŪNAS, E. Žvelgiant į Lietuvos Respublikos 1992 m. Konstituciją platesniame konstitucionalizmo raidos kontekste [A View on the 1992 Constitution of the Republic of Lithuania in a Broader Context of the Development of Constitutionalism]. *Jurisprudencija*. 2002, No.30(22); p. 50.

of the protection of human rights and freedoms.<sup>2</sup> In Europe, attention to human rights protection has become increasingly widespread. This development has undoubtedly been encouraged by the possibility of applying to the European Court of Human Rights (hereinafter referred to as the ECtHR), as well as by the possibility of invoking the jurisprudence of this Court. Meanwhile, the domestic response of states to these tendencies has been to expand the competence of the constitutional courts to promote the active participation of individuals.

With the growing importance and protection of fundamental rights, national legislators must decide what role the Constitution and, consequently, the constitutional courts should play. Should they only protect the objective constitutional order (which includes the protection of fundamental rights in the sense that these rights are part of the objective constitutional order)? Or should there be a specific guarantee of subjective fundamental rights conferred to the individual by the Constitution? There is a clear tendency towards the introduction of mechanisms that allow for the protection of individual (fundamental) rights through the Constitutional Court, and, more specifically, for individual access. Conversely to the original model where only constitutional bodies were entitled to approach the Constitutional Court, states now often give an individual (physical person) the means to question the constitutionality of a normative or individual act.

Thus, in the constitutional legal practice of European states, the constitutional complaint, as a specific procedural instrument for the protection of the rights and freedoms guaranteed by the Constitution for a person, has become a means that is increasingly accepted and applied, and proves to be effective. In broader terms, such tendencies can be assumed to be related to the general change affecting the status of an individual in a modern society.

The individual constitutional complaint is considered to be a specific legal remedy, providing the possibility for a person, who believes that his or her constitutional rights have been violated, to petition the body responsible for constitutional justice and request that it verify the decisions adopted by a public authority. The constitutional complaint is not an entirely new institution. Its forerunner can be traced back to the law of the Kingdom of Aragon in the 13<sup>th</sup>-16<sup>th</sup> century, as well as in Germany from the 15<sup>th</sup> century. The specific institution of the constitutional complaint was consolidated in the second half of the 19<sup>th</sup> century in Switzerland and Austria.<sup>3</sup> However, this mechanism for the protection of constitutional rights definitely constitutes a feature of the further development and modernisation of constitutionalism. In this context, it must be noted that the establishment of the individual constitutional complaint institution is a European tendency.

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<sup>2</sup> ŠILEIKIS, E. *Alternatyvi konstitucinė teisė [Alternative Constitutional Law]*. Vilnius: VĮ „Teisinės informacijos centras“, 2003, p.48.

<sup>3</sup> MAVČIČ, A. M. *Individual complaint as a domestic remedy to be exhausted or effective within the meaning of the ECHR: comparative and Slovenian aspect*. 2011. <http://www.concourts.net/lecture/constitutional%20complaint1.pdf> [accessed: 8 January 2015].

A broader or narrower model of the constitutional complaint is consolidated in Albania, Andorra, Austria, Croatia, the Czech Republic, Cyprus, Germany,<sup>4</sup> Hungary, Latvia, Liechtenstein, Macedonia, Malta, Montenegro, Poland, Russia, Serbia, Slovakia, Slovenia, Spain, and Switzerland. It can be assumed that, due to this tendency, the widespread establishment of the constitutional complaint mechanism may be identified in future legal thought as a particular stage in the evolution of constitutionalism.

## **2. The necessity to consolidate the individual constitutional complaint institution in the national legal system**

The Lithuanian legal system does not provide for the institution of the individual constitutional complaint, which would enable individuals to directly apply to the Constitutional Court. According to the Constitution of the Republic of Lithuania the right to apply to the Constitutional Court of the Republic of Lithuania is vested in the Seimas *in corpore*, not less than 1/5 of all the Members of the Seimas, the President of the Republic, the Government, and courts.

In Ukraine, if an individual sets forth that diverging applications of a law could lead to, or have led to, a violation of their constitutional rights, they can demand a binding interpretation by the Constitutional Court. In such a case, the interpretation of a normative act rather than an individual act is in question. It should be noted, however, that, by decree 119/2015 of 3 March 2015, the President of Ukraine, Mr. Petro Poroshenko, established the Constitutional Commission of Ukraine, assigned with the task of preparing amendments to the current Constitution. The proposed amendments to Article 151-1 provide for the constitutional complaint that goes further than the current possibility of requesting an official interpretation of the Constitution, insofar as it enables the Constitutional Court to annul the unconstitutional laws upon application by individuals. It should also be noted that this proposal was particularly welcomed by the European Commission for Democracy through Law (Venice Commission).<sup>5</sup>

The introduction of the individual constitutional complaint is supported by the majority of Lithuanian and foreign representatives of legal thought. It has been maintained that namely the individual complaint would render the constitutional system of the protection of the rights of individuals fully coherent from the legal point of view,<sup>6</sup> as well as that the aim to consolidate the individual constitutional complaint institution is inseparable from the currently

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<sup>4</sup> In Germany, the constitutional complaint exists both at the federal and land levels.

<sup>5</sup> European Commission for Democracy through Law. Preliminary opinion on the proposed constitutional amendments regarding the judiciary of Ukraine, 2015, p. 10. <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI%282015%29016-e> [accessed: 8 September 2015]

<sup>6</sup> SAKALAUSKAS, J. Individualus konstitucinis skundas. Diskusijos tęsiamos... [The Individual Constitutional Complaint. Discussions Are Continuing...] *Justitia*, 2005, No. 5 (13), pp. 14–15.

growing tendency to constitutionalise law.<sup>7</sup> Less than a year following the introduction of the individual constitutional complaint in Latvia in 2001, the then President of the Constitutional Court of Latvia, Aivars Endziņš, stated that, even in such a short period of time, it became obvious that the institution of the individual complaint was particularly important in cultivating a state under the rule of law.<sup>8</sup> According to a former President of the Federal Constitutional Court of Germany, Jutta Limbach, the principle of a state governed by the rule of law would not be ensured in Germany if there was no possibility of the constitutional complaint. She maintains that the constitutional complaint has a strong impact on future decisions that will be made by politicians, representatives of state authority institutions, as well as judges.<sup>9</sup> German legal science treats the entitlement of an individual to be involved in the administration of constitutional justice as a naturally understandable feature of a constitutional state under the rule of law and as a major achievement of such a state.<sup>10</sup> Arne Mavčič from Slovenia points out that the individual access to the Constitutional Court stimulates the democratisation of the legal order, since individuals have an opportunity to initiate a direct and immediate control over the legislative, executive, and judicial state power (depending on the model of the individual complaint).<sup>11</sup> The possibility for an individual to directly access the body of constitutional justice is actively promoted in the study “On Individual Access to Constitutional Justice”, prepared by the Venice Commission in 2010.<sup>12</sup>

In providing reasons for the necessity to consolidate the individual constitutional complaint along with other means of protecting constitutional rights and freedoms, it is important to note that the role of the constitutional complaint is not limited to the defence of concrete rights of a person. One of the peculiarities of the constitutional complaint insofar as it is addressed, namely, to the body of constitutional justice leads to the reasoning that it has a broader meaning. Since the European model of constitutional justice entails that constitutional disputes are decided by a specially established Constitutional Court or an analogous institution vested with not only the powers to declare the unconstitutionality of legal acts *inter partes* (as in the American model), but also the powers to adopt decisions with *erga omnes* effect. Therefore, the meaning of the individual constitutional complaint goes beyond the protection of an individual interest; the institution of the individual constitutional complaint also defends the public interest and the whole constitutional

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<sup>7</sup> ABRAMAVIČIUS, A. Konstitucinio skundo samprata ir reikšmė konstitucinėje teisminėje kontrolėje [The Concept of the Constitutional Complaint and Its Significance for Constitutional Judicial Control]. *Jurisprudencija*. 2007, No.11 (101), p. 15.

<sup>8</sup> ENDZIŅŠ, A. Konstitucinio skundo institutas Latvijoje // *Konstitucijos aiškinimas ir tiesioginis taikymas: Baltijos ir Skandinavijos šalių konferencijos medžiaga* [The Constitutional Complaint Institution in Latvia // *Interpretation and Direct Application of the Constitution: the Baltic-Nordic Regional Conference*]. Vilnius, 2002, p. 81.

<sup>9</sup> LIMBACH, J. On the Role of the Federal Constitutional Court of Germany. [http://www.festokyo.com/limbachtext\\_e.htm](http://www.festokyo.com/limbachtext_e.htm) [accessed: 8 January 2015].

<sup>10</sup> ABRAMAVIČIUS, A. Op. cit., p.16.

<sup>11</sup> MAVČIČ, A. M. Op. cit.

<sup>12</sup> European Commission for Democracy through Law. Draft study on individual access to constitutional justice, 2010. [http://www.venice.coe.int/webforms/documents/CDL-JU\(2010\)004-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-JU(2010)004-e.aspx) [accessed: 8 January 2015].

order. Once individuals are granted the right to directly access the body of constitutional justice, society is integrated into the process of the constitutionalisation of the national system of law. In addition, with regard to the impact of the constitutional complaint on the constitutional justice body itself, it should be noted that, in scientific literature, it is often argued that where natural persons are recognised as subjects entitled to petition the constitutional court, constitutional supervision becomes more effective.

The possibility for an individual to directly access the constitutional justice body is an effective measure to avoid overburdening the ECtHR. The statistics provided by the ECtHR show that those countries in which a constitutional complaint mechanism exists have a lower number of complaints before the ECtHR than others, which do not have such a mechanism.<sup>13</sup> It needs to be pointed out that the jurisprudence of the ECtHR follows the position that the individual constitutional complaint is an effective domestic legal remedy to be exhausted before a person can appeal to the ECtHR.<sup>14</sup>

It can be assumed that the necessity to consolidate the constitutional complaint in the legal system of Lithuania arises both from the Constitution of the Republic of Lithuania and the official constitutional doctrine formulated by the Constitutional Court. According to the provisions of the official constitutional doctrine: 1) a person whose constitutional rights or freedoms are violated has the right to apply to a court (Article 30(1) of the Constitution);<sup>15</sup> 2) the Constitutional Court is a body of judicial power;<sup>16</sup> 3) the Constitution is a directly applicable act (Article 6(1) of the Constitution); 4) everyone may defend their rights by invoking the Constitution (Article 6(2) of the Constitution).

### **3. Preliminary arrangements for introducing the individual complaint in Lithuania**

Preliminary arrangements for introducing the individual complaint in Lithuania were made on 4 July 2007 when the Seimas approved the Conception of the Individual Constitutional Complaint (hereinafter also referred to as the Conception).<sup>17</sup> The Conception holds that the “level” of democracy in political orders is determined according to the scope of human rights and the extent of their implementation, as well as that the constitutional complaint is deemed to be one of the major instruments for protecting the rights and freedoms of a person.

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<sup>13</sup> European Commission for Democracy through Law. Op. cit., p. 56..

<sup>14</sup> See, e.g., Decision of the ECtHR of 25 November 2014 on admissibility in *Larionovs v. Latvia* and *Tess v. Latvia*, applications No.45520/04 and No. 19363/05.

<sup>15</sup> The Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 1992, No. 33-1014; 1996, No. 64-1501; 1996, No.122-2863; 2002, No. 65-2629; 2003, No.14-540; 2003, No.32-1315; 2003, No. 32-1316; 2004, No. 111-1423; 2004, No.111-4124; 2006, No.48-1701.

<sup>16</sup> *Inter alia*, Ruling of the Constitutional Court of the Republic of Lithuania of 6 December 2012. Official Gazette *Valstybės žinios*, 2012, No. 142-7457.

<sup>17</sup> Resolution of the Seimas of the Republic of Lithuania of 4 July 2007 on the approval of the Conception of the Individual Constitutional Complaint. Official Gazette *Valstybės žinios*, 2007, No. 77-3061.

The following main provisions of the Conception can be mentioned: 1) a complaint may be submitted to the Constitutional Court by any private person, including a legal person (*inter alia*, a company, political party, another organization); 2) this person has to be a victim of the violation of his or her constitutional rights and 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, or the act of the Government, which served as a legal ground for adopting the individual decision allegedly violating constitutional rights or freedoms; 4) the rule of the exhaustion of other legal remedies—a person concerned must have used all other available and effective measures of legal defence (first of all, judicial proceedings in other courts); 5) the *ratione temporis* rule—a person concerned must submit a complaint within a relatively short period of three months from the final decision of his or her case; 6) a special preliminary admissibility procedure, according to which the admissibility issue must be solved at a preliminary stage by a single justice or a special chamber of the Constitutional Court.

Thus, the Conception proposes introducing in Lithuania the so-called normative constitutional complaint model, rather than the full constitutional complaint model, the distinctive feature of which is that an individual constitutional complaint can be filed not only regarding the constitutionality of a legal norm that is underlying for a concrete decision, but also regarding the application of this norm by the judicial or other state authority institutions. The full constitutional complaint model is chosen by, for example, Austria, the Czech Republic, Spain, and Germany. However, it should be noted that, in the aforementioned study by the Venice Commission, it is pointed out that the relation between the Constitutional Court and ordinary courts is less conflict ridden in the systems with the normative constitutional complaint than with full ones, since constitutional courts there do not directly review the application of a particular legal act by an ordinary court.<sup>18</sup> The unquestionable benefits of the normative constitutional complaint include reduced tension between the Supreme Court and the Constitutional Court, the Constitutional Court does not become the “super-Supreme Court”, and the constitutional justice body avoids overburdening itself.

The normative constitutional complaint models similar to that proposed in the Conception have been chosen by Latvia and Poland. It should be noted that the Latvian legislator has consolidated in the Law on the Constitutional Court of Latvia the right of the Constitutional Court to review not only the constitutional compliance of legal acts of the highest state institutions (as proposed in the Conception), but also the compliance of other normative legal acts with the Constitution. However, it may be assumed that, in this case, the competence of the Constitutional Court would be excessively extended and the Court could be overburdened with the consideration

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<sup>18</sup> European Commission for Democracy through Law. Op. cit., p. 53.

of cases at times not so significant in terms of human rights protection. According to the Venice Commission, the constitutional review of lower-ranking legal acts should be assigned to the competence of administrative courts.<sup>19</sup>

The requirement stipulated in the Conception that all available legal remedies be exhausted has been established in the majority of other states that have the individual constitutional complaint institution. For example, in Poland, the essential condition for addressing the Constitutional Tribunal with a complaint regarding the constitutionality of a law or other normative legal act is the decision issued in the last instance. In this context, it can be pointed out that, in this case, in order the possibilities of a person to defend his or her violated constitutional rights would not be unduly narrowed, certain exceptions could also be established. For instance, the provision of Article 19.2(3) of the Law on the Constitutional Court of Latvia<sup>20</sup> should be assessed positively insofar as it provides for an important possibility of applying to the Constitutional Court before all the other legal means have been exhausted if the review of the constitutional claim is of general importance, or if legal protection of the rights with general legal means cannot avert material injury to the applicant.

It can be noted that the three-month period from the final decision issued by the public authority, within which a complaint may be submitted, is the same as established in Poland (Article 46(1) of the Act on the Constitutional Tribunal of Poland),<sup>21</sup> while Latvia has chosen a longer—six-month—period after the decision in the last instance comes into effect.

However, as the economic crisis broke out, in the Lithuanian community of lawyers, in political layers, and in society in general, the discussions and initiatives on the establishment of the individual constitutional complaint in the national law faded away. The implementation of the Conception of the Individual Constitutional Complaint, approved by the 4 July 2007 resolution of the Seimas, was postponed for an indefinite period of time, as it was believed it might bring an unbearable financial burden on the state, which was hit by the crisis at that time. Thus, a paradoxical situation emerged as the universal ideas about creating an effective system of the protection of human rights could not be implemented due to the global economic recession. Although it has now been some time since the end of the economic crisis was first spoken about, the aforementioned discussions have not been renewed.

While answering the question why the introduction of the individual constitutional complaint mechanism in Lithuania has been delayed, it should be mentioned, first of all, that one of

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<sup>19</sup> European Commission for Democracy through Law. *Op. cit.*, p.28.

<sup>20</sup> Law on the Constitutional Court of Latvia. <http://www.tiesa.gov.lv/?lang=2&mid=9> [accessed: 8 January 2015].

<sup>21</sup> Act on the Constitutional Tribunal of Poland of 1 August 1997 (Dz. U. No. 102, item 643; amended: 2000, No. 48, item 552, No. 53, item 638; 2001 No. 98, item 1070; 2005, No.169, item 1417; 2009, No. 56, item 469, No. 178, item 1375; 2010, No. 182, item 1228 and No. 197, item 1307). <http://www.trybunal.gov.pl/eng/index.htm> [accessed: 8 January 2015].

the most frequent arguments voiced on the account of *practical reasoning* against the establishment of the constitutional complaint in Lithuania is that supposedly the Constitutional Court would be overloaded and the efficiency of work at the Constitutional Court would be negatively affected. For instance, cases upon individual constitutional complaints make up approximately 95 percent of the caseload of the German Federal Constitutional Court. Another example can be the Constitutional Court of Slovenia, which, in view of the fact that it annually received around 4,000 individual constitutional complaints, applied to the national legislator requesting that it limit the possibility for individuals to petition the Court.<sup>22</sup>

Another *practical-reasoning* argument that is frequently put forward to substantiate the view opposing the necessity of the individual constitutional complaint institution is that, purportedly, limited results would be achieved at a high cost, i.e. as the practice of the states where this institution has been put in place shows, usually only a fairly small number of individual constitutional complaints (2-5 percent) is satisfied.<sup>23</sup> In this context, it should be indicated that public opinion surveys show that the Constitutional Court enjoys much greater public confidence compared to other Lithuanian judicial bodies; whereas, upon the introduction of the individual constitutional complaint institution, there is a risk not to meet the expectations of people, which would undermine the popularity of the Constitutional Court in society.

Nevertheless, it is also evident that the constitutional justice process and the right of access to the constitutional court are not merely practical, but, to a large extent, also ideological issues. It is not a rare occurrence that the opponents of the individual constitutional complaint contend that the conception of the individual constitutional complaint is a consequence of an idealistic-utopian model of a state under the rule of law.<sup>24</sup> One of the sceptics of the individual constitutional complaint, French constitutionalist Louis Favoreu, while discussing the possibility of introducing the individual constitutional complaint in France, wrote that conferring this right on individuals would weaken the autonomy of Parliament.<sup>25</sup> More often than not it is feared that granting an individual access to the Constitutional Court will alter the traditional balance of powers between the Constitutional Court and Parliament.<sup>26</sup> Since in this case, the limitation of the powers of state authorities in terms of human rights protection would accelerate even more—upon the

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<sup>22</sup> European Commission for Democracy through Law. Op. cit., p. 3.

<sup>23</sup> ABRAMAVIČIUS, A. Op. cit., p. 17.

<sup>24</sup> ПФЕРСМАНН, О. Селективное правовое государство и конституционная жалоба. *Конституционное право: восточноевропейское обозрение* [A Selective Law-Governed State and the Constitutional Complaint. Constitutional Law: East European Survey]. 2003, No. 3(44), p. 175.

<sup>25</sup> FAVOREU L. Sur l'introduction hypothétique du recours individuel direct devant le Conseil constitutionnel, 2001. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-10/sur-l-introduction-hypothetique-du-recours-individuel-direct-devant-le-conseil-constitutionnel.52373.html> [accessed: 20 February 2015].

<sup>26</sup> TSERETELI, N. Mechanism of Individual Complaints – German, Spanish and Hungarian Constitutional Courts – Comparative Analysis. 2007, p. 3. [http://www.etd.ceu.hu/2007/tsereteli\\_nino](http://www.etd.ceu.hu/2007/tsereteli_nino) [accessed: 8 January 2015].

introduction of the individual constitutional complaint mechanism, the number of petitions before the Constitutional Court would definitely rise, while increasing the number of legal acts (or their parts) adopted by the political authority where such acts would be ruled in conflict with the Constitution. Thus, it is not without good reason that the accessibility of constitutional courts is said to be one of the key factors determining their effectiveness.

Although it is difficult to prove unequivocally that namely the fears of the above-mentioned character lie behind the delay by the political authority in introducing the institution of the individual constitutional complaint in Lithuania, nevertheless, this assumption can, at least partly, be confirmed by the statements made by some politicians and certain initiatives voiced by them regarding the narrowing of the competence vested in the Constitutional Court. These initiatives escalated during the economic crisis. During that period, the Constitutional Court delivered not an inconsiderable number of rulings in which it had to consider the constitutional compliance of austerity measures, i.e. legal provisions applied by the legislative and executive powers to manage the economic crisis. Obviously, after certain austerity measures had been ruled anti-constitutional, not all these rulings of the Constitutional Court were favourably received by the political authority. The then media released a number of statements by politicians not only claiming that the Constitutional Court allegedly took over the legislative and executive powers over the economic policy, but also more seriously threatening to restrict the competence of the Constitutional Court,<sup>27</sup> or even to eliminate this institution altogether. Therefore, during the economic crisis and post-crisis period, an unfavourable environment developed to discuss the possibility of expanding the circle of subjects entitled to apply to the Constitutional Court (i.e. granting individuals the possibility of a direct access to the Constitutional Court) and, thus, to reinforce the limitation of the powers of state authorities with regard to human rights protection.

In the context of doubts as to the necessity of the individual constitutional complaint, it is also quite often maintained that the current model of constitutional control is fully sufficient, in particular, considering that the Lithuanian legal system provides for the possibility of indirect access to the constitutional justice body (a person may access the constitutional justice body through intermediate bodies, which are courts in the case of Lithuania). It is frequently emphasised that an advantage of such indirect access is that ordinary courts “serve” as “guards” protecting the constitutional justice body against groundless or repetitive requests. In this respect, attention should be drawn to the fact that namely petitions by courts make the largest part of the applications brought before the Constitutional Court of the Republic of Lithuania for investigation into the compliance of

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<sup>27</sup> Seime sklando idėja apriboti Konstitucinio Teismo galias [An idea of limiting the powers of the Constitutional Court is lingering in the Seimas]. [http://www.lrt.lt/naujienos/ekonomika/4/29475/seime\\_sklando\\_ideja\\_apriboti\\_konstitucinio\\_teismo\\_galias](http://www.lrt.lt/naujienos/ekonomika/4/29475/seime_sklando_ideja_apriboti_konstitucinio_teismo_galias) [accessed: 16 January 2015].

legal acts with the Constitution. In 2014, the petitions from courts amounted to 90 percent of all the applications received by the Constitutional Court. Thus, in Lithuania, individuals have the possibility of defending their constitutional rights through the courts of general jurisdiction and the courts of special (administrative justice) competence.

#### **4. Preliminary requests to the Constitutional Court: main characteristics**

This possibility is regulated by Article 110 of the Constitution of the Republic of Lithuania. The basic provision here is *the prohibition for the judiciary to apply unconstitutional legal acts*: a judge cannot apply a law that is in conflict with the Constitution (Article 110(1) of the Constitution). In its turn, this prohibition logically follows from the constitutional principle of the supremacy of the Constitution, as stated in Article 7(1) of the Constitution, according to which any law or other act contrary to the Constitution cannot be valid.<sup>28</sup> While interpreting this principle, the Constitutional Court noted<sup>29</sup> 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 should be noted that neither the text of the Constitution, nor the jurisprudence of the Constitutional Court, contains such a term as “preliminary request”. However, there are constitutional provisions establishing not only the right, but even the duty of 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. Article 110(2) of the Constitution provides that “in cases when there are grounds to believe that a law or any 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 that it decide whether the law or any other legal act in question is in compliance with the Constitution”. Therefore, the term “preliminary request” will be used hereinafter in dealing with the aforesaid duty of Lithuanian courts to apply to the Constitutional Court.

Thus, *the following main characteristics* of the regulation governing the preliminary request in Lithuania can be outlined:

1. The power to apply to the Constitutional Court is *granted to all courts*, whether ordinary or administrative, regardless of their place in the judiciary system, i.e. the courts of first instance (local courts, regional courts in certain cases, and regional administrative courts), also appellate courts (regional courts in certain cases, the Supreme Administrative Court, and the Court of Appeal), as well as the court of cassation (the Supreme Court). The major difference here from the

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<sup>28</sup> 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.

<sup>29</sup> Decision of the Constitutional Court of the Republic of Lithuania of 19 December 2012.

Ukrainian system is that *all courts can apply to the Constitutional Court directly*, without the involvement of any superior intermediate court. In Ukraine, where a court has doubts during the consideration of a case as to the conformity of a law or another legal act with the Constitution and the solution of the issue of constitutionality falls under the jurisdiction of the Constitutional Court of Ukraine, the court applies to the Supreme Court of Ukraine for the solution of the issue on the submission of a petition to the Constitutional Court of Ukraine on the constitutionality of a law or another legal act in question.

It can be assumed that the model of the direct preliminary request could better serve its purpose in ensuring the supremacy of the Constitution; in particular, it provides more independence for judges from superior courts in deciding on the matter of the preliminary request. In states where individuals are not granted the possibility of direct access to the constitutional justice body, the model of the direct preliminary request constitutes a very important guarantee in ensuring human rights and could be regarded as an alternative to the individual constitutional complaint.

There is also the European model of direct requests for preliminary rulings of the Court of Justice of the European Union (hereinafter referred to as the CJEU), where any court is obliged to ensure the uniform application of the EU law and, therefore, to submit a request for a preliminary ruling directly to the CJEU when the issue of the interpretation of the EU law, or of the compatibility of national and the EU law, is not enough clear. This model has proved to be efficient.

2. The ground to apply to the Constitutional Court occurs where *a reasonable doubt appears during the consideration of a case and concerns the constitutionality of a legal act applicable in this particular case*; the court must substantiate this doubt (i.e., provide sufficient reasoning). In particular, this means that the court cannot question the constitutionality of the legal act that is not applicable in the case before it.

3. *Courts are independent from the position of parties to the case in deciding whether to apply to the Constitutional Court*, i.e. they can apply to the Constitutional Court either *on the initiative of the parties* (which is considered the constitutional right of the parties) or *on their own initiative*. The power to apply to the Constitutional Court in cases where no party to the case is raising this issue (i.e., when any of the parties submits neither request nor any arguments regarding the doubtful constitutionality of the applicable legal act) can be derived from the above-mentioned constitutional prohibition for the judiciary to apply unconstitutional legal acts (Article 110(1) of the Constitution): a court is under the duty not to apply any legal act of doubtful constitutionality in all cases, including those when a court itself finds serious arguments against the constitutionality of the particular legal act. Thus, courts *should be active* in challenging the constitutionality of legal acts applicable in cases under their consideration, regardless of the positions of the parties on this issue,

provided that there are serious grounds to prove the incompatibility of the particular act with the Constitution.

4. The next characteristic of the preliminary request procedure is that *it is not considered to be a substitute for the proceedings in the applying court: the ruling of the Constitutional Court on constitutionality cannot substitute for a decision (judgment) of the applying court*. The preliminary request procedure is of a rather *subsidiary character* with regard to the proceedings before the applying court. It is only for the latter (and not for the Constitutional Court) to solve a concrete dispute between individual parties, and the ruling subsequent to the preliminary request helps in the proceedings only by answering the question of constitutionality, which lies outside the scope of the 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 on the final resolution of the case; although the applying court must certainly follow and cannot alter the ruling of the Constitutional Court (i.e., it cannot apply the legal act ruled to be contrary to the Constitution).

5. Virtually the last one and perhaps the most important characteristic of the preliminary request is that it is *the duty*, not only the right or a matter of discretion, *of courts to apply to the Constitutional Court* in each case when they face serious doubts regarding the constitutionality of the applicable legal act. This conclusion follows from the wording of Article 110(2) of the Constitution (“a judge *shall suspend* the consideration of the case and *shall apply* to the Constitutional Court”), as well as from its interpretation by the Constitutional Court. As held by the Constitutional Court,<sup>30</sup> where a court considering a case faces doubts as to whether a statutory law (or another 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 on whether that law (or another legal act) is in compliance with the Constitution; until the Constitutional Court decides on this matter, the consideration of the case in the applying court cannot be continued, 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 were applied in the case, the court would take a risk to adopt a decision that would not be a just one; this is why courts, in cases of reasonable doubts regarding the compliance of a legal act with the Constitution, *not only may, but also must, apply* to the Constitutional Court.

6. As it is clear from the above-discussed duty to apply to the Constitutional Court, *the accompanying procedural duty of the applying court is to suspend the 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

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<sup>30</sup> *Inter alia*, in the ruling of 24 October 2007.

case cannot be continued until it is clear whether the applicable legal act can be applied due to the existing reasonable doubts regarding its constitutionality. This obstacle to the proceedings can be removed only by the ruling of the Constitutional Court either confirming or denying these doubts. In practice, apart from the applying court (an applicant in the case of constitutional justice), other courts also suspend the 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 their provision); they can renew the consideration of those cases only after a respective ruling of the Constitutional Court is given.

#### **5. Insufficiency of the indirect defence (through the court considering the individual case) of the rights of a person before the Constitutional Court of the Republic of Lithuania**

Preliminary requests submitted by other courts to the Constitutional Court in cases when they have serious grounds to doubt the constitutionality of the applicable legal act constitute the largest part of the caseload of the Constitutional Court. They are important means to ensure the supremacy of the Constitution and protect constitutional rights and freedoms.

On the other hand, one major, though natural, deficiency of this procedure can be noticed—the dependence of a person who is a party to the case before the court (of general or administrative jurisdiction) dealing with the case: it is not the person, but the court, who decides on the necessity of a preliminary request, i.e. whether to apply to the Constitutional Court. Therefore, there is always a certain room for subjective judicial discretion in assessing the arguments provided by a party to the preliminary request; in other words, the preliminary request procedure does not necessarily guarantee that the court will apply to the Constitutional Court in each case where there are reasonable doubts regarding the constitutionality of the applicable legal act (where the court refuses to apply to the Constitutional Court, such a situation may be regarded as incompatible with the constitutional guarantee provided for a person whose constitutional rights or freedoms have been violated to complain before a competent court, as provided for by Article 30 of the Constitution). Indeed, sometimes it might happen that a judge or a court is reluctant to suspend the case before them due to either objective<sup>31</sup> or subjective<sup>32</sup> reasons. The study “On Individual Access to Constitutional Justice”, prepared by the Venice Commission in 2010, expresses the position that indirect access to the constitutional justices body is an insufficient means in ensuring the constitutional rights of an individual, since the effectiveness of this mechanism is heavily reliant on

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<sup>31</sup> E.g., the 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 for such a long time, though now this indicator is becoming better because of the appropriate changes in the Court’s proceedings).

<sup>32</sup> E.g., subjective convictions or prejudices against the involvement of the Constitutional Court as the Court that does not belong to the same judiciary system with ordinary or administrative courts.

the capacity of the intermediary bodies and their willingness to identify potentially unconstitutional legal acts and to apply to the Constitutional Court. Therefore, according to the Venice Commission, indirect access should be combined with a possibility for a person to directly access the constitutional justice body.<sup>33</sup>

The main measure to exclude the above-indicated insufficient situations is the introduction of an individual constitutional complaint, which would be the most powerful means to protect constitutional rights and would fill the aforesaid gap emerging in the event of a failure by a court to hear reasonable arguments regarding the constitutionality of the applicable legal act. The fears, expressed by the opponents of this institution, that, allegedly, the Constitutional Court, which is already overloaded, will not manage to cope with new tasks should be believed to be addressed and resolved. Properly selected filters and organisational amendments of work at the Constitutional Court could help to overcome the said problems. The issue of overburdening the Court could be controlled by establishing the requirement for the exhaustion of other legal remedies, by introducing the time limits for filing individual constitutional complaints, also by requiring that a complaint be drawn up by an advocate, as well as by establishing other filters that could help to leave aside legally groundless, repetitive, or potentially unsuccessful complaints. Certainly, in order to avoid unduly narrowing the possibility for individual persons to defend their violated rights, certain exceptions to these filters should be established.

The introduction of the individual constitutional complaint possibly could even provide a reason for optimising the work of the Constitutional Court, as well as reconsidering other norms regulating the constitutional justice process, to enable the Court to cope with its workload smoothly and expeditiously. To substantiate this assumption, the position of a former President of the Constitutional Court of Latvia, Gunārs Kūtris, could be invoked in relation to these matters. Gunārs Kūtris divides the history of the Latvian Constitutional Court into three stages.<sup>34</sup> During the first stage, neither individual persons, nor ordinary courts, had the right of access to the Constitutional Court. At that time, the Court annually delivered approximately 5 judgments. During the second stage, after the constitutional complaint was introduced and courts were granted the right to apply to the Constitutional Court, the absolute majority of cases before the Court were initiated upon constitutional complaints; at that time, the Court annually delivered from 13 to 17 judgments. And the third stage refers to the period when the number of complaints has considerably increased. During this stage, the Latvian Constitutional Court has been annually adopting from 27 to 34 judgments. However, this growth in the number of complaints is assessed by Gunārs Kūtris not as a

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<sup>33</sup> European Commission for Democracy through Law. *Op. cit.*, p. 30.

<sup>34</sup> KŪTRIS, G., JURCENA, L. Characteristics of Work of the Constitutional Court of the Republic of Latvia: Case-Law of the Court in Social Security Matters. *Конституционное правосудие [Constitutional Justice]*. 2012, No.1(55), p. 48.

problem, but rather as a stimulus, leading to both the quantitative and qualitative enhancement of the activity of the Latvian Constitutional Court. There are no objective circumstances why the same position could not be applied to the possibility of introducing the individual constitutional complaint in Lithuania, and likewise in Ukraine.

### **Conclusions**

The fundamental idea of constitutionalism is the limitation of state power while seeking to protect human rights; therefore, the widespread establishment of the individual constitutional complaint, as a mechanism for defending constitutional rights, in Europe reflects an even deeper entrenchment of constitutionalism in this region. Hence, the consolidation of this institution in the national law would undoubtedly be a significant step towards the development of human rights protection and constitutionalism in Lithuania, as well as in Ukraine.

In Lithuania, though the institution of the individual complaint is still not introduced, individuals have the possibility of defending their constitutional rights through the courts of general jurisdiction and special (administrative justice) competence.

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

The model of direct preliminary requests, when the power to apply to the Constitutional Court is granted to all courts directly, without the involvement of any superior intermediate court, is an important means to ensure the supremacy of the Constitution and protect constitutional rights

and freedoms. However, the effectiveness of such indirect access to the Constitutional Court is heavily dependent on the capacity and willingness of courts to identify potentially unconstitutional legal acts and, consequently, to apply to the Constitutional Court. Thus, indirect access to constitutional justice should be combined with a possibility for a person to petition the Constitutional Court directly.