

**INDIVIDUAL ACCESS TO
CONSTITUTIONAL JUSTICE IN
LITHUANIA: THE POTENTIAL
WITHIN THE NEWLY ESTABLISHED
MODEL OF THE INDIVIDUAL
CONSTITUTIONAL COMPLAINT**

INGRIDA DANIELIENE

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INDIVIDUAL ACCESS TO CONSTITUTIONAL JUSTICE IN LITHUANIA: THE POTENTIAL WITHIN THE NEWLY ESTABLISHED MODEL OF THE INDIVIDUAL CONSTITUTIONAL COMPLAINT

INGRIDA DANIELIENE¹

INTRODUCTION

The Lithuanian model of constitutional justice was created for the very first time in the last decade of the XX century with the adoption of the Constitution in 1992 and the completion of the establishment of the Constitutional Court in 1993.² Since that time, a thorough jurisprudential constitution had been developed through the caselaw of the Constitutional Court, thus indicating the achieved maturity of constitutional control.³ However, for more than two and a half decades one of the most reprehensible elements of the chosen model remained the lack of direct access of individuals to constitutional justice. Following the introduction of the individual complaint in Ukraine on 1 January 2018⁴, Lithuania, along with Bulgaria, Italy and

¹ Investigadora principal de la Universidad Mykolas Romeris de Vilnius. Ex-Secretaria General del Tribunal Constitucional de Lituania. Address: Ateities str. 20, LT-08303, Vilnius, Lithuania
Email: ingrida.daneliene@mruni.eu

² Constitution of the Republic of Lithuania [Constitution], Official Gazette *Valstybės žinios* [OG], 1992, No. 33-1014), for text in English see <https://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192>; Law on the Constitutional Court of the Republic of Lithuania (OG, 1993, No. 6-120), for text in English see <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475>.

³ Jarašiūnas, E. Jurisprudencinė konstitucija ir oficialiosios konstitucinės doktrinos plėtojimas. In *Konstituciniai ginčai*. Vilnius: Mykolas Romeris universitetas, 2019, p. 338; Žalimas, D. The Constitution of the Republic of Lithuania as the Jurisprudential Constitution. In *Lithuanian Constitutionalism. The Past and the Present*. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 289-388.

⁴ Constitution of Ukraine, for text in English see <https://www.refworld.org/pdfid/44a280124.pdf>

Moldova, had held out as one of the four Council of Europe member states⁵ having a constitutional court, but not allowing direct individual access to constitutional justice. This element of the Lithuanian model of constitutional justice thus dissonated with the very essence of the trends of European constitutionalism of the second half of the XX century — the latter both placing the rights and freedoms of the individual at the center of constitutional protection, as well as recognizing that the efficiency of protection of such rights and freedoms is directly dependent on the legal measures or instruments available for defending individual rights and freedoms in instances of possible violation.⁶

Under the Lithuanian Constitution, the right to fair proceedings, i.e. the right of a person whose constitutional rights or freedoms have been violated to apply to a court (as guaranteed by the Constitution itself⁷ and interpreted *inter alia* in the light of Article 6 of the ECHR⁸), has always been seen as an absolute, undeniable⁹, unrestrictable, unlimitable¹⁰ fundamental constitutional right, based on the universal constitutional principle of judicial protection¹¹ and derived from the foundational constitutional principle of the rule of law¹². On the other hand, the right to defend one's constitutional rights and freedoms could have only been implemented *indirectly*, i.e. through limited subjects whose right to apply to the CCL had been expressly established by the Constitution, specifically, that of courts and their constitutional obligation to apply to the CCL regarding any legal provision that raises questions of constitutionality and is applicable in cases heard by them.¹³ Accordingly, the constitutional powers granted to courts to initiate the investigation of the constitutionality of legal acts, *inter alia*, have always presupposed the right of a person

⁵ The constitutional complaint is known (in one form or another) to most European legal systems having either a constitutional court or an equivalent institution, among them to the following states: Austria, Belgium, Czech Republic, Spain, Croatia, Latvia, Poland, Lichtenstein, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia, Hungary, Germany (1951), Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Montenegro, Macedonia, Russia, Serbia, Turkey, and Ukraine.

⁶ See also Danėlienė, I. Who is Entitled to the Right to Respect for Family Life Under the European Union Law?, *Teisė*, 1100, p. 25. Arnold, R. Reflections on the Universality of Human Rights. In *The Universalism of Human Rights*. Dordrecht: Springer. 2013, p. 5. Žalimas, D. The Individual Constitutional Complaint as an Effective Instrument for the Development of Human Rights Protection and Constitutionalism, 2015, <https://www.lrkt.lt/data/public/uploads/2016/07/2015-10-02-individualcomplaint-kiev.pdf>.

⁷ Constitution, Art. 30.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005.

⁹ Constitutional Court of the Republic of Lithuania [CCL], ruling of 13 December 2004. OG, No. 181-6708.

¹⁰ CCL, ruling of 4 March 2003. OG, No. 24-1004.

¹¹ CCL, ruling of 18 April 1996. OG, No. 36-915.

¹² CCL, ruling of 9 July 2015. Register of legal acts [TAR], 09-07-2015, No. 11196.

¹³ Arts. 30 and 110, paras. 1 and 2.

whose case is being heard by an ordinary court to request the court hearing the case to apply to the CCL.¹⁴ In this regard, such a system was formally in line with both the Constitution itself, as well as the ECHR. However, in practice, indirect individual access to constitutional justice, as an only alternative, at times meant the preclusion of individuals from effectively defending their constitutional rights and freedoms. As is demonstrated by the analysis, the existence in Lithuania of a model that did not allow individual access to constitutional justice also had its implications on the development of national constitutional jurisprudence.

Therefore, the possibility of natural and legal persons to invoke their right to a court before the CCL directly, granting them the right to challenge the constitutionality of a given legal act or norm directly, as established one year ago^{15, 16}, brings with itself expectations not only regarding improved constitutional protection of constitutional rights and freedoms, but also as regard the development of relevant constitutional jurisprudence, i.e. official constitutional doctrine. This right is also especially relevant taken into account that Lithuania is attributed to countries with centralized systems of constitutional review, where the sole institution entrusted the task of control of constitutionality is the constitutional court.

The relevance of this analysis is, therefore, firstly, based on the novelty and the deemed potential of the institution of the individual constitutional complaint in Lithuania. The latter is substantiated by the existence of very limited research on the subject.¹⁷

¹⁴ CCL, ruling of 28 March 2006. OG, 2006, No. 36-1292.

¹⁵ The Law Amending Articles 106 and 107 of the Constitution of the Republic of Lithuania (TAR, 2019-04-02, No. 5330) came into effect on 1 September 2019. Following these constitutional amendments, the Law on the Constitutional Court was also amended and supplemented, and came into effect on the same day, laying down the procedures for the implementation of this right (TAR, 26-07-2019, No. 12391).

¹⁶ The Lithuanian model of the individual constitutional complaint is in part based on the concept that had been adopted by the Lithuanian Parliament already in 2007, and had planned its introduction in the second half of 2009 (see Seimas of the Republic of Lithuania, resolution of July 2007 No. X-1264. OG, 2007, No. 77-3061).

¹⁷ See Danėlienė, I. Subjektai, turintys teisę kreiptis į Konstitucinį Teismą (*Subjects having the right to apply to the Constitutional Court*). In *Konstituciniai ginčai (Constitutional Disputes)*. Vilnius: Mykolo Romerio universitetas, 2019, p. p. 379-438; Miliuvienė J. Individualaus konstitucinio skundo įteisinimas ir pirmoji patirtis (Validation of the individual constitutional complaint and first experience). *Lietuvos teisė 2019: esminiai pokyčiai*. 2020, p. 19-28; Pūraitė-Andrikiienė, D. «Lietuvos individualaus konstitucinio skundo modelio privalumai ir trūkumai» (*Advantages and Disadvantages of the Lithuanian Model of Individual Constitutional Complaint*). *Teisė*, 2020, vol. 114, p. 49-70.

I. THE POTENTIAL OF THE INDIVIDUAL CONSTITUTIONAL COMPLAINT

I.1. The right of political actors to initiate constitutional proceedings

Under the provisions of Article 106 of the Constitution, i.e. its original wording of 25 October 1992, the right to initiate constitutional proceedings had always been granted to state political actors (the Parliament, the President of the Republic, the Government, also a group of 1/5 or more of all the Members of the Parliament) and ordinary courts.¹⁸ Undoubtedly, the right of state political actors to refer questions regarding the constitutionality of legal acts to the CCL is a significant guarantor of constitutional democracy. It is derived from the constitutional principle of the separation of powers, as well as the perception of the status of the CCL as an institution that ensures the balance of powers (is the guarantor of constitutional balance).¹⁹ As a general rule, the provisions of the Constitution establish the right of one state political actor to question the constitutionality of acts adopted by the other: the President may refer to the CCL regarding the acts of the Government (and has the right to veto laws adopted by the Parliament, i. e. the *Seimas*), the Government may question the acts adopted by the Parliament, while the Parliament — acts adopted by both the President, the Government, but also by the Parliament itself. This may, in part, also be explained by the fact that neither the Constitution, nor the laws in Lithuania establish the possibility for *a priori* control of the constitutionality of laws and other legal acts. Therefore, the Parliament has the right to apply to the CCL regarding legal acts adopted by earlier Parliaments, but also regarding the constitutionality of legal acts adopted by the Parliament of the same term, i.e. when the Parliament has doubts regarding the constitutionality of acts it adopted itself.²⁰

The right of a group of no less than 1/5 of all the Members of the Parliament to address the CCL mostly relates to the objective rights of the political opposition and, specifically, the rights of the parliamentary minority. These rights follow from the constitutional form of government — Lithuania is a pluralist parliamentary democracy, while the parliamentary minority *inter alia* the parliamentary opposition is an essential element²¹ or the *conditio sine qua non* thereof.²² The constitutional status

¹⁸ The latter list was finite; according to the CCL, no other persons could have questioned before the CCL the constitutionality of legal acts adopted by the Parliament, the President of the Republic or the Government, even if the latter violated their rights or freedoms. See CCL, ruling of 28 June 2016. TAR, 29-06-2016, No. 17828.

¹⁹ Jarašiūnas, E. *Valstybės valdžios institucijų santykiai ir Konstitucinis Teismas*. Vilnius: Teisinės informacijos centras, 2003, p. 69, 72-75.

²⁰ See, e. g., Seimas of the Republic of Lithuania, resolution No. XIII-1596 of 25 October 2018. TAR, 29-10-2018, No. 17095; CCL, ruling of 15 February 2019. TAR, 15-02-2019, No. 2373.

²¹ CCL, ruling of 25 January 2001. OG, 2001, No. 10-295.

²² CCL, ruling of 18 January 2018. TAR, 18-12-2019, No. 20438. See also Žalimas (footnote No. 3), p. 309.

of the parliamentary opposition, as well as the constitutional protection of the rights of the parliamentary minority are both acknowledged²³ and thus serve a subjective and an objective aim. First, they allow the parliamentary minority to fulfil its purpose through proposing an alternative political agenda, substantiating it and criticizing the political activity of the parliamentary majority. Second, the rights of the opposition are aimed at ensuring that the diversity of political views is reflected in the parliament, i.e. that political pluralism (within the parliament of a democratic state governed by the rule of law) is guaranteed.²⁴ Accordingly, one of the tools that the opposition is entrusted with an aim of safeguarding the supremacy of the Constitution²⁵ is its right to refer questions regarding the constitutionality of all acts of the Parliament, the President and the Government, i. e. to apply regarding the constitutionality of all acts attributed to the competence of the Constitutional Court.

Although the functioning system has proved to be an effective guarantor of constitutional balance, several side effects thereof could also be distinguished. First of all, during the recent years, Lithuanian constitutional jurisprudence has been especially dominated by issues relating to the constitutionality of the formation and the organization of the activities of state institutions, liability thereof, legislative and other parliamentary procedures (e. g. a number of constitutional cases on the constitutionality of the formation of *ad hoc* investigation commissions of the Seimas of the Republic of Lithuania and their mandate to conduct parliamentary investigations), the execution of the powers of the President and the Government (e. g. the appointment and termination of service of justices; the adoption of planning documents regarding national parks), etc.²⁶ Thus, second, this lead to the involuntary, however, unavoidable intervention of the CCL in political processes, the execution of the political agenda of the parliamentary majority, the President and the Government. This involvement is also sensitized by the fact that the vast majority of constitutional cases brought before the CCL by the political minority have led to constitutional rulings declaring the contested laws and legal acts to be in conflict with the constitution. Third, naturally, the direct influence of cases of abstract normative review as are cases initiated by political actors is, as a rule, of lesser direct influence towards the developments of human rights jurisprudence and towards the protection of human rights and freedoms in general.

²³ CCL, ruling of 4 April 2006. OG, 2006, No. 38-1349.

²⁴ CCL, ruling of 18 December 2019. TAR, 18-12-2019, No. 20438.

²⁵ Žilys, J., Miliuvienė, J. *Lietuvos konstitucinė teisė*. Vilnius: VĮ Registrų centras, 2017, p. 595.

²⁶ For more information see <https://www.lrkt.lt/en/about-the-court/activity/annual-reports/183>.

I.2. The right of ordinary courts to initiate constitutional proceedings. Indirect individual access to the CCL

While state political actors, as a rule, raise abstract questions of constitutionality (unless, for example, they refer to the CCL regarding the constitutionality of an individual act), any ordinary court has the right and an obligation to address the CCL only regarding the conformance with the Constitution of legal provisions that are directly applicable in the specific case before it. This right follows from provisions of the Constitution, according to which judges may not apply any law that is in conflict with the Constitution (Art. 110, para. 1). Instead, in cases when there are grounds to believe that a law or another legal act that should be applied in a concrete case is in conflict with the Constitution, the judge is obliged to suspend the consideration of the case and apply to the CCL regarding its compliance with the Constitution (Art. 110, para. 2). Therefore, the right of ordinary courts to apply to the CCL is directly linked to their constitutional powers — administering justice, as well as the need to ensure that the application of potentially unconstitutional acts does not violate the rights and legitimate interests of individuals.²⁷

Ordinary courts in Lithuania (meaning both general and specialized, i.e. administrative courts), have always played an essential role in ensuring the supremacy of the Constitution and protecting the constitutional rights and freedoms of individuals by raising and referring to the CCL relevant questions regarding the constitutionality of legal acts applicable in the cases before them (i.e. when the necessary condition of *locus standi* was met). Namely the courts are the traditional «largest employer» of the CCL, meaning that of all subjects specified in Article 106 of the Constitution, the majority of applications (more than 78,5 percent) regarding the constitutionality of legal provisions have come from ordinary courts.²⁸ However, analysis of statistical data collected by the CCL also demonstrates that the role of courts in initiating constitutional proceedings has been decreasing. E.g. in 2018 and 2019²⁹, applications filed by courts constituted just over half of all petitions (excluding individual constitutional complaints), while long-term statistics (1993-2017) show a much greater percentage, i.e. approximately 80 percent.³⁰ Although thorough analysis of such trends is an object of separate studies, a number of relevant

²⁷ Kūris, E. *Konstitucinis Teismas*. In *Lietuvos teisinės institucijos*. Vilnius: VĮ Registrų centras, 2011, p. 83-84.

²⁸ The calculations are based on statistical data regarding all applications filed before the CCL in 1993-2019 (excluding individual constitutional complaints). See Annual Report, 2019. Vilnius: Constitutional Court of the Republic of Lithuania, 2020, p. 120, https://www.lrkt.lt/data/public/uploads/2020/06/annual-report-2019-web_.pdf

²⁹ Ibid. See also Annual Report, 2018. Vilnius: Constitutional Court of the Republic of Lithuania, 2019, p. 118, https://www.lrkt.lt/data/public/uploads/2019/05/annual-report-web_.pdf.

³⁰ Annual Report, 2017. Vilnius: Constitutional Court of the Republic of Lithuania, 2018, p. 138, <https://www.lrkt.lt/data/public/uploads/2018/08/annual-report-2017-web.pdf>. These statistics are also influenced by the absolute peak of applications filed by courts that was recorded in 2010. In most

factors that determine decisions to address or refrain from addressing the CCL (other than the existence of reasonable doubt regarding the constitutionality of applicable legal acts or the lack thereof) may be distinguished. First, an emerging practice of arbitrary interpretation of the provision of Art. 110 of the Constitution: judicial discretion to independently evaluate the arguments provided by the parties regarding the need for referral to the CCL is increasingly often amounted to a court's «free and autonomous right to decide»³¹ (basically amounting to arbitrary discretion). Second, side arguments taking priority over duty to apply in cases where courts acknowledge the existence of reasonable doubt as to the constitutionality of the applicable provisions.³² Finally, even decisions of ordinary courts to carry out the evaluation of constitutionality of applicable provisions themselves³³, thus directly disregarding Constitution.³⁴ The fact that in such cases indirect individual access to constitutional justice, as an only alternative, means the preclusion of persons from effectively defending their constitutional rights and freedoms before the CCL is well-illustrated by the second ruling of the CCL that had been adopted after examining an individual constitutional complaint. In the said case, the CCL found the contested legal provision to be in conflict with the Constitution while a request for application to the CCL had been previously denied by ordinary courts of both first and appellate instance.³⁵

part, these applications regarded measures adopted by the Parliament in response to the economic crisis of 2008.

³¹ The Supreme Administrative Court of Lithuania has in a number of cases specifically stressed that the court is granted with the exclusive right to apply to the Constitutional Court and the said right is, therefore, in no way linked or bound to the relevant requests of the parties to the proceedings, but rather relies solely on its own discretion without giving further arguments to substantiate the decision of the court to decline the request for the application to the CCL. See e. g. Supreme Administrative Court of Lithuania, ruling of 30 December 2019, administrative case No. A-1552-525/2019, etc.

³² Such position of the court is explained by, e.g., the unwillingness to stay the proceedings, giving priority to an expedient adjudication of the case, even if doubt regarding the unconstitutionality of the applicable provisions remains. In the opinion of the author, the position lacks constitutional argumentation and is contrary to both the requirements stemming specifically from Art. 110 para. 2 of the Constitution and the constitutional right to a fair trial in general. E. g., Supreme Court of Lithuania, ruling of 23 March 2012, civil case No. 3K-3-166/2012.

³³ Supreme Court of Lithuania, ruling of 25 November 2019, criminal case No. 2K-7-174-303/2019. One recent example is a judgment of the Supreme Court (adopted by an extended panel of 7 justices), where the court, *inter alia*, took upon itself to interpret a provision of Article 114 paragraph 2 of the Constitution that establishes judicial immunity. When interpreting the Constitution, the Supreme Court relied on the relevant wording of a provision of the Law on Courts of the Republic of Lithuania. Among other, this interpretation contradicted the principle of the supremacy of the Constitution, according to which the interpretation of the provisions of the Constitution may not be based on no other legal act, but only on the Constitution itself). The latter contradictions were later confirmed by the CCL (ruling of 9 March 2020, TAR, 09-03-2020, No. 5178).

³⁴ Constitution, Art. 102, para. 1. See also CCL, ruling of 28 March 2006. OG, 2006, No. 36-1292.

³⁵ CCL, ruling of 11 September 2020. TAR, 11-09-2020, No. 19129.

Lithuanian practice, therefore, confirms the conclusion that is just as true in the broader European context³⁶: although indirect access to individual justice may be considered an important tool to ensure respect for individual human rights at the constitutional level, its disadvantage mostly lies in the fact that its effectiveness relies on the capacity of the intermediaries to identify potentially unconstitutional normative acts, as well as their willingness to submit applications before the CCL. Consequently, the advantage in combining indirect and direct access and creating a balance between the different existing mechanisms, has been noted not only by the European Court of Human Rights³⁷, the majority of European states, the Venice Commission, legal scholars³⁸, but also by the CCL itself³⁹.

II. DIRECT INDIVIDUAL ACCESS TO CONSTITUTIONAL JUSTICE

II.1. *Essential elements of the Lithuanian Model of the Individual Constitutional Complaint*

Although neither the text of the Constitution, nor that of the Law on the Constitutional Court directly define the term «individual constitutional complaint»⁴⁰, the individual constitutional complaint may, first of all, be understood as the right of every person to apply to the Constitutional Court regarding the compliance of the legal acts assigned to the competence of the Constitutional Court with the Constitution (another act of higher legal force), when a decision adopted on the basis of such acts may have violated his or her constitutional rights or freedoms.⁴¹ Essential elements of the individual

³⁶ European Commission for Democracy Through Law [Venice Commission], Study No. CDL-AD(2010)039rev «*On Individual Access to Constitutional Justice*», 27 January 2011 (adopted at the 85th Plenary Session in Venice, 17-18 December 2010), [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e). The study indicates as an advantage of indirect access the fact that the bodies filing complaints (often being namely the courts, also the ombudsmen) are well-informed and have the required legal skills to formulate a valid request. See also Žalimas (footnote No. 3), p. 271.

³⁷ ECtHR, *Hasan Uzun v Turkey*, App no 10755/13 (3 January 2013); ECtHR [GC] *Vučković and othrs v Serbia*, App No 17153/11, 17157/11, and oths. (25 March 2014).

³⁸ See, e. g., Beliūnienė, L. *Žmogaus teisių apsaugos stiprinimas konstitucinio skundo institutu*. Vilnius: Justitia, 2014, p. 183-184; Žalimas (footnote No. 3), p. 270-272; Žalimas, footnote No. 6, p. 16, <http://www.lrkt.lt/data/public/uploads/2016/07/2015-10-02-individualcomplaint-kiev.pdf>; Arnold, R. *The individual constitutional complaint (Verfassungsbeschwerde) in German Law with comparative references to Ukrainian Law*, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2018\)016-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2018)016-e); etc.

³⁹ CCL, decision of 28 June 2016 (footnote No. 18).

⁴⁰ An individual constitutional complaint is defined in the Law on the Constitutional Court by the wording «petition of a person specified in paragraph four of Article 106 of the Constitution». The concept of the individual constitutional complaint is, however, officially established through the constitutional jurisprudence of the CCL. See CCL, ruling of 25 November 2019. TAR, 25-11-2019, No. 18747.

⁴¹ Ibid.

constitutional complaint that may be derived from the provisions of the Constitution⁴², also the Law on the Constitutional Court and the constitutional jurisprudence of the CCL, allows for the identification of certain features of the complaint that correlate, as well as distinguish it from similar models known to the legal systems of neighboring central European states. The models of Poland (introduced in 1997⁴³) and of Latvia (introduced in 2011⁴⁴), undoubtedly served as relevant examples for Lithuania, mostly due to the proximity in the legal systems, as well as similarities in the competence and activities of the courts (taken into account also the differences in the populations of these states). The Lithuanian legislator, however, needed to find a unique solution that would adapt to the material and procedural provisions of its national Constitution and, even more so, of the Law on the Constitutional Court that in itself is one of the older laws in Lithuania that has not been essentially revised or amended ever since it came into effect in 1993.

II.1.1. Subjects of the individual constitutional complaint

The constitutional term that defines subjects entitled to launch a constitutional complaint («*every person*»⁴⁵) constitutes any natural or legal person whose constitutional rights or freedoms may have been violated, if such a person is subject to the jurisdiction of the Republic of Lithuania. In other words, there are no restrictions under the Constitutions with regard to the subjects of the constitutional complaint. The concept of a natural person comprises all national and foreign citizens, as well as stateless persons. In this sense, the concept of a natural person in this context is broad, just as in Poland and Latvia. The latter is also determined by the broad constitutional protection of human rights and freedoms as a central concept of the Constitution, stemming from human dignity. Consequently, in Lithuania, the absolute majority of individual constitutional complaints (94 per cent) received by the CCL have been lodged by natural persons.⁴⁶

The notion of legal persons is also understood very broadly, i.e. as legal persons of private and public law, including public and private institutions, enterprises,

⁴² According to the Constitution, «Every person shall have the right to apply to the Constitutional Court concerning the acts specified in the first and second paragraphs of Article 105 if a decision adopted on the basis of these acts has violated the constitutional rights or freedoms of the person and the person has exhausted all legal remedies. The procedure for implementing this right shall be established by the Law on the Constitutional Court» (Art. 106 para. 4).

⁴³ Constitution of the Republic of Poland, <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (English translation).

⁴⁴ Constitutional Court Law, <https://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/> (English translation).

⁴⁵ Art. 106, para. 2.

⁴⁶ See official website of the CCL, www.lrkt.lt.

NGOs and other organizations, associations, etc. Legal persons are entitled with the right to a constitutional complaint insofar as they enjoy certain constitutional rights and freedoms, i.e. mostly relating to property rights and economic activities, also such freedoms as the freedom of association. Legal persons that have already applied to the CCL include private limited liability companies, individual enterprises, charity funds, a public education institution, etc. The same is also true in Latvia, which has been witnessing an increasing number of applications from legal persons, both of private and public law. In Poland, the constitutional provision of Article 79(1) establishing the right of «everyone» to lodge a constitutional complaint before the Constitutional Tribunal is presently interpreted as also applicable to legal persons, however, this is only due to the development of constitutional jurisprudence.⁴⁷ The position of the Constitutional Tribunal has been substantiated by such arguments as the need for a systematic and functional interpretation of Article 79 of the Constitution, as well as the need to fully comply with the standards established by the ECHR.⁴⁸ From a comparative perspective, one must mention that some countries (e. g., Germany) foresee exceptions precluding from application to the CCL either legal persons in general, or legal persons of public law (as they are themselves considered to be bodies of public power).⁴⁹

Accordingly, any natural or legal person may apply to the CCL only if a legal act that is requested to be reviewed in terms of its constitutionality served as the basis for adopting a decision that may have violated the constitutional rights or freedoms of that natural or legal person. The latter circumstance must be substantiated with adequate proof or reasonably grounded arguments.⁵⁰ Furthermore, they may apply to the CCL only in aim of the defense of their own constitutional rights or freedoms and not those of other persons (the CCL has already refused petitions filed by the applicants on behalf of, e. g., their relatives⁵¹; such petitions have been considered to have been filed by institutions or persons having no right to apply to the CCL, the

⁴⁷ Constitutional Tribunal of the Republic of Poland, judgment of 24 February 1999, No. SK 4/98.

⁴⁸ Klopocka-Jasinska, M. On the right of public law entities to lodge a constitutional complaint in the light of the jurisprudence of the Polish Constitutional Tribunal. *Wroclaw Review of Law, Administration & Economics*, Vol 6:1, p. 48.

⁴⁹ For more see Arnold (footnote No. 38), p. 5; Wiczanowska H., The adequacy of the constitutional complaint as extraordinary means of human rights protection — a comparison of Polish and German solutions. *Torun International Studies*, 2018, No. 1 (11), p. 15-16.

⁵⁰ See e. g. CCL, decision of 9 October 2019 No. KT28-A-S17/2019, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1970/content>; decision of 6 November 2019 No. KT43-A-S31/2019, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1989/content>, decision of 11 December 2019, No. KT62-A-S48/2019, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta2008/content>, etc. The most often ground for the refusal to consider a petition is the inability to either prove the existence of a decision that would have been based on a possibly unconstitutional legal act (or provision), or the lack of arguments proving the link between such a decision and the contested legal act (or provision).

⁵¹ CCL, decision of 16 October 2019 No. KT33-A-S22/2019, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1976>.

latter being one of the grounds for the refusal of petitions under Article 69 of the Law on CCL). This requirement is also one of the elements that allows the chosen model of individual constitutional complaint to be identified as a narrow model. It also means that the Lithuanian Constitution does not allow for an *actio popularis* petition: it recognizes the limited — incidental — model of constitutional complaint, aimed at the protection of the constitutional rights and liberties of an individual and arising from a particular legal dispute, rather than the protection of the public interest and the elimination of unconstitutional legal acts provisions, thus guaranteeing the constitutionality of legal regulation in general. This is in line with the general trends in Europe, as it serves the primary aim of ensuring effective protection of human rights and freedoms, while also prevents the overburdening of the Constitutional Court and attracting abusive complaints, that may be typical of *actio popularis*.⁵² Thus a number of constitutional complaints have been refused by the CCL as *actio popularis*, the object of the complaint having been legal acts or provisions that the complainants had believed were unconstitutional, even when no act had been adopted based on such acts or provisions with respect to the complainants, their rights or freedoms. Among such complaints were, e.g. petitions regarding the conformity with the Constitution of COVID-19 related measures, i.e. travel restrictions⁵³ and others, that have been refused by the CCL, as no individual decision had been adopted with respect to the applicant based on the general acts that have introduced such restrictions.

Consequently (though once proposed⁵⁴), the adopted model also does not ensure a possibility for the individual constitutional complaint to be lodged by an ombudsperson or another similar body (e.g. prosecutor, etc.), on behalf of an individual whose constitutional rights might have been breached by an unconstitutional act, and such circumstances are established by that institution. In other words, direct individual access to the CCL has not been supplemented by the possibility to apply indirectly through an ombudsperson. In this regard, a number of European states⁵⁵, recognize this possibility in one form or another (e. g. Armenia, Austria, Azerbaijan, Brazil, Croatia, Czech Republic, Estonia, Hungary, Portugal, Spain, Moldova, Montenegro, Slovenia, Slovakia, Bosnia and Herzegovina, Latvia, Poland⁵⁶), as it is seen as yet another guarantee of greater accessibility to

⁵² Van Aaken, A. «Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Ius Standi Provisions», Preprints of the Max Planck Institute for Research on Collective Goods Bonn 2005/16, Bonn, 2005, p. 14, in: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=802424#

⁵³ CCL, decision of 2 July 2020, No. KT116-A-S108/2020, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta2172/content>.

⁵⁴ Draft Law on Amending Articles 106 and 107 of the Constitution of the Republic of Lithuania No. XIIIIP-431(2), <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/d8f62110408011e7b8e5a254f4e1c3a7?jfwid=sql10wggg>.

⁵⁵ See e. g. Venice Commission (footnote No. 36), 66-69 pts.

⁵⁶ Ibid., 106 pt.

constitutional justice. Moreover, states such as Slovenia only allow for individual constitutional complaints to be lodged through a specially designated ombudsman.⁵⁷ In other states, the ombudsman is given the right to lodge an *actio popularis* application regarding the constitutionality of legal acts.⁵⁸

II.1.2. Object of the individual constitutional complaint

The object of the complaint, as established by the Constitution, constitutes acts specified in the first and second paragraphs of Article 105 of the Constitution, i.e. laws of the Republic of Lithuania or other acts adopted by the Seimas, acts of the President of the Republic and the acts of the Government of the Republic. Following the developed jurisprudence of the CCL, this is to be understood as all laws and other legal acts, which fall within the scope of control of constitutionality carried out by the CCL: first, both normative (general and abstract norms) and individual acts; second, all acts adopted not only by the Parliament, President, Government, but also by referendum. This includes the examination of conformity with the Constitution not only of ordinary laws and legal acts, but also of laws amending the Constitution, constitutional laws.⁵⁹ In this regard, the object is relatively broad. In contrast, constitutionality review in Poland is restricted to bills (laws) and normative acts (under Art. 79 of the Constitution). On the one hand, it does not extend to individual acts, thus narrowing the possibilities of persons in seeking defense of their constitutional rights and freedoms possibly violated by unconstitutional individual acts of the Parliament, President or the Government,⁶⁰ for example, individual acts of the Parliament and the President regarding the appointment and termination of service of judges.

On the other hand, the definition of normative acts, as developed by the Constitutional Tribunal, allows for such review and defense in respect of possibly unconstitutional acts enacted by «bodies of international organizations of which Poland is a member, such as the European Union».⁶¹ The Latvian Constitutional Court Law also expands the object of constitutional review so as to include both compliance of laws or international agreements signed or entered into by Latvia with the Constitution (also until the confirmation of the relevant agreement in the *Saeima*), as well as compliance of Latvian national legal norms with international agreements

⁵⁷ Constitution of the Republic of Slovenia, Art. 159, <https://www.us-rs.si/media/constitution.pdf> (English translation).

⁵⁸ Venice Commission (footnote No. 36), 66-69 pts.

⁵⁹ Constitutional laws are a specific category of laws that are of higher legal force than ordinary laws and are adopted under a specific procedure. See Constitution, art. 69, paras. 3 and 4.

⁶⁰ Wiczanowska (footnote No. 49), p. 12.

⁶¹ Ibid.; Constitutional Tribunal, judgment of 16 November 2016, SK 45/09.

entered into by Latvia that are not in conflict with the Constitution.⁶² However, it narrows the objective scope of the individual complaint, as it restricts it to normative acts of the level of national laws or higher: the individual is not among the subjects that may submit an application regarding initiation of a matter regarding compliance with law of other acts of the *Saeima*, the Cabinet, the President, the Speaker of the *Saeima* and the Prime Minister.⁶³

Accordingly, in Lithuania, the object of an individual constitutional complaint may be legal acts (certain provisions thereof) that are in force at the time the complaint is lodged, but also legal acts (provisions) that have been repealed, declared invalid, amended or have expired. According to the official constitutional doctrine, the refusal to do so would lead to further violations of constitutional rights and values and contradict the very aim of the individual constitutional complaint — the establishment of not just any, but of effective remedies of protection against the infringement of constitutional rights and freedoms.⁶⁴ The law, legal act or the specific provision thereof (depending on the specific legal and factual circumstances of the complaint) must be formulated with precision, as it will then serve as the object of the constitutional review.⁶⁵ The applicant will be required to substantiate that the said legal act (or provisions thereof) is in conflict with the Constitution, while a decision (of a public authority or an ordinary court) adopted on the basis of these legal acts has violated his/her/its constitutional rights or freedoms. The same requirement applies under Polish and Latvian law.⁶⁶

The objective scope of constitutional review is, however, narrowed in Lithuania, just as in Poland and Latvia, by the circumstance that it may not be a judgment adopted by a court: the Constitution does not grant the CCL the power to rule on the conformity of the judgments with the Constitution, nor to review cases decided by ordinary courts or to annul judgments adopted by them⁶⁷. This follows from the constitutional organization of the judicial system in Lithuania: the CCL is considered to be one of three judicial systems in Lithuania (next to the systems of ordinary and specialized, i. e. administrative courts), functioning independently within the limits of its constitutional competence. The Constitution thus precludes it from being seen as a superior judicial instance for judgments adopted by courts belonging to the other two systems.⁶⁸ Accordingly, the CCL will refuse to consider such petitions as being

⁶² Constitutional Court Law of the Republic of Latvia, Art. 17, para. 1, <https://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/> (English translation).

⁶³ *Ibid.*, Art. 17, para. 2.

⁶⁴ CCL, ruling of 25 October 2019. TAR, 25-11-2019, No. 18747.

⁶⁵ CCL, decision of 9 October 2019, No. KT28-A-S17/2019, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1970/content>.

⁶⁶ Constitutional Court Law of the Republic of Latvia, Section 17.

⁶⁷ CCL, decision of 9 October 2019, No. KT27-A-S16/2019, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1969/content>.

⁶⁸ CCL, ruling of 6 June 2006. OG, 2006, No. 65-2400.

outside its jurisdiction.⁶⁹ Other petitions that will be (and already have been) refused on the same ground are complaints against action (or inaction) of state or municipal institutions, officials, members of the parliament, other politicians, judges, representatives of NGOs, professional organizations, etc.⁷⁰ In comparison to other European states, the approach towards the object of constitutional review is, in this regard, quite narrow. For example, the Basic Law of Germany allows for the review of constitutionality of all forms of public power, including judicial decisions.⁷¹

II.1.3. Essential admissibility criteria

Three essential procedural conditions may be distinguished that must be satisfied for lodging a constitutional complaint: *first*, a natural or legal person must have exhausted other effective legal remedies, *second*, a final and non-appealable decision must be adopted by an ordinary court⁷² in a case in which the person (a) attempted to defend his/her constitutional rights or freedoms, and (b) failed to do so.⁷³ These conditions follow from the general principle that the constitutional proceedings are a subsidiary and extraordinary measure of protection of constitutional rights and freedoms. They are based on the presumption that the primary effective judicial remedy enabling persons to assert their constitutional rights is the right to a fair trial before ordinary courts and independent tribunals, having jurisdiction to examine all questions of fact and law that are relevant to the dispute before it. The latter is also in line with the ECHR and the jurisprudence of the ECtHR⁷⁴. It also serves as a regulator of the workload of, first, the CCL and, later, the ECtHR, also corresponds

⁶⁹ CCL, decision of 9 October 2019, No. KT28-A-S17/2019 (footnote No. 65) and decision of 9 October 2019, No. KT27-A-S16/2019 (footnote No. 67).

⁷⁰ CCL, decision of 9 October 2019, No. KT28-A-S17/2019 (footnote No. 65).

⁷¹ Basic Law for the Federal Republic of Germany, Art. 93(1) [4a], https://www.gesetze-im-internet.de/englisch_gg/ (English translation).

⁷² Law on Constitutional Court stipulates that «[a person shall have the right to file a petition with the Constitutional Court <...> if: <...>] 2) the person has exhausted all remedies provided for by law for defending his constitutional rights or freedoms, including the right to apply to a court, and, after all possibilities established by law for filing a complaint against the decision of the court have been exhausted, the final and non-appealable decision is adopted by the court <...>» (Art. 65, para. 2, part 2).

⁷³ CCL, decision of 11 December 2019 No. KT63-A-S49/2019, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta2009/content>.

⁷⁴ ECtHR, *Běleš and Others v. the Czech Republic*, App. No. 47273/99 (12 November 2002), § 49; *Naii-Liman v. Switzerland (GC)*, App. No. 51357/07 (15 March 2018), § 112; *Obermeier v. Austria*, § 70, App. No. 11761/85 (28 June 1990); *Terra Woningen B.V. v. the Netherlands*, § 52, App. No. 20641/92 (17 December 1996); *Sigma Radio Television Ltd v. Cyprus*, §§ 151-57, App. Nos. 32181/04 and 35122/05 (21 July 2011). According to the ECtHR, the Constitutional Court as a judicial body will not be considered to have «full jurisdiction», as it could inquire into the contested proceedings solely from the point of view of their conformity with the Constitution, thus preventing it from examining all the relevant facts. See ECtHR, *Zumtobel v. Austria*, §§ 29-30, App. No. 12235/86 (21 September 1993).

with the *reasonable time* requirement, it being an element of the right to a fair trial, as guaranteed both by the Article 6 of the ECHR and national constitutions.

The Constitution thus requires, prior to application to the CCL, the exhaustion of all available effective legal remedies, including mandatory extrajudicial dispute resolution procedures (where such exist), application to an ordinary court, an implemented right to appeal and, where available, cassation (in Lithuania, the institute of cassation is only available within the system of ordinary courts, while the existing system of administrative courts consists of two levels — regional administrative courts and the Supreme Administrative Court, that, in the vast majority of administrative cases, serves as the court of appeal). In Poland, however, cassation is seen as an extraordinary legal remedy, therefore, it does not constitute an effective legal remedy that must be exhausted prior to application to the CCL. Other than Lithuanian and Polish legislation, Latvian law establishes an exception to the precondition of exhaustion of remedies in cases where the CCL decides that the review of the constitutional complaint is of general importance or the legal means cannot avert material injury to the applicant of the claim⁷⁵ (this being possibly based on the German example⁷⁶).

Mention must be made that Lithuanian legislation (also jurisprudence) does not yet have a definite answer with regard to the requirement to exhaust legal remedies in cases where such remedies are unavailable (e. g. regarding constitutionality of individual acts of the Parliament that are outside the jurisdiction of ordinary courts). However, it is only logical that in such cases, a final and non-appealable judicial decision of an ordinary court refusing to admit the application should be seen as sufficient ground to admit the complaint to the CCL, until constitutional jurisprudence (or law) provides for a simpler solution. In some countries, including Latvia⁷⁷ and Germany⁷⁸, immediate access to the CCL is expressly allowed in such cases.

Consequently, such decisions of national courts as decisions regarding the examination of requests for reopening of the proceedings, also decisions of extranational judicial institutions such as decisions⁷⁹ of the European Court of Human Rights, do not constitute *a final and non-appealable decision of the court* within the meaning of Art. 65 of the Law on the CCL, the latter itself being a precondition to apply to the CCL.⁸⁰ The CCL has specifically stressed that application to the ECtHR is not considered an effective legal remedy the exhaustion of which is required prior to

⁷⁵ Constitutional Court Law of the Republic of Latvia (footnote No. 62), Art. 19.2, para 3.

⁷⁶ Act on the Federal Constitutional Court, Art. 90.2. http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=6.

⁷⁷ Ibid., Art. 19.2, para 2.

⁷⁸ Ibid., Art. 90.2.

⁷⁹ In this case, the ECtHR had adopted a decision on the inadmissibility of the application, however, the same conclusion is relevant with regard to final judgments of the ECtHR as well.

⁸⁰ CCL, decision of 3 September 2020, No. KT156-A-S143/2020 <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta2216/content>.

the application to CCL: it is an international remedy of a subsidiary nature; the ECtHR plays a complementary role in the implementation of the Convention and its protocols; it does not alter the competence and jurisdiction of national courts, it is not an instance of appeal or cassation with regard to the decisions thereof.⁸¹ Instead, a *vice versa* requirement will apply in most cases, as individual application to the CCL is recognized as a domestic remedy which should be exhausted before applying to the ECtHR.⁸²

Third, the time limit for the petition to be filed must not exceed four months, counting from the day that a final and non-appealable decision of a court comes into force⁸³. Accordingly, this ensures the stability of legal relationships and the legal system, which could be undermined by the possibility for natural and legal persons to challenge the constitutionality of legal acts for an indefinite period of time (in contrast, the four-month time limit is not applicable to political actors that have the right to apply to the CCL). Though the necessity of the time limit for individual complaints was one of the issues that became an object of a political debate (ultimately resulting in a fixed four-month time limit instead of the initially proposed period of three months), this requirement is not a national novelty, as it is known to all European states whose legal systems allow for the individual constitutional complaint. However, the time-limits for applications vary from 8 working days to even several years depending not only on the country, but also on the object of the complaint. For example, it is only 8 working days in Malta⁸⁴, either 20, 30 days or 3 months in Spain⁸⁵, depending on the nature of the contested legal act; 30 days in Croatia⁸⁶; in Germany, the general term is 1 month, but a 1 year term applies to complaints regarding legislation⁸⁷; 6 weeks in Austria⁸⁸; 2 months in Slovenia (60 days)⁸⁹, Slovakia⁹⁰ and the Czech Republic⁹¹; 3 months — in Poland⁹² and 6 months in Latvia.⁹³

The Law on the CCL establishes the possibility for the time-limit that has been missed due to significant justifiable reasons to be renewed on the request of the applicant, by the decision of the CCL or the President of the CCL (Art. 65, para. 4).

⁸¹ Ibid. Also CCL, ruling of 5 September 2012. OG 2012, No. 105-5330

⁸² E. g. ECtHR, *Hasan Uzun v Turkey*, App No. 10755/13 (30 April 2013).

⁸³ Law on the Constitutional Court, Art. 65, para. 2.

⁸⁴ Legal Notice 35 of 1993 entitled Regulations Regarding Practices and Procedures of the Court (Republic of Malta), Art. 4.

⁸⁵ Organic Law on the Constitutional Court (Kingdom of Spain), Arts. 42-44.

⁸⁶ Constitutional Act on the Constitutional Court (Republic of Croatia), Arts. 64, 66.

⁸⁷ Act on the Federal Constitutional Court (footnote No. 76), Art. 93.

⁸⁸ Federal Law on the Constitutional Court (Federal Republic of Austria), Art. 82.

⁸⁹ Constitutional Court Act (Republic of Slovenia), Ar. 52, para. 1.

⁹⁰ Act No. 38/1993 on the Organizational Structure of the Constitutional Court of the Slovak Republic and on the Proceedings brought to the Court and on the Position of Its Judges (Republic of Slovakia), Art. 53.

⁹¹ Constitutional Court Act (Czech Republic), Art. 72.

⁹² Constitutional Tribunal Act (Republic of Poland), Art. 46.

⁹³ Constitutional Court Law (Republic of Latvia), Art. 19.2.

However, these provisions allowing for the renewal of the time-limit have been found to be inapplicable with regard to the first petitions lodged by natural and legal persons following the very introduction of the individual constitutional complaint on 1 September 2019. In its very first decisions regarding the admissibility of the petitions received, the CCL established that the said constitutional right applies only to situations where a judicial decision of an ordinary court has been adopted no earlier than 1 May 2019 (i.e. 4 months prior to 1 September 2019).⁹⁴ In other words, the principle of *lex retro non agit*, according to which the law only applies prospectively and does not apply retroactively is, *inter alia*, applicable to situations where the deadline for lodging the complaint has been missed due to the fact that the constitutional amendments establishing the right to an individual complaint came into force at a later time. According to the CCL, the latter is an essential element of the constitutional principle of the rule of law and is also based on the principle of legal certainty.⁹⁵ It thus means that applications relating to earlier judgments of ordinary courts are considered as not within the jurisdiction of the CCL (Art. 69, para. 1, part 2 of the Law on the CCL).

Finally, in addition to those discussed above, two more features of the individual constitutional complaint may be mentioned upon that are not uniquely viewed across Europe: the obligation to be represented before the CCL by a legal attorney (or, rather, lack of such an obligation) and the absence of court fees. First of all, in aim of ensuring maximum access to constitutional justice, the Lithuanian legislator decided to waive the requirement of mandatory participation of a legal attorney (advocate) when applying to the CCL. All applicants (as well as other participants to the proceedings) may conduct their cases before the CCL either personally or through their representatives⁹⁶. If represented, all parties to the proceedings may seek the assistance of advocates, while natural and legal persons that apply to the CCL may also rely for such representation on their close relatives, spouse (cohabiting partner) if they have a higher university education in the field of law.⁹⁷ In Lithuania, the requirement of compulsory legal representation has been waived mostly, once again, in aim of ensuring greater access of individuals to constitutional justice. Such regulation also correlates with the official doctrine of the CCL, according to which the right to an advocate, as one of the conditions for the effective implementation of the constitutional right of a person to judicial protection, may not, in any case, be transformed into the duty that restricts the said constitutional right and the non-fulfilment of which could deny the possibility of exercising the right to file an appeal

⁹⁴ E. g. CCL, decision of 22 October 2019 No. KT36-A-S25/2019, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1981/content>), etc.

⁹⁵ CCL, decision of 25 March 1998, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta374/content>; ruling of 11 January 2001, OG 2001, No. 5-143), decision of 22 March 2018, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1805/content>.

⁹⁶ Law on the Constitutional Court, Art. 32 para. 1.

⁹⁷ *Ibid.*, Art. 3, para. 4.

with the court of appeal instance against the final act of a court of first instance.⁹⁸ Lithuania has in this sense followed the examples of Latvia, the ECtHR and also other European states. Many other European countries, however, mostly in aim of eliminating unfounded complaints at an earliest stage possible, by ensuring all essential requirements of the constitutional complaint are fulfilled, meaning the facilitation of the admissibility stage (thus also a lower workload of the court),⁹⁹ as well of the further fulfilment of the task of the CCL, require compulsory representation by a lawyer or even an advocate, thus precluding individuals from lodging the complaint and representing themselves. Such countries include Poland, where compulsory legal representation (of a solicitor or barrister) is required in all cases, except where the applicant is a judge, a prosecutor, a barrister, a notary public, a professor or the holder of a post-doctoral degree in legal studies.¹⁰⁰ Such representation is required for all procedural steps from drafting and submitting the complaint to representation of the applicant through the entirety of the proceedings.¹⁰¹ One may mention, however, that of the constitutional complaints found admissible for constitutional review by the CCL, two out of seven have been launched without the official assistance of a professional lawyer, i.e. without legal representation.

Second, as in the majority of European states, no court fee is established (among European countries, exceptions to this rule are Austria, Switzerland and Russia). The non-applicability of court fees is yet another factor that is aimed at ensuring greater individual access to constitutional justice.

II.2. First practices of admissibility

The entirety of the described essential elements (along with a number of additional formal requirements) will have to be established for the individual constitutional complaint to be admitted and, later, to be examined in substance. Here one must also mention that in Lithuania, both issues on admissibility, just as examination of all applications - including individual complaints - in substance is vested with the whole CCL, the panel being composed of all 9 judges.¹⁰² As regards individual complaints (the admissibility and examination in essence thereof), this provision is important especially at the earliest stages of the application of the novel legal institute, as it is aimed at ensuring the uniformity of the practices and the jurisprudence of the court. However, solutions such as the formation of smaller panels (most likely consisting of 3 judges) must be envisaged and applied in the future, that

⁹⁸ CCL, ruling of 1 March 2019, TAR, 01-03-2019, No. 3464.

⁹⁹ Wiczanoska (footnote No. 49), p. 12.

¹⁰⁰ Ibid.

¹⁰¹ Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Republic of Poland), Art. 44, point 1.

¹⁰² Decisions on admissibility require a majority vote of the justices present at the sitting (as long as no less than 2/3 of all the justices are present). Law on the Constitutional Court, Art. 1, paras. 1 and 4.

would allow, along with other measures that are also applied by other European courts¹⁰³, to control the flow of constitutional complaints and ensure the efficiency of constitutional justice (especially the *reasonable time* element of the right to a fair trial). So far, however, the number of constitutional complaints received and the time within which a decision on the admissibility of such complaints is delivered by the CCL gives ground for prudent optimism that the court has the proper legal and functional capabilities of handling the extra caseload properly and in due time.

With regard to the admissibility of constitutional complaints, the first year has shown that Lithuania falls into the general European statistical norm, as out of 257 individual complaints received in a calendar year (from 1 September 2019 until 1 September 2020), only 7 complaints have been found to be admissible for examination in essence, constituting 3.2 per cent of all complaints¹⁰⁴. In 2019, the most common grounds for the refusal of individual complaints were the following¹⁰⁵: (a) the petition was lodged by a person not having the right to apply to the CCL, i.e. a person has not exhausted available legal remedies and no longer has the possibility to exhaust them; a person has applied regarding a violation of the constitutional rights or freedoms of other persons; a decision has not been adopted on the basis of the disputed legal regulation that could have violated the constitutional rights or freedoms of the petitioner; (b) the petition is not within the jurisdiction of the CCL, i.e. the applicant had raised issues of application of law; a final and unappealable judicial decision in the case regarding the violation of the constitutional rights or freedoms of the petitioner has entered into force before 1 May 2019; the petitioner has applied regarding the assessment of the compliance of court decisions with the Constitution, the review thereof; the petitioner has applied regarding the compliance with the Constitution of action of other institutions - ministers, institutions under ministries, their territorial subdivisions and other legal acts of lower power; the petitioner has applied regarding the compliance with the Constitution of the actions of judges, members of the Seimas, state officials and civil servants, actions or omissions of state or municipal institutions or establishments, judicial self-government institutions; the petition was submitted where the issue of investigation was not present or it was formulated in too abstract a manner; the petition regarded the compliance of a factual situation with the Constitution; (c) the petition was based

¹⁰³ E.g. Federal Constitutional Court of Germany [FCC] relies on chambers of 3 judges, also such measures as sparse arguments, imposition of fines for abuse of procedure for managing the massive number of applications received. See Act on the FCC, Art. 34. A possibility to impose a sanction (fine) for abuse of procedure is also established by the Law on the Constitutional Court of the Republic of Lithuania (Art. 40, para. 1 (6)).

¹⁰⁴ In contrast, statistics show that the Constitutional Court has, on average, accepted for examination about 72-86 per cent of the applications received (excluding individual complaints). CCL, Annual Report of 2018, footnote No. 29, p. 118.

Official website of the CCL, www.lrkt.lt.

¹⁰⁵ Danėlienė, I. Išankstinis kreipimosi tyrimas. In *Konstituciniai ginčai*. Vilnius: Mykolo Romerio universitetas, 2019, p. 453. See also Law on the Constitutional Court, Art. 69.

on non-legal grounds, i.e. it had been established from the arguments presented and the totality of the petition that it had been based on grounds other than legal ones, i.e. economic, efficiency and other arguments. These grounds are to a lesser or greater extent also common to other states. However, one must also mention that unlike some states, Lithuanian legislation or constitutional jurisprudence does not as such distinguish manifestly unfounded applications (e.g. in Poland, applications regarding *vacatio legis* and application of law are regarded specifically as such). It rather checks the conformity of the individual complaint with the explicit requirements, as laid down in the Law on Constitutional Court (Arts. 69 and 70 lay down the grounds for the refusal or the return of the petition). As regards complaints concerning *vacatio legis*, an answer is yet to be provided by the CCL in essence.

III. PRECONDITIONS FOR ENHANCED PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS THROUGH THE INDIVIDUAL CONSTITUTIONAL COMPLAINT

III.1. *Protection of individual constitutional rights or freedoms*

In its ruling of 25 November 2020, the Constitutional Court emphasized that that the establishment of the institute of an individual constitutional complaint in the Constitution has not been an aim in itself - it aims to create preconditions for effective protection of a person's constitutional rights or freedoms that may have been violated by decisions adopted on the basis of unconstitutional legal acts.¹⁰⁶ Therefore, the primary constitutional goal of the constitutional complaint must be identified as it being a subjective right and guarantee of the protection of individual constitutional rights and freedoms. Thus, the constitutional complaint is, first of all, a subsidiary and extraordinary measure of protection of constitutional rights and freedoms - an effective domestic judicial remedy that may be relied upon when other legal and judicial remedies have failed. The effectiveness of this measure relies as much on the chosen model of the constitutional complaint, as on its application in practice. As is evident from the conclusions made in previous sections of this article, being an extraordinary measure, the constitutional complaint is not capable, however, of remedying the violated subjective rights and freedoms of a person in the concrete case. In other words, although the ruling of the CCL is binding and final in its entirety, the CCL will only rule on the constitutionality of the contested act or legal provision, but will not, as a rule, provide an accurate solution with regard to the legal protection of a person. From the objective point of view, however, the legal consequences of the constitutional complaint that has been found by the constitutional court to be valid, are just important *erga omnes* as they are *inter partes*.

¹⁰⁶ CCL, ruling of 25 November 2019 (footnote No. 40).

Based on the provisions of the Constitution and of the Law on the CCL, elements of both *erga omnes* and *inter partes* effect may be distinguished with regard to the legal consequences of the ruling of the CCL that finds the contested legal acts (provisions) to be in conflict with the Constitution. On the one hand, a final act of the CCL will apply *erga omnes* with regard to the constitutionality of the contested legal acts (provisions), the validity and the applicability thereof. This rule is relevant regardless of the fact that the natural or legal person has applied to the court in aim of defending his/her/its rights only. Following the general rule established in the Art. 107 para. 1 of the Constitution, the *erga omnes* effect will apply prospectively. On the other hand, the latter constitutional rule sees an exception with regard to the *inter partes* effect of such rulings and decisions: Art. 107, para 3 of the Constitution establishes that the decision of the CCL that finds the contested legal acts or provisions thereof to be in conflict with the Constitution «shall constitute a basis for renewing, according to the procedure established by law, the proceedings regarding the implementation of the violated constitutional rights or freedoms of the person». In other words, the ruling of the CCL will have retroactive effect with regard to the parties to the proceedings in the case before the ordinary court that had adopted a final and non-appealable decision in the case, as it will affect the consequences of the application of the legal act or legal provisions that have been declared unconstitutional. The CCL has noted that the said constitutional provisions allowing for the renewal of the proceedings before an ordinary court is an essential in guaranteeing the right of access to a court¹⁰⁷; it calls for the review of the decision that had been based on an unconstitutional legal act or provisions in aim of eliminating the violation of the constitutional rights or freedoms of a person and (or) compensating the damage caused by it. In the Lithuanian legal order, two additional constitutional guarantees are relevant in this respect: the provisions Art. 6, para. 2 of the Constitution establishing the right to defend one's rights by invoking the Constitution directly, as well as the provisions of the constitutional jurisprudence stipulating that the possibility to defend violated rights must be true (rather than formal).¹⁰⁸

One may conclude that the legal consequences, as established by the provisions of the Constitution and the Law on the Constitutional Court, constitute an effective mechanism for remedying of the constitutional rights and freedoms that have been affected by an unconstitutional act. As will be demonstrated in further paragraphs, the first ruling adopted by the CCL that had been based on an individual constitutional complaint and that resulted in the established contradictions of legal provisions, had immediate and direct effect on the rights and freedoms of the applicant: the applicant was from the moment of the adoption of the ruling no longer obliged to unwanted membership within an association. However, the true standard

¹⁰⁷ *Ibid.*

¹⁰⁸ CCL, ruling of 12 April 2001. OG, 2001, No. 33-1108.

of protection of such rights and freedoms will be disclosed through the practices of the functioning of the said mechanism that are yet inexistent.

III.2. Protection of constitutional rights and freedoms through the development of constitutional jurisprudence

While the primary advantage of the individual constitutional complaint is it being an effective remedy of protection of all constitutional rights and freedoms (*subjective dimension of the constitutional complaint*), its significance is supplemented by its effect on the development of the official constitutional jurisprudence and constitutional law (*objective dimension of the constitutional complaint*).¹⁰⁹ The development of constitutional jurisprudence is vital for ensuring, among other, the real supremacy of the Constitution, which implies the uniform and binding understanding and implementation of the constitutional provisions, the stability of the constitutional order (that includes *inter alia* the respect for human rights), as well as the progressive development of the State and society, while at the same time allowing to avoid any unnecessary changes and abrupt turbulences in the constitutional order. Therefore, the first aspect of the significance of the constitutional complaint on the development of constitutional jurisprudence is its plausible influence on the gradual and harmonious quantitative and qualitative development of the official constitutional human rights doctrine.

Following the Constitution (Art. 106, para. 4), all constitutional rights and freedoms¹¹⁰ that are protected by the Constitution, are also defendable by the individual constitutional complaint. Therefore, as one of an inherent objectives of the constitutional complaint, one must specifically emphasize the reasonable expectations for the development of national constitutional jurisprudence to shift from usually to a greater and lesser extent politically motivated applications brought to the CCL by political actors, to substantial human rights issues that could be resolved at a national constitutional level, rather than before the ECtHR. In its first ruling based on a valid constitutional complaint lodged by a natural person, the Constitutional Court found to be in conflict with the Constitution a provision of the Law on the Chamber of Architects establishing mandatory membership in the Chamber of Architects of the Republic of Lithuania by certified architects *not engaged* in the activity of a certified architect. Specifically, the CCL declared the said provision to be in conflict with the freedom of association, as guaranteed by Art. 35, para. 2 of the Constitution («*No one*

¹⁰⁹ Arnold (footnote No. 38), p. 2.

¹¹⁰ The catalogue of constitutional rights and freedoms is consolidated by Chapter 2 of the Constitution. All of these rights are guaranteed as subjective rights and freedoms, that may be defended before the court directly. Consequently, the inherent nature of human rights is expressly established in Art. 18 of the Constitution; human rights and freedoms have been attributed the status of an *eternity clause* in constitutional jurisprudence and, thus, may not be denounced, repealed or amended (CCL, ruling of 11 July 2014, TAR, 11-07-2014, No 10117).

may be compelled to belong to any society, political party, or association»), and also with the constitutional principle of the rule of law.¹¹¹ The applicant — a certified but a not practicing architect — had been removed from the Chamber of Architects (thus losing his license) as he had not covered his membership fee.

Among constitutional complaints admitted and cases pending before the CCL are also those regarding such rights as the right of citizens to participate in the governance of their State, the right to choose one's job freely, the right to a fair trial and the right to be presumed innocent until proven guilty according to procedure established by law, constitutional principles of non-discrimination, justice, proportionality, etc.¹¹² Other constitutional complaints lodged often regarded constitutional property rights, the right to a fair trial, social rights, including the right to labor and social security, etc.¹¹³ Thus, on the one hand, the content matter of Lithuanian constitutional complaints is so far in line with the early practices of its neighboring countries. For example, Latvian practice shows that the content matter of the individual constitutional complaints have shifted from intended defense of social rights and the right to a fair trial, from the rebuke of the conditions at the institutions of detention and imprisonment, and from the right to property to rights associated with such areas as copyright, data protection, business activities, state aid, freedom of association, penal policy and other areas of public law where wide discretion is enjoyed by the public administrator.¹¹⁴

On the other hand, the ruling adopted by the CCL on 11 September 2020 has supplemented the official doctrine on the freedom of association and, therefore, on the protection of constitutional rights and freedoms in general. One must also mention that in this decision, the constitutional freedom of association was interpreted by the CCL *inter alia* in the light of the provisions of Article 11 of the ECHR and the relevant case-law of the ECtHR.¹¹⁵ Consequently, provisions of Art. 4, para 1 of the Law on the Chamber of Architects were instantly eliminated as unconstitutional from the legal system, insofar as they established an obligation of persons (though certified but) *not engaged* in certain state-controlled professional activities to belong *ex lege* to associations ensuring self-government of such profession (as such an obligation could not be constitutionally justified with respect to its aim). The CCL also declared unconstitutional provisions of Art. 4, para. 4 of the said law

¹¹¹ CCL, ruling of 11 September 2020, No. KT166-A-N14/2020.

¹¹² Information regarding admitted petitions is provided on the official website of the CCL, <https://www.lrkt.lt/lt/prasymai/neisnagrinetu-prasymu-sarasas/370>.

¹¹³ Decisions on admissibility of all petitions are published on the official website of the CCL, <https://www.lrkt.lt/lt/teismo-aktai/nutarimai-ismados-ir-sprendimai/138/y2020>.

¹¹⁴ Kinis, U. The constitutional complaint in the case law of the Constitutional Court of the Republic of Latvia. In *Конституційний контроль і процеси демократичної трансформації у сучасному суспільстві (матеріали міжнародної конференції, присвяченої 20-ій річниці Конституційного Суду України, Київ, 7-8 жовтня 2016 року)*. Київ: ВАІТЕ, 2016, pp. 169-180.

¹¹⁵ ECtHR, decision of 6 November 2003 on admissibility in *Popov and others v Bulgaria*, App. Nos. 48047/99, 48961/99, 50786/99 and 50792/99.

insofar as they established that the grounds for suspension and termination of membership in the Chamber are laid down in the Statute of that Chamber rather than by law.

Accordingly, another aspect of human rights protection, which has been developed in a particularly distinctive way, specifically by the jurisprudential constitution in Lithuania, is the qualitative harmony and sustainability of the Constitution and extranational law. In the area of human rights, the latter aspect mostly follows from the requirement for the Constitutional Court to rely on the European human rights standards because it is so obliged by the Constitution itself - through explicitly and implicitly established interrelated constitutional principles, which determine the openness of the Constitution towards international law, especially insofar it concerns human rights protection, and, accordingly, its openness towards ECHR law. In this respect, the following principles are identified: the principle of respect for international law; the principle of an open, just and harmonious civil society; and the principle of the geopolitical orientation of the state (the latter is grounded in the value-based commonness of Lithuania with Western democratic states and means the membership of Lithuania in the European Union and the North Atlantic Treaty Organization)¹¹⁶. The principle of respect for international law is complemented by the principle of an open, just and harmonious civil society and the principle of the geopolitical orientation of the state, which imply the integration of the State of Lithuania into the community of democratic states, united through respect for inherent human rights.¹¹⁷ All these principles entail the openness of the Constitution to the standards of European human rights protection. However, they also give rise to the obligation to accept them within the national legal framework as the minimum constitutional standards¹¹⁸ and, thus, to take into account extranational law when the provisions of the Constitution are interpreted: it gives rise to the duty of the Constitutional Court to pay regard to the European (extranational) legal context in its interpretations of the provisions of the Constitution (the duty of consistent interpretation). Accordingly, derogations from the obligation to interpret the provisions of the Constitution in harmony with international and EU law may only be constitutionally justifiable in two cases: first, when the Constitution raises higher human rights protection requirements than international law (e. g., as it does in Lithuanian law in the field of social rights, or with regard to the freedom of association, in the case already decided by the court); second, when a harmonized interpretation would fundamentally change the system of values enshrined in the Constitution. The constitutional complaint thus also creates the legal preconditions, through a quantitative increase of human right related issues before the constitutional court, for an objective qualitative development of constitutional jurisprudence as

¹¹⁶ CCL, ruling of 24 January 2014, TAR, 24-01-2014, No 478.

¹¹⁷ See Žalimas (footnote No 3), p. 155.

¹¹⁸ *Ibid.*, pp. 159, 162.

regards the relation between the human rights standards established by the ECHR and those established by the Constitution.

CONCLUSIONS

Following the introduction of the individual complaint in Lithuania on 1 September 2019, only three Council of Europe member states remain, having a constitutional court, but not allowing direct individual access to constitutional justice. Just as the majority of European states, Lithuania has opted for the limited model of individual constitutional complaint: the Constitution only allows for the review of constitutionality of legal provisions based on which a decision has been adopted with regard to a natural or legal person, possibly breaching the constitutional rights and freedoms thereof. The institute of the individual constitutional complaint is also of subsidiary nature, i.e. the application to the Constitutional Court is an extraordinary measure of defense of constitutional rights and freedoms. Direct access to the Constitutional Court is only available following the exhaustion of all effective legal remedies (a final and non-appealable judicial decision must be adopted by an ordinary court prior to application to the Constitutional Court). As the Constitutional Court constitutes a separate judicial system and it does not serve as a superior judicial instance for judgments adopted by courts belonging to the two systems of ordinary courts, judicial decisions are not an object of constitutional control.

Regardless of the limited and subsidiary nature of the institute, the individual constitutional complaint is deemed an effective instrument for the defense of constitutional rights and freedoms. This is required under Article 30 of the Constitution that demands all judicial remedies to be effective. The Constitutional Court has thus emphasized that the establishment of the constitutional institute of an individual constitutional complaint has not been an aim in itself — it aims to create preconditions for effective protection of a person's constitutional rights or freedoms that may have been violated by decisions adopted on the basis of unconstitutional legal acts. The preconditions of effective individual constitutional justice are created by the following elements of the constitutional complaint. The Constitution establishes a broad definition of subjects able to launch a constitutional complaint, constituting all natural persons and all legal persons of private and public law. The object of review of constitutionality are the laws and other acts, which fall within the scope of control of constitutionality carried out by the Constitutional Court: first, both normative (general and abstract norms) and individual acts; second, all acts adopted not only by the Parliament, President, Government, but also by referendum. Effectiveness of the individual constitutional complaint is also ensured through the retroactive *inter partes* effect of the rulings and decisions adopted following the examination of individual constitutional complaints (such rulings and decisions constituting a basis for renewing, according to the procedure established

by law, the proceedings regarding the implementation of the violated constitutional rights or freedoms of the person), and also through the prospective *erga omnes* effect. Accessibility of constitutional justice is guaranteed through the lack of an obligation to be represented before the Constitutional Court by an attorney and non-existence of court fees.

Direct access to the Constitutional Court qualitatively supplements the possibility of indirect application implemented through ordinary courts, initiated either by the ordinary court itself or by the parties to the proceedings. This is also true because unlike in cases of indirect access to the Constitutional Court, the decision to launch an individual constitutional complaint does not rely neither on the objective capacity of the ordinary court to identify potentially unconstitutional normative acts, nor on its subjective willingness to submit such an application. Therefore, although sustainable conclusions regarding the efficiency of the newly established mechanism will be made in the future based *inter alia* on its functioning in practice, it is expected that the individual constitutional complaint will become an effective domestic measure of last resort for the protection of human rights and freedom with regard to practices based on unconstitutional acts.

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Título

El acceso individual a la justicia constitucional en Lituania: el potencial dentro del modelo recientemente establecido del recurso constitucional individual.

Sumario

Introducción. I. El potencial del recurso constitucional individual. I.1. El derecho de los actores políticos a iniciar procedimientos constitucionales. I.2. El derecho de los tribunales ordinarios a iniciar procedimientos

constitucionales. Acceso individual indirecto a la TCL (Tribunal Constitucional de Lituania). II. Acceso individual directo a la justicia constitucional. II.1. Elementos esenciales del modelo lituano del recurso constitucional individual. II.1.1. Los sujetos del recurso constitucional individual. II.1.2. Objeto del recurso constitucional individual. II.1.3. Criterios esenciales de admisibilidad. II.2. Primeras prácticas de admisibilidad. III. Condiciones previas para una mayor protección de los derechos y libertades constitucionales mediante el recurso constitucional individual. III.1. Protección de los derechos o libertades constitucionales individuales. III.2. Protección de los derechos y libertades constitucionales mediante el desarrollo de la jurisprudencia constitucional. Conclusiones

Resumen

El 1º de septiembre de 2019 entraron en vigor las enmiendas a la Constitución de la República de Lituania, que establecen por primera vez en el sistema jurídico lituano el derecho de una persona a recurrir directamente al Tribunal Constitucional. Lituania ha optado por el modelo limitado de recurso constitucional individual. La Constitución sólo permite el examen de la constitucionalidad de los actos sobre la base de las cuales se ha adoptado una decisión individual, lo que posiblemente constituya una violación de los derechos y libertades constitucionales de una persona física o jurídica. En consecuencia, el acceso individual directo al Tribunal Constitucional es una medida extraordinaria de defensa de los derechos y libertades constitucionales y sólo es posible tras el agotamiento de todos los recursos jurídicos efectivos, mientras que las decisiones judiciales adoptadas por los tribunales ordinarios no son objeto de control constitucional. En el artículo se llega a la conclusión de que las condiciones previas de una justicia constitucional individual efectiva se crean mediante los siguientes elementos del recurso de inconstitucionalidad. En primer lugar, una definición amplia de los sujetos capaces de interponer un recurso de inconstitucionalidad, que constituyen las personas físicas y todas las personas jurídicas de derecho privado y público. En segundo lugar, una definición amplia del objeto de la revisión, es decir, todas las leyes y otros actos que entran en el ámbito del control de constitucionalidad efectuado por el Tribunal Constitucional (actos normativos e individuales; todos los actos aprobados no sólo por el Parlamento, el Presidente, el Gobierno, sino también por referéndum). En tercer lugar, el efecto retroactivo *inter partes* de las sentencias adoptadas tras el examen de los recursos constitucionales individuales. En el artículo se llega a la conclusión de que, aunque todavía no se han formulado conclusiones sostenibles sobre la eficacia del mecanismo recientemente establecido, se espera que el recurso constitucional individual se convierta en una medida interna eficaz de último recurso para la protección de los derechos humanos y la libertad con respecto a las prácticas basadas en actos inconstitucionales.

Abstract

On 1 September 2019 amendments to the Constitution of the Republic of Lithuania came into effect, establishing for the first time in the Lithuanian legal system the right of an individual to apply to the Constitutional Court directly. Lithuania has opted for the limited model of individual constitutional complaint. The Constitution only allows for the review of constitutionality of acts based on which an individual decision has been adopted, possibly breaching the constitutional rights and freedoms of a natural or legal person. Accordingly, direct individual access to the Constitutional Court is an extraordinary measure of defense of constitutional rights and freedoms and is only available following the exhaustion of all effective legal remedies, while judicial decisions adopted by ordinary courts are not an object of constitutional control. The article concludes that the preconditions of effective individual constitutional justice are created by the following elements of the constitutional complaint. First, a broad definition of subjects able to launch a constitutional complaint, constituting natural persons and all legal persons of private and public law. Second, a broad definition of the object of review, it being all laws and other acts which fall within the scope of control of constitutionality carried out by the Constitutional Court (normative and individual acts; all acts adopted not only by the Parliament, President, Government, but also by referendum). Third, the retroactive *inter partes* effect of the rulings adopted following the examination of constitutional complaints. The article concludes that although sustainable conclusions regarding the efficiency of the newly established mechanism are yet to be made, it is expected that the individual constitutional complaint will become an effective domestic measure of last resort for the protection of human rights and freedom with regard to practices based on unconstitutional acts.

Palabras clave

Recurso constitucional individual; derecho a recurrir ante el Tribunal Constitucional; derechos humanos y libertades; justicia constitucional.

Keywords

Individual constitutional complaint; the right to apply to the Constitutional Court; human rights and freedoms; constitutional justice.

