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INDIVIDUAL CONSTITUTIONAL COMPLAINTS IN LITHUANIA: AN EFFECTIVE REMEDY TO BE EXHAUSTED BEFORE APPLYING TO THE EUROPEAN COURT OF HUMAN RIGHTS?

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ABSTRACT

Although the significance of an individual constitutional complaint mechanism is mostly associated with the national constitutional protection of human rights, it is a no less significant remedy in the context of the international human rights protection system. Individual constitutional complaints can be considered an effective domestic legal remedy to be exhausted before applying to the European Court of Human Rights (the ECtHR). However, the answer to the question of whether proceedings in a constitutional justice institution fall within the scope of such domestic remedies is very complex and may vary from case to case. Whether it will be required to exhaust an individual constitutional complaint procedure before filing a complaint with the ECtHR will largely depend on the legal system of the state and the scope of the powers of the constitutional justice institution.

This article aims to assess whether the individual constitutional complaint mechanism operating in Lithuania could be recognised an effective remedy to be exhausted before applying to the ECtHR.

KEYWORDS

Individual constitutional complaint, Constitutional Court, European Court of Human Rights

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INTRODUCTION

Ever growing sensitivity to human rights can be observed in Europe. Undoubtedly, this development has been encouraged by the possibility of applying to the European Court of Human Rights (the ECtHR) and the jurisprudence of this court. The domestic response of the states to these tendencies has been to broaden the competence of constitutional courts through strengthening the active participation of individuals.

As of 1 September 2019, the amendments to the Constitution of the Republic of Lithuania[1] consolidating the mechanism of individual constitutional complaints came into force.[2] Thus, discussions regarding the consolidation of individual constitutional complaints in the national legal system, which had continued from the very beginning of the formation of the Lithuanian constitutional justice model, ultimately came to an end. Lithuania has established the model of limited normative constitutional complaints: a person may file an individual constitutional complaint concerning laws and other acts adopted by the Seimas and legal acts of the executive, i.e., legal acts passed exclusively by supreme state authorities. The scope of persons[3] with the right to apply to the Constitutional Court with individual constitutional complaints covers not only natural persons but also legal persons, citizens of the Republic of Lithuania and also citizens of other states, stateless persons, etc.[4]

In the context of the national remedies for human rights protection, individual constitutional complaints are described as an additional remedy that is used where it is not possible to prevent human rights violations by general remedies. Among all powers of constitutional courts, the procedure of individual constitutional complaints differs primarily in that it has the greatest direct effect in the context of a specific

[1] *The Constitution of the Republic of Lithuania*, Official Gazette (1992, no. 33-1014). The English translation of the Constitution of the Republic of Lithuania is available at http://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192.

[2] Article 106 of the Constitution was supplemented with a new paragraph, which stipulates that every person has the right to apply to the Constitutional Court concerning the acts specified in Paragraphs 1 and 2 of Article 105 of the Constitution 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. Article 107 of the Constitution was supplemented with the paragraph providing that, in the case heard subsequent to an application by a person referred to in the fourth paragraph of Article 106 of the Constitution, the decision of the Constitutional Court that a law (or part thereof) of the Republic of Lithuania or another act (or part thereof) of the Seimas (Parliament), an act of the President of the Republic, or an act (or part thereof) of the Government is in conflict with the Constitution constitutes 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.

[3] Before the entry into force of these amendments, applications concerning the constitutionality of legal acts could be filed with the Constitutional Court of the Republic of Lithuania only by a group of not less than 1/5 of all the members of the Seimas, the President of the Republic, the Government of the Republic, courts and the Seimas *in corpore*; thus, these amendments substantially expanded the scope of applicants with the right to initiate the review of the constitutionality of legal acts in the Constitutional Court.

[4] For more on this and other elements of the Lithuanian constitutional complaint model, see Dovilė Pūraitė-Andrikienė, "Advantages and Disadvantages of the Lithuanian Individual Constitutional Complaint Model," *Teisė* 114 (2020); Toma Birmontienė, *et al*., *Konstituciniai ginčai* (Vilnius: Mykolo Romerio universitetas, 2019), 414-435; Ingrida Danėlienė, "Individual access to constitutional justice in Lithuania: the potential within the newly established model of the individual constitutional complaint," *Revista de Derecho Político*, 111 (2021).

violation of human rights, as it is initiated by a person whose rights have possibly been violated. However, the meaning of this institution is not limited to the protection of the individual interest and has a much broader meaning in the national protection of human rights. Decisions adopted in proceedings dealing with individual constitutional complaints go beyond a specific case, as they usually have an *erga omnes* effect: legal acts violating constitutional human rights can be removed from the legal system; an official constitutional doctrine is formed in the field of human rights.

When describing the significance of this institution, it should not be forgotten that it is a no less important remedy in the international system of human rights protection. Constitutional complaints may constitute a remedy to be exhausted before filing a complaint with the ECtHR. Therefore, this institution allows states to remedy possible human rights violations before applying to the ECtHR and helps to overcome the problem of overburdening the Strasbourg Court.

The necessity to reduce the number of applications to the ECtHR was also cited as one of the arguments substantiating the need to establish the institution of individual constitutional complaints in Lithuania.[5] However, the answer to the question of whether proceedings in a constitutional justice institution constitute a remedy to be exhausted before filing a complaint with the ECtHR is very complex and may vary from case to case. Whether an individual application to the Constitutional Court is required by Article 35(1) of the Convention will largely depend on the particular features of the respondent State's legal system and the scope of its Constitutional Court's jurisdiction[6].

Thus, the aim of this article is to assess whether the individual constitutional complaint mechanism operating in Lithuania could be recognised as an effective remedy to be exhausted before application to the ECtHR. To achieve this, the following tasks are undertaken and dealt with: 1) disclosing the relationship between an individual constitutional complaint and an application to the ECtHR; 2) identifying the criteria of the effectiveness of a constitutional complaint as set out in the jurisprudence of the ECtHR; and 3) assessing the compliance of the features of the Lithuanian constitutional complaint procedure with the criteria of the effectiveness of a constitutional complaint as set out in the jurisprudence of the ECtHR.

[5] For more on this, see Dovilė Pūraitė-Andrikienė, "Individual Constitutional Complaint as an Effective Instrument of Protection of Human Rights and Development of Constitutionalism," *Teisė*, 96 (2015): 209.
[6] Certainly, given that Article 35(1) of the European Convention on Human Rights is to be interpreted autonomously, i.e., independent from the domestic law of the States that have ratified the Convention. For more on this, see: The ECtHR, "Practical Guide on Admissibility Criteria" (2022) // https://www.echr.coe.int/documents/admissibility_guide_eng.pdf.

1. INDIVIDUAL CONSTITUTIONAL COMPLAINTS AS AN EFFECTIVE REMEDY AGAINST VIOLATIONS OF THE CONVENTION AND AS A FILTER FOR CASES BEFORE THEY COME TO THE ECtHR

Although the significance of an individual constitutional complaint mechanism is mostly associated with the national constitutional protection of human rights, it is a no less significant measure in the international system of human rights protection. The European Convention on Human Rights (the Convention) also gives individuals the so-called right of an individual complaint. It is sometimes argued that this remedy acts as an individual complaint where national law does not provide for adequate protection of human rights.[7]

As mentioned before, constitutional complaints may be recognised as an effective remedy to be exhausted before applying to the ECtHR. The exhaustion of domestic legal remedies reflects the principle of subsidiarity, according to which international human rights protection is invoked only after the state concerned fails to protect human rights at the national level.[8] Article 35(1) of the Convention provides that "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken".

The purpose of this article of the Convention is to enable the Contracting Parties to prevent or remedy the alleged infringements before they have been brought before the ECtHR. In order to be required to exhaust the remedy in question within the meaning of Article 35(1) of the Convention, the national remedy must comply with the requirements of Article 13 of the Convention. Article 13 provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Thus, the rule of the exhaustion of all domestic legal remedies, consolidated in Article 35(1), relies on the presumption, stipulated in Article 13 of the Convention, that there is an effective domestic legal remedy available in the event of a possible breach of a right enshrined in the Convention.[9]

It is important to emphasize that Article 35(1) of the Convention also has another purpose: to protect the ECtHR from excessive workload. The number of

[7] Arne Marjan Mavčič, "Individual Complaint as a Domestic Remedy to Be Exhausted or Effective within the Meaning of the ECHR: Comparative and Slovenian Aspect" (2011) // https://www.concourts.net/lecture/constitutional%20complaint1.pdf.
[8] Lina Beliūnienė, *Žmogaus teisių stiprinimas konstitucinio skundo institutu* (Vilnius: Justitia, 2014), 25.
[9] See *The judgment of the European Court of Human Rights of 28 July 1999 in the case of Selmouni v. France [GC]* (no. 25803/94); *The judgment of the European Court of Human Rights of 26 October 2000 in the case of Kudła v. Poland [GC]* (no. 30210/96).

applications to the ECtHR has been gradually increasing each year, culminating in some 160,000 cases in 2011.[10] Thus, although the ECtHR has criticized the States in its judgments for the excessive length of court proceedings, the length of its own proceedings has steadily increased due to its excessive workload.

The main remedy to this problem was Protocol No. 14,[11] which brought about several procedural simplifications and, notably, a reduction in the number of judges for decisions of inadmissibility from three to one judge. Under Protocol No. 14, a single judge can reject manifestly inadmissible applications. Protocol No. 14 was quite successful, the ECtHR was able to reduce the number of cases from 160,000 to 90,000 within three years; however, the number of pending cases before this court remains very high.[12] A further reform was brought about by Protocol No. 15, which explicitly refers to the principle of subsidiarity but also reduces the deadline to submit a case from six months to four months after the final national judgment.[13]

However, reforms related to the procedures at the ECtHR alone are not sufficient; therefore, it has been returned to the question of how human rights violations can be settled at the national level rather than by cases being brought to Strasbourg. In this respect, Protocol No.16[14] was adopted, according to which the highest courts of the Member States can request advisory opinions from the ECtHR in the context of a case pending before the national court. The idea is that, by following the advisory opinion, the national court would avoid a later appeal to the ECtHR and a possible condemnation by this court.[15]

In this wider context of national remedies, the European Commission for Democracy through Law (Venice Commission) prepared a study on individual access to constitutional justice,[16] which, *inter alia*, elaborated on the issue of how such national remedies have to be designed in order to live up to the standards of the ECtHR, which would require their exhaustion before cases can be brought before the

[10] The ECtHR, "Annual Report of the European Court of Human Rights (2012)" (2013) // http://www.echr.coe.int/ Documents/Annual_report_2012_ENG.pdf.
[11] *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention* (2004) // https://www.echr.coe.int/Documents/Library_Collection_P14_ETS194E_ENG.pdf.
[12] Schnutz Rudolf Dürr, "Improving Human Rights Protection on the National and the European Levels – Individual Access to Constitutional Courts and the Accession of the European Union to the European Convention on Human Rights" (2016) // https://www.academia.edu/36018234/D%C3%BCrr_Schnutz_Rudolf_Improving_Human_Rights_Protection_on_the_National_and_the_European_Levels_Individual_Access_to_Constitutional_Courts_and_the_Accession_of_the_European_Union_to_the_European_Convention_on_Human_Rights_Homenaje_a_Jean_Claude_Colliard_Tomo_II_Mexico_2016_pp_267_298?email_work_card=title.
[13] *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms* (2013) // https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.
[14] *Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms* (2013) // https://www.echr.coe.int/Documents/Protocol_16_ENG.pdf.
[15] Schnutz Rudolf Dürr, *supra* note 12.
[16] The European Commission for Democracy through Law (Venice Commission), "Study on Individual Access to Constitutional Justice" (2010) // https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e.

Strasbourg Court. Starting with the need to reduce the excessive workload of the ECtHR, the Venice Commission provides advice on what model of individual complaints can be considered an "effective remedy".

In one of its recent rulings (adopted in the case initiated by an individual constitutional complaint), the Constitutional Court of the Republic of Lithuania also ruled that the purpose of individual constitutional complaints is to effectively protect human rights at the national level, *inter alia*, thereby creating the preconditions for reducing the number of petitions to international institutions.[17] Having declared the disputed legal regulation unconstitutional, the Constitutional Court noted that the adoption of this ruling creates the preconditions for avoiding such a violation of Article 6 of the Convention in the future as the ECtHR found in the judgment in *Černius and Rinkevičius v. Lithuania*.[18]

2. THE COMPLIANCE OF THE LITHUANIAN CONSTITUTIONAL COMPLAINT MODEL WITH THE CRITERIA OF THE EFFECTIVENESS OF CONSTITUTIONAL COMPLAINTS AS SET OUT IN THE JURISPRUDENCE OF THE ECtHR

The ECtHR has considered only one case related to the effectiveness of the Lithuanian constitutional complaint mechanism.[19] The case concerned the refusal by the Seimas to grant to the Ancient Baltic religious association *"Romuva"* the status of a State-recognised religious association.[20] The applicant association, *inter alia*,[21] argued that no effective domestic remedies were available to it. In this judgment, the ECtHR was unable to find that lodging an individual constitutional complaint could be considered an effective remedy in the present case, within the meaning of Article 35(1) of the Convention. The ECtHR observed that, under the Lithuanian law, the Constitutional Court may examine an individual complaint only after all remedies have been exhausted and a final court decision has been adopted. The Government submitted that the applicant association ought to have complained to the administrative courts, and, following the delivery of the final decision in the administrative case, it would

[17] *The ruling of the Constitutional Court of the Republic of Lithuania of 19 March 2021*, Official Gazette (2021, no. 5546).
[18] *The judgment of the European Court of Human Rights of 18 June 2020 in the case of Černius and Rinkevičius v. Lithuania* (nos. 73579/17 and 14620/18).
[19] *The judgment of the European Court of Human Rights of 8 June 2021 in the case of Ancient Baltic religious association Romuva v. Lithuania* (no. 48329/19).
[20] The Ministry of Justice concluded that the applicant association met the relevant legal requirements for being granted State recognition. However, the Seimas refused to grant it that status.
[21] Relying on Article 9 of the Convention taken alone and in conjunction with Article 14, the applicant association also complained that, although it met all the legal criteria for being granted State recognition, the members of the Seimas did not rely on the conclusions of the relevant authorities that had examined its activities but based their decision on their own religious convictions and political interests. It argued that it was treated differently from other religious associations and that the difference in treatment was unjustified and discriminatory.

have been able to lodge a constitutional complaint. However, the ECtHR found that it had not been demonstrated that proceedings before the administrative courts constituted an effective remedy in the circumstances of the present case; therefore, the applicant association could not have been expected to initiate such proceedings. The ECtHR observed that the Law on the Constitutional Court does not provide for any possibility to lodge an individual complaint in cases that do not fall within the remit of other courts and in respect of which no other remedies are available.[22]

However, this does not mean that the Lithuanian individual constitutional complaint procedure will not be considered an effective remedy in other cases. The answer to the question of whether proceedings in a constitutional justice institution fall within the scope of such domestic remedies is very complex and may vary from case to case. Even for any given country, a constitutional complaint may be an effective remedy for some violations of the Convention, whereas, according to the case law of the Strasbourg Court, it may not be effective for other violations.[23] Nevertheless, the case law of the ECtHR makes it possible to identify certain criteria that the Strasbourg Court will take into account when deciding on the effectiveness of this national legal remedy.

2.1. THE MODEL OF THE CONSTITUTIONAL COMPLAINT AS A CRITERION OF EFFECTIVENESS WITHIN THE MEANING OF ARTICLE 35(1) OF THE CONVENTION

The main criterion for the classification of constitutional complaint models is the object of constitutional complaints: whether it is possible to challenge the constitutionality of normative and/or individual acts. Although there are more models of individual constitutional complaints (*inter alia*, constitutional revision, *amparo*, constitutional petition[24]), in general, it can be stated that the European region is dominated by two main ones: full constitutional complaint and normative constitutional complaint models. Full constitutional complaints concern the constitutionality of individual acts and any underlying normative acts. Therefore, this model is sometimes identified as the most comprehensive form of human rights protection. Meanwhile, normative constitutional complaints concern the constitutionality of normative acts alone. Summarizing various positions expressed in the doctrine of legal science regarding the effectiveness of these dominant

[22] The fact that the Lithuanian constitutional complaint model does not provide for the exception to the requirement to have exhausted all legal remedies was criticized in another publication of the author of this article, see Dovilė Pūraitė-Andrikienė, *supra* note 4: 61.
[23] The European Commission for Democracy through Law, *supra* note 16.
[24] For more on these models, see the European Commission for Democracy through Law, *supra* note 16.

complaint models, the following advantages of full constitutional complaints are usually emphasized:

1. Wider opportunities for the protection of constitutional human rights.[25]
2. It is argued that only this constitutional complaint model can be considered an effective remedy to be exhausted before applying to the ECtHR; thus, only this type of complaint model can help to reduce the number of cases before this court.[26]

With regard to the normative constitutional complaint model, the following advantages are emphasized:

1. The relationship between the constitutional court and ordinary courts is less likely to be conflict-ridden with normative constitutional complaints than with full individual ones, because the constitutional court does not directly review the application of a normative act by the ordinary court.[27]
2. It helps to avoid overburdening the constitutional court; in this way, priority is given to the quality of the reasoning of decisions.[28]
3. The spread of the normative constitutional complaint model in Eastern and Central Europe is sometimes justified by other arguments. In particular, this choice should be assessed in the context of the political and economic situation in the country, the level of legal culture, and the quality of legal services. There is a view that in a transitional environment, all reforms, especially those as significant as the establishment of a constitutional complaint mechanism, should be moderate and gradual.[29]

In Europe, the full constitutional complaint model has been established in, *inter alia*, Albania, Austria, Bosnia and Herzegovina, the Czech Republic, Spain, Croatia, Slovenia, Slovakia, Northern Macedonia, and Germany. Although it is often emphasized that the model of normative constitutional complaints is mostly established only in Eastern and Central European states,[30] such as Latvia, Poland, Montenegro, Romania, Russia, Ukraine, and Hungary, the Venice Commission also includes Liechtenstein, Luxembourg, Portugal, and France among the countries that have opted for this model.[31]

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[25] The European Commission for Democracy through Law (Venice Commission), "Revised Report on Individual Access to Constitutional Justice" (2020) // https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)001-e.
[26] See Schnutz Rudolf Dürr, *supra* note 12.
[27] The European Commission for Democracy through Law, *supra* note 25.
[28] See Dovilė Pūraitė-Andrikienė, *supra* note 4: 53.
[29] Larysa Nalyvaiko and Olha Chepik-Trehubenko, "Normative Model of the Constitutional Complaint: Domestic and Foreign Practice"; in: Larysa Nalyvaiko and Olha Chepik-Trehubenko, *Normative model of the constitutional complaint domestic and foreign practice* // http://dspace.onua.edu.ua/bitstream/handle/11300/12928/Nalyvaiko%20L.%2C%20Chepik-Trehubenko%20O.%20Normative%20model%20of%20the%20constitutional%20complaint%20domestic%20and%20foreign%20practice%20.pdf?sequence=1&isAllowed=y.
[30] See Schnutz Rudolf Dürr, *supra* note 12.
[31] The European Commission for Democracy through Law, *supra* note 16.

From 2019, in Lithuania, a person may file an individual constitutional complaint concerning the same legal acts (if a decision adopted on the basis of these legal acts has violated the constitutional rights or freedoms of this person) whose constitutionality could so far be contested also by other entities entitled to apply to the Constitutional Court, i.e., concerning the compliance of laws and other acts adopted by the Seimas, the acts of the President of the Republic, and the acts of the Government with the Constitution or any other higher-ranking legal act.[32] Thus, not the model of full constitutional complaints, but the model of normative constitutional complaints has been chosen in Lithuania: i.e., a constitutional complaint may be filed if a state authority institution adopted a decision on the basis of a legal act (possibly) in conflict with the Constitution.

As mentioned before, it is often argued that only full constitutional complaints can be recognised an effective remedy within the meaning of the Convention. According to some authors, if the chosen model of constitutional complaints does not give the right to challenge court decisions, it is not necessary to apply to the constitutional court before applying to the ECtHR.[33] The Guide to Good Practice in Respect of Domestic Remedies (2013)[34] states that one of the criteria for assessing the effectiveness of the constitutional complaints model and deciding whether this national remedy can be an effective one within the meaning of the Convention is whether it relates not only to legislative provisions but also to the decisions of ordinary courts. In the opinion of the Venice Commission, a normative constitutional complaint—directed only against a normative act, but not its application in an individual case—would not be sufficient as a national "filter", because, in practice, human rights violations are most often not the result of the "technically correct" application of an unconstitutional law, which can be challenged by this type of complaint, but frequently they are the result of an unconstitutional individual act, which can be but is not necessarily based on a law that is in conformity with the constitution.[35]

However, a review of the case law of the ECtHR has revealed that claims that only a full constitutional complaint model can be recognised an effective remedy are too categorical. Analysing the model of constitutional complaints in Poland, which has also opted for the concept of the normative complaint, the ECtHR noted that procedures before constitutional courts, to which individuals have direct access under domestic law, constitute a remedy to be exhausted before filing a complaint with the

[32] Art. 106(4) of the Constitution.
[33] Lina Beliūnienė, *supra* note 8, 119.
[34] The Council of Europe's Directorate General Human Rights and Rule of Law, "The Guide to Good Practice in Respect of Domestic remedies" (2013) // https://rm.coe.int/guide-to-good-practice-in-respect-of-domestic-remedies/1680695a9f.
[35] The European Commission for Democracy through Law, *supra* note 16.

ECtHR. However, the Court observed that the Polish model of constitutional complaints is characterised by two important limitations: as to its scope and as to the form of redress it provides.[36]

Analysing the first limitation, i.e., that a constitutional complaint can only be lodged against a statutory provision and not against a judicial or administrative decision as such, the ECtHR noted that such a procedure of constitutional complaints cannot serve as an effective remedy if the alleged violation resulted only from the erroneous application or interpretation of a statutory provision that, in its content, is not unconstitutional. However, the ECtHR noted that constitutional complaints can be considered an effective remedy for the purposes of Article 35(1) of the Convention in a situation in which the alleged violation of the Convention resulted from the application—as a direct legal basis of a decision or act affecting the individual—of a legal provision that can reasonably be questioned as unconstitutional.

The second limitation of constitutional complaints under the Polish law concerns the redress a constitutional complaint provides to the individual. The Court observed that, according to Article 190 of the Constitution, the only direct effect of a judgment of the Constitutional Court is the abolition of the statutory provision that has been found unconstitutional. Such a judgment, however, does not automatically quash an individual decision in relation to the constitutional complaint that was lodged. Article 190(4) of the Constitution grants the author of a successful constitutional complaint the right to request that the procedure in his/her case be reopened or otherwise revised "in a manner and on the basis of principles specified in provisions applicable to the given proceedings".

The ECtHR stated that the Polish constitutional complaint model does not provide immediate redress, as the successful appellant will have to go through another step: to request the reopening of his/her individual case or the quashing of the decision delivered in the case. However, since, in the renewed examination of the case, the authorities will have to disregard the law declared unconstitutional in the proceedings before the Constitutional Court and apply the law—as interpreted in its judgment—to the particular facts of the individual case, the two-step remedy envisaged under the Polish law is capable of providing redress.

Having analysed the above-mentioned limitations of the Polish procedure of constitutional complaints, the Court has observed that it can be recognised as an effective remedy, within the meaning of the Convention, only where: 1) the individual decision, which allegedly violated the Convention, had been adopted in the direct application of an unconstitutional provision of national legislation; and 2) procedural

[36] *The decision of the European Court of Human Rights of 9 October 2003 as to the admissibility of application no. 47414/99 by Szott-Medyńska and others v. Poland*.

regulations applicable for the revision of such a type of individual decisions provide for the reopening of the case or quashing the final decision upon the judgment of the Constitutional Court in which unconstitutionality had been found. Consequently, the exhaustion of the procedure of constitutional complaints should be required under Article 35(1) of the Convention in situations in which both above-mentioned requirements have been met.

The ECtHR similarly assessed the Latvian constitutional complaint model, which is also described as normative.[37] The ECtHR found that the applicants in the case of *Larionovs and Tess v. Latvia* were required to lodge a constitutional complaint before having applied to the Court. The ECtHR noted that, under Section 32(2) of the Law on the Constitutional Court of the Republic of Latvia, a judgment by that court and its interpretation of any legal provision contained therein are binding on all domestic authorities, as well as on both natural and legal persons. The Constitutional Court's ruling, however, does not automatically quash an individual decision in relation to the constitutional complaint that was lodged: a successful appellant has to go through another step—to request the reopening of his/her individual case. However, since, in the renewed examination of the case, the authorities will be bound by the judgment of the Constitutional Court and its interpretation of the impugned provision, the two-step remedy envisaged under the Latvian law can be considered capable of providing redress. Therefore, in this case, the ECtHR acknowledged that the applicants had not exhausted all legal remedies by failing to lodge an individual constitutional complaint.

However, in other cases against Latvia, the ECtHR found that the applicant's complaint was related to the application and interpretation of domestic law. In such circumstances, the ECtHR considered that the applicant need not have exhausted this remedy.[38] Thus, in a state where the constitutional complaint procedure is limited to reviewing the constitutionality of legal acts, applicants will have to apply to the Constitutional Court only if they doubt the compatibility of a provision of the legal act with the Convention.[39] However, this will not be an effective remedy in cases where the applicant complains about the erroneous application or interpretation of a legal act when the legal act is not unconstitutional *per se*.[40]

Therefore, the model of a normative constitutional complaint does not in itself mean that such a procedure will not be considered an effective remedy within the

[37] *The decision of the European Court of Human Rights of 25 November 2014 as to the admissibility of applications nos. 45520/04 and 19363/05 by Larionovs and Tess v. Latvia*.
[38] See *The judgment of the European Court of Human Rights of 24 June 2014 in the case of Petrova v. Latvia (no. 4605/05)*; *The judgment of the European Court of Human Rights of 24 June 2014 in the case of Grišankova and Grišankovs v. Latvia (no. 4605/05)*.
[39] *The judgment of the European Court of Human Rights of 24 June 2014 in the case of Grišankova and Grišankovs v. Latvia (no. 4605/05)*.
[40] *The judgment of the European Court of Human Rights of 24 June 2014 in the case of Petrova v. Latvia (no. 4605/05)*.

meaning of the Convention. In such cases, the ECtHR uses a two-step test, and, if the situation meets the two requirements, the ECtHR may recognise that a normative constitutional complaint may be an effective remedy in a particular case.[41]

The discussed examples lead to the assumption that the ECtHR would similarly assess the normative constitutional complaint in Lithuania, as it can be characterised by the same two limitations as the Polish and Latvian models: as to its scope (it can only be lodged against a statutory provision and not against a judicial or an administrative decision) and as to the form of redress it provides. Article 107 of the Lithuanian Constitution grants the author of a successful constitutional complaint the right to renew the proceedings regarding the implementation of the violated constitutional rights or freedoms of that person. This means that, in the same way as it is in Latvia and Poland, the Lithuanian Constitutional Court's ruling does not automatically quash an individual decision in relation to the lodged constitutional complaint: a successful appellant has to go through another step—to request the reopening of his/her individual case.

It is true that the model of individual constitutional complaints is not the only criterion according to which the ECtHR decides whether this remedy will be recognised as effective. The ECtHR has repeatedly stated that the rule of the exhaustion of remedies is not absolute and cannot be applied automatically; in deciding whether it can be adapted, the circumstances of the particular case must be taken into account.[42]

2.2. THE LEGAL FORCE OF THE DECISIONS OF THE CONSTITUTIONAL COURT AS A CRITERION OF EFFECTIVENESS

For constitutional complaints to be recognised as an effective remedy, the court must be in a position to provide redress through a binding decision in the case. A mere declaratory decision on unconstitutionality will not be sufficient; the complaint must be "effective" in practice as well as in law.[43] For example, when assessing the effectiveness of Poland's constitutional complaint model,[44] the ECtHR took into account the fact that, during the period of two years after the date of the entry into force of the Constitution (i.e., until 17 October 1999), pursuant to the transitional provision of Article 239(1) of the Constitution, the Sejm was competent to "reject", by a two-third majority, a judgment of the Constitutional Court as to the non-

[41] The Council of Europe's Directorate General Human Rights and Rule of Law, *supra* note 34.
[42] *The judgments of the European Court of Human Rights of 16 September 1996 in the case of Akdivar and Others v. Turkey [GC]* (no. 21893/93) and *of 28 July 1999 in the case of Selmouni v. France [GC]* (no. 25803/94).
[43] The European Commission for Democracy through Law, *supra* note 16.
[44] *The decision of the European Court of Human Rights of 9 October 2003 as to the admissibility of application no. 47414/99 by Szott-Medyńska and others v. Poland*.

conformity with the Constitution of statutes adopted before the entry into force of the Constitution. Following the expiry of the two-year transitional period, the judgments of the Constitutional Court are no longer subject to reconsideration by the Sejm.

The ECtHR noted that a judicial remedy whose outcome is subject to discretionary rejection by the national legislative body cannot, in principle, be regarded as effective for purposes of Article 35(1) of the Convention. However, the ECtHR took into account that, in its practice, the Sejm had never used its power to reject the Constitutional Court's judgments delivered in individual cases. Having regard to that practice and to the relatively short period when the Sejm had the power to reject a judgment of the Constitutional Court under the new Constitution, the Court considered that, even if the applicants might have had doubts as to the effectiveness of constitutional complaints, they were not dispensed from employing that remedy.

The ECtHR also takes into account whether individual constitutional complaints have, over time, become a remedy that can be considered capable of providing appropriate redress.[45] If the violation of the Convention right, as well as the Constitution, concerns a positive obligation, the court should be in a position to order the state authorities to take the action they had failed to take in the given case.[46]

According to the Constitution, a law (or part thereof) of the Republic of Lithuania or another act (or part thereof) of the Seimas, an act of the President of the Republic or an act (or part thereof) of the Government may not be applied from the day of the official publication of the decision of the Constitutional Court that the act in question (or part thereof) is in conflict with the Constitution of the Republic of Lithuania.[47] The decisions of the Constitutional Court on the issues assigned to its competence by the Constitution are final and not subject to appeal.[48] According to the Law on the Constitutional Court,[49] the rulings of the Constitutional Court are binding on all state institutions, courts, all enterprises, establishments and organisations, as well as officials and citizens.[50] Thus, in Lithuania, the rulings of the Constitutional Court on the constitutionality of legal acts are final, i.e., they can be overturned only by constitutional amendments.

[45] *The judgment of the European Court of Human Rights of 1 July 2014 in the case of Riđić and Others v. Serbia (nos. 53736/08, 53737/08, 14271/11, 17124/11, 24452/11 and 36515/11)*.
[46] The European Commission for Democracy through Law*, supra* note 16.
[47] Article 107(1).
[48] Article 107(2).
[49] *The Law on the Constitutional Court of the Republic of Lithuania*, Official Gazette (1993, no. 6-120). English translation available at: http://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/193.
[50] Article 72(2).

As it was mentioned before, Article 107 of the Constitution grants the author of a successful constitutional complaint the right to renew the proceedings regarding the implementation of the violated constitutional rights or freedoms of that person. Thus, although Lithuania has the *ex nunc* constitutional review model, the 2019 constitutional amendments *expressis verbis* consolidated the retroactive effect of rulings adopted by the Constitutional Court after examining the individual constitutional complaints of persons.[51]

In developing the doctrine of the finality of its rulings, the Constitutional Court has held that every legal act recognised in conflict with a certain higher-ranking legal act, *inter alia* (and, first of all), with the Constitution, is removed from the Lithuanian legal system for good and may never be applied again. It should also be noted that the power of the ruling of the Constitutional Court to recognise that a legal act or part thereof is unconstitutional may not be overruled by the repeated adoption of a like legal act or part thereof.[52] The constitutional duty arises for the respective law-making subject to declare such a legal act (part thereof) no longer valid or, if it is impossible to do without the legal regulation of the social relationships in question, to change it so that the newly established legal regulation is not in conflict with higher-ranking legal acts, *inter alia* (and, first of all), with the Constitution. As long as this constitutional duty is not carried out, the respective legal act (part thereof) may not be applied under any circumstances. In this respect, the legal force of such a legal act is abolished.[53]

Thus, the legal force of the rulings of the Constitutional Court of Lithuania meets the criterion, set out in the case law of the ECtHR, regarding the finality and bindingness of the decisions of the constitutional court.

2.3. PROCEDURAL REQUIREMENTS AS A CRITERION FOR THE EFFECTIVENESS OF CONSTITUTIONAL COMPLAINTS

The jurisprudence of the ECtHR sets out various procedural requirements, which also determine whether individual constitutional complaints would be recognised as an effective remedy. In addressing this issue, the ECtHR assesses such procedural institutions as the length of the proceedings, the time limit for lodging a complaint, legal representation, and interim measures.

[51] For more on this and other exceptions from the *ex nunc* model, see: Dovilė Pūraitė-Andrikienė, "The Effects of the Rulings of Constitutional Court in Time," *Teisė* 112 (2019).
[52] *Inter alia*, *The ruling of the Constitutional Court of the Republic of Lithuania of 28 March 2006*, Official Gazette (2006, no. 36-1292).
[53] *Inter alia*, *The ruling of the Constitutional Court of the Republic of Lithuania of 6 June 2006*, Official Gazette (2006, no. 36-65-2400).

The length of the proceedings

In assessing whether constitutional complaints will be an effective remedy, the ECtHR takes into account the length of the proceedings.[54] In the case law of the ECtHR, the obligation to organise the judicial system in such a way that it meets the requirements of Article 6(1) of the Convention also applies to constitutional courts.[55] This means that, if the state is preparing to establish the institution of individual constitutional complaints, it must be done in such a way that it does not excessively prolong the entire duration of the proceedings. Thus, the court must have the powers and resources to deal effectively with the additional burden.[56]

The main challenge in the states that have established an individual constitutional complaint procedure is the increased number of applications to the constitutional courts and the workload of these institutions. With an increase in the number of constitutional complaints, the efficiency of constitutional courts may decrease and, at the same time, the duration of the examination of cases may also increase. Thus, national legislatures are trying in various ways to ensure that the constitutional courts have the possibility of not instituting less significant or hopeless proceedings in order to avoid overburdening the court and increasing the length of proceedings. Therefore, the states are setting down different conditions and terms for application to the constitutional courts (filters), which help to reduce the inflow of individual constitutional complaints and to avoid the excessive length of proceedings.

In the states with a mechanism of individual constitutional complaints, the following filters are most common: (1) the requirement that the rights and freedoms of the applicant, but not those of a third person, have been violated by a legal act that is (possibly) in conflict with the constitution; (2) the requirement to have exhausted all other legal remedies; (3) the time limit for filing a constitutional complaint; and (4) the requirement that a lawyer could draw up a complaint in accordance with the prescribed requirements.[57] The Lithuanian model of individual constitutional complaints contains the first three above-mentioned measures. Two of them are prescribed in the Constitution: (1) "person has the right to apply to the Constitutional Court concerning the acts … if a decision adopted on the basis of these acts has violated the constitutional rights or freedoms of the person" and (2) "the person has exhausted all legal remedies".[58] The third measure is established at the level of ordinary law. The Law on the Constitutional Court provides for the time limit

[54] *The judgment of the European Court of Human Rights of 29 October 2015 in the case of Story and Others v. Malta* (no. 56854/13).
[55] See *The decision of the European Court of Human Rights of 2 October 2001 as to the admissibility of application no. 42320/98 by Belinger v. Slovenia*.
[56] The European Commission for Democracy through Law, *supra* note 16.
[57] Dovilė Pūraitė-Andrikienė, *supra* note 4: 59.
[58] Article 106(4).

of four months for filing a constitutional complaint from the day when the final decision of the last instance having heard the case was adopted.[59]

In Lithuania, individuals have used the new possibility of filing individual constitutional complaints quite actively. For example, in 2020, the Constitutional Court received a total of 231 individual constitutional complaints. However, only five individual constitutional complaints (3%) were accepted as admissible for consideration, 151 (83.5 %) were rejected as inadmissible for consideration, and other constitutional complaints were returned to the petitioners.[60] In 2019–2021, the Constitutional Court adopted 10 rulings in cases following constitutional complaints.[61] The first ruling was adopted within approximately 5 months,[62] the subsequent nine rulings were adopted within approximately 7 months,[63] 13 months,[64] 10 months[65] 10 months[66], 10 months,[67] 8 months[68], 11 months[69], 7 months[70], and 8 months[71] respectively. Such a time frame for dealing with complaints cannot be considered excessive. Thus, it can be assumed that it would comply with the requirement regarding the length of the proceedings.

However, the above-mentioned statistics on the admissibility of complaints (only 3% of the complaints were accepted for examination) may cause other doubts about the effectiveness of constitutional complaints in Lithuania: whether the refusal

[59] Art. 65 (2(3)).
[60] The Constitutional Court of the Republic of Lithuania, "The Annual Report of the Constitutional Court for 2020" (2021) // https://www.lrkt.lt/data/public/uploads/2021/04/metinis-2020-web.pdf.
[61] *The ruling of the Constitutional Court of the Republic of Lithuania of 18 March 2020*, Register of Legal Acts (2020, no. 5659); *The ruling of the Constitutional Court of the Republic of Lithuania of 11 September 2020*, Register of Legal Acts (2020, no. 19129); *The ruling of the Constitutional Court of the Republic of Lithuania of 4 March 2021*, Register of Legal Acts (2021, no. 4528); *The ruling of the Constitutional Court of the Republic of Lithuania of 19 March 2021*, Register of Legal Acts (2021, no. 5546); *The ruling of the Constitutional Court of the Republic of Lithuania of 14 April 2021*, Register of Legal Acts (2021, no. 5546); *The ruling of the Constitutional Court of the Republic of Lithuania of 16 July 2021*, Register of Legal Acts (2021, no. 16058); *The ruling of the Constitutional Court of the Republic of Lithuania of 28 September 2021*, Register of Legal Acts (2021, no. 20273); *The ruling of the Constitutional Court of the Republic of Lithuania of 9 November 2021*, Register of Legal Acts (2021, no. 23240); *The ruling of the Constitutional Court of the Republic of Lithuania of 22 December 2021*, Register of Legal Acts (2021, no. 26640); *The ruling of the Constitutional Court of the Republic of Lithuania of 30 December 2021*, Register of Legal Acts (2021, no. 27683).
[62] The petition accepted for consideration by the Constitutional Court's decision (no. KT38-A-S27/2019) of 24 October 2019.
[63] The petition accepted upon the ordinance (no. 2A-57) of the President of the Constitutional Court of 14 February 2020.
[64] The petitions accepted for consideration by the Constitutional Court's decisions of 16 January 2020 (no. KT6-A-S6/2020) and 20 January 2020 (no. KT7-A-S7/2020).
[65] The petition accepted for consideration by the Constitutional Court's decision (no. KT93-A-S88/2020) of 20 May 2020.
[66] The petition accepted upon ordinance (no. 2A-136) of the President of the Constitutional Court of 1 June 2020.
[67] The petition accepted for consideration by the Constitutional Court's decision (no KT150-A-S139/2020) of 27 August 2020.
[68] The petition accepted for consideration by the Constitutional Court's decision (no KT25-A-S25/2021) of 4 February 2021.
[69] The petition accepted for consideration by the Constitutional Court's decision (no KT216-A-S198/2020) of 17 December 2020.
[70] The petition accepted for consideration by the Constitutional Court's decision (no KT82-A-S75/2021) of 27 May 2021.
[71] The petition accepted for consideration by the Constitutional Court's decision (KT57-A-S54/2021) of 14 April 2021.

to examine constitutional complaints is not excessively formalistic. In 2020, the ECtHR rendered an important judgment concerning the admissibility of a request before the Portuguese Constitutional Court (PCC). The ECtHR found a violation of the right to an effective remedy because the dismissal of claims before the PCC was deemed excessively formalistic.[72] The ECtHR considered that the reasoning of the PCC disproportionately limited the applicant's right to have their constitutional actions examined on the merits. It, therefore, found a breach of the right to an effective remedy because of an excessively formalistic interpretation of this principle.

Time limits for filing a constitutional complaint

Such time limits should be reasonable and permit the preparation of the complaint by the individual himself/herself or by a lawyer. The constitutional court should also be able to extend deadlines only in exceptional cases.[73]

Taking into account the need to ensure the stability of the legal system and the principle of legal certainty, unlike applications by other entities, the constitutional complaints of natural and legal persons can usually be filed only within a limited period of time. The Law on the Constitutional Court provides for the time limit of four months for filing a constitutional complaint from the day when the final decision of the last instance having heard the case was adopted.[74] The four-month time limit chosen for filing a constitutional complaint is in line with the recommendation of the Venice Commission and is not particularly different in the context of neighbouring states.[75] Furthermore, Lithuania has also implemented the recommendation of the Venice Commission that the constitutional court should be able to extend the time limit in cases where applicants have missed it due to reasons not related to their fault.[76] The Law on the Constitutional Court provides that a person has the right to request the renewal of the time limit established for filing a petition with the Constitutional Court if this time limit has been missed due to important reasons.[77] Thus, the Lithuanian constitutional complaint model meets the requirements of the said criteria.

[72] *The judgment of the European Court of Human Rights of 31 March 2020 in the case of Dos Santos Calado and Others v. Portugal* (nos. 55997/14, 68143/16, 78841/16 and 3706/17).
[73] The European Commission for Democracy through Law, *supra* note 16.
[74] Article 65 (2[3]).
[75] Poland has a time limit of three months from the adoption of the final decision at the last instance that decided the case, while Latvia has opted for a bit longer period of six months from the entry into force of the decision adopted by the last institution. However, some European states have fairly shorter respective time limits: in Slovakia, a constitutional complaint may be filed within two months from the date of the final decision; in Croatia, a constitutional complaint may be submitted within 30 days from the day the decision was received.
[76] The European Commission for Democracy through Law, *supra* note 16.
[77] Article 65(4) of the Law on the Constitutional Court.

Legal representation and court fees

In the opinion of the Venice Commission, legal representation is intended to help the applicant and to raise the quality of complaints. However, legal representation has strong financial implications. Therefore, especially if legal representation is mandatory, the denial of financial assistance or free legal aid could amount to the denial of effective access to a court. Thus, free legal aid should be provided to applicants if their material situation so requires in order to ensure their access to constitutional justice. Concerning fees, the Venice Commission recommends that they should not be excessive and only be used to deter abusive applications, and the financial situation of the applicant should be taken into account when fixing them. The court must be accessible: requirements regarding the court fees or legal representation must be reasonable.[78]

The Lithuanian model of constitutional complaints fully meets these requirements because Lithuania has not introduced mandatory legal representation, nor has it imposed any court fees for filing a constitutional complaint. It has been decided that such measures would excessively restrict the possibilities of the persons referred to in the Paragraph 4 of Article 106 of the Constitution to defend their violated rights and freedoms before the Constitutional Court.[79]

Interim measures

The ECtHR has held that, when the consequences of measures would be irreversible, a constitutional court should be in a position to prevent the execution of such measures. [80] The Venice Commission emphasises that suspending the implementation of a challenged, normative and/or individual, act is a necessary extension of the principle of ensuring that individuals are protected from suffering irreparable damage. It is the constitutional court that must decide whether to impose such a suspension.[81]

The Lithuanian constitutional justice model does not provide for the possibility for Constitutional Court to suspend a challenged normative act while examining individual constitutional complaints. [82] However, Article 67^2 of the Law on the Constitutional Court provides for the possibility of suspending the execution of the

[78] The European Commission for Democracy through Law, *supra* note 16.
[79] For more on this, see Dovilė Pūraitė-Andrikienė, *supra* note 4, 63–65.
[80] *The judgment of the European Court of Human Rights of 5 February 2002 in the case of Čonka v. Belgium* (no. 51564/99).
[81] The European Commission for Democracy through Law, *supra* note 16.
[82] In Lithuania, the challenged normative act may be suspended only in cases where the Constitutional Court receives a submission from the President of the Republic of Lithuania to investigate whether an act of the Government is in compliance with the Constitution and laws, or where it receives a resolution of the Parliament wherein it is requested to investigate whether a law of the Republic of Lithuania or another act adopted by the Parliament is in compliance with the Constitution, or whether a decree of the President of the Republic or an act of the Government is in compliance with the Constitution and laws (Article 26 of the Law on the Constitutional Court).

decision of the Court in cases where a petition is filled by a person referred to in the Paragraph 4 of Article 106 of the Constitution. The Constitutional Court has held that Article 67^2 of the Law on the Constitutional Court establishes the general rule that acceptance of a petition of a person specified in Paragraph 4 of Article 106 of the Constitution in the Constitutional Court does not suspend the execution of the decision of the court, and the suspension of the execution of the decision of the court, enshrined in this article, is an exception to this general rule, which may be applied by a reasoned decision of the Constitutional Court only in cases where the execution of the decision of the court would irreparably violate the applicant's constitutional rights or freedoms or where this is necessary for the public interest. In this decision, the Constitutional Court noted that the imposition of a custodial sentence was not a ground for recognising that the constitutional rights or freedoms of the petitioner would be irreparably violated in the execution of such a decision of a court.[83]

2.4. THE INTERPRETATION OF CONSTITUTIONAL HUMAN RIGHTS IN A "CONVENTION-FRIENDLY" MANNER

The Convention has been labelled as the "constitutional instrument of European public order". This functionalist utterance has inspired assertions that the ECtHR Court should become, or already is, a "European constitutional court".[84] However, the Convention is a legal order different from a constitution (despite some similarities).[85] A constitution is integral; it has no gaps in the (Kelsenian) sense that, for the purposes of constitutional review, there can be no areas where legality rests and it cannot be tested whether certain act or decision is in compliance with the constitution. The Convention, however, has gaps. It focuses on one, even if wide, segment of social reality: human rights. Other segments are outside its ambit.[86] However, this in no way abates the possibilities of the Strasbourg Court's positive impact on the quality of the law and, consequently, its role as guardian and promoter of the rule of law.[87]

National constitutional courts have a special relationship with the ECtHR: as the guardians of the respective national constitutions, they are able to interpret the national constitutions in a "Convention-friendly" manner and, in this way, to domestically implement the standards of the ECHR. The ability on the part of

[83] *The decision of the Constitutional Court of the Republic of Lithuania of 24 October 2019* (no. KT38-A-S27/2019).
[84] For more on this, see Geir Ulfstein, "The European Court of Human Rights as a Constitutional Court?" *PluriCourts Research* 14 (2014): 8 // https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419459.
[85] Egidijus Kūris, "On the Rule of Law and the Quality of the Law: Reflections of the Constitutional-Turned-International Judge", *Teoría y realidad constitucional* 42 (2018): 131// DOI:10.5944/trc.42.2018.23654.
[86] *Ibid*.: 133.
[87] *Ibid*.: 134.

constitutional courts to take into consideration the Convention (as interpreted by the ECtHR) also helps to minimize the risk of a direct constitutional-conventional conflict.[88] However, typically, constitutional courts apply the human rights catalogue of their own respective constitution as the standard of review. These rights can differ not only in their formulation, but also in the way how limitations are expressed. Even if the national rights and the Convention rights seem to be close textually, the interpretation that is given to them by the national constitutional court and the ECtHR can differ substantially.[89]

Therefore, if individual complaints are to serve also as an effective national remedy filtering cases before they are brought before the ECtHR, the national rights need to be interpreted in a "Convention-friendly" manner. This does not mean that the interpretation of these rights has to be the same for both courts. The national complaint can be wider and can confer more freedom on the individual. However, the national interpretation should not be narrower than the European one. If the scope of the national right were considerably narrower than the Convention right, the ECtHR would probably find that this remedy is not effective and would accept complaints without insisting on the exhaustion of this remedy.[90]

This is a requirement of a different (material) nature that must be implemented in order for an individual constitutional complaint to be recognised an effective remedy for the purposes of Article 35(1) of the Convention.

In assessing whether the jurisprudence of the Lithuanian Constitutional Court can be described as "Convention-friendly", it should first be noted that the legal system of Lithuania is based on the principle of the supremacy of the Constitution. However, the Constitution itself enshrines the principles that presuppose the openness of the Constitution to international law, especially in the field of the protection of human rights, and, thus, openness to the law of the Convention. These principles include 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.[91]

The special nature of the Convention was emphasized by the Constitutional Court already in 1995 in its conclusion on the constitutionality of certain of its provisions.[92] The Constitutional Court noted that the Convention is a special source

[88] Ausra Padskocimaite, "Constitutional Courts and (Non)Execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania" (2017) // https://www.zaoerv.de/77_2017/77_2017_3_a_651_684.pdf.
[89] See Schnutz Rudolf Dürr, *supra* note 12.
[90] *Ibid.*
[91] Dainius Žalimas, "Europos Žmogaus Teisių Teismo praktikos įtaka Lietuvos Respublikos Konstitucinio Teismo jurisprudencijai" (2016) // https://lrkt.lt/data/public/uploads/2017/09/pranesimai_zalimas_2016-m.pdf.
[92] *The conclusion of the Constitutional Court of the Republic of Lithuania of 24 January 1995*, Official Gazette (1995, no. 9-19924).

of international law, the purpose of which is different from that of many other acts of international law. This purpose is universal, i.e., to strive for the universal and effective recognition of the rights declared in the Universal Declaration of Human Rights and to ensure that they are observed while protecting and further implementing human rights and fundamental freedoms. With respect to its purpose, the Convention performs the same function as the constitutional guarantees for human rights, because the Constitution establishes guarantees in a state and the Convention consolidates them on an international scale. Later, in 2000, the Constitutional Court held (and later reiterated many times in its jurisprudence) that the jurisprudence of the ECtHR, as a source of legal interpretation, is important for the interpretation and application of the Lithuanian law.[93]

The Constitutional Court has relied on the Convention or the jurisprudence of the ECtHR in the vast majority of constitutional justice cases concerning the right to a fair trial, the protection of property, freedom of expression and information, the right to private and family life, and the right to free elections.[94] There are a number of significant constitutional justice cases in the field of human rights in which constitutional human rights have been interpreted in a particularly "Convention-friendly" manner.

In its ruling of 28 September 2011,[95] the Constitutional Court stated that the constitutional concept of family must also be interpreted by taking account of the international obligations of the State of Lithuania that were undertaken after it had ratified the Convention. In this case, the Constitutional Court took into account the fact that, in the jurisprudence of the ECtHR, the concept of family life is not confined to families formed on the basis of marriage and that it may cover other *de facto* relationships; the Constitutional Court also took into account that the ECtHR had held more than once that other types of the relationship of living together are also defended in the sense of Article 8 of the Convention, as those that are characterised by the permanence of the relationship between persons, the character of assumed obligations, common children, etc. The Constitutional Court, taking into account the case law of the ECtHR, formulated the conclusion that the constitutional concept of family is based on mutual responsibility between family members, understanding, emotional affection, assistance and similar relationships, as well as on the voluntary determination to take on certain rights and responsibilities, i.e., the content of

[93] *The ruling of the Constitutional Court of the Republic of Lithuania of 8 May 2000*, Official Gazette (2000, no. 9- 39-1105).
[94] Dainius Žalimas, *supra note* 91.
[95] *The ruling of the Constitutional Court of the Republic of Lithuania of 28 September 2011*, Official Gazette (2011, no. 39-1105).

relationships, whereas the form of expression of these relationships has no essential significance for the constitutional concept of family.

In 2019, the Constitutional Court was called to consider certain provisions of the Law on the Legal Status of Aliens, which restricted the right of residence to married or registered same-sex partners (national law explicitly forbids same-sex marriage and does not provide for the possibility of a registered partnership). The Court ruled that, in a democratic state under the rule of law, the attitudes or stereotypes prevailing among the majority of the members of society in a certain period of time may not serve as constitutionally justifiable grounds for discriminating against persons solely based on their gender identity and/or sexual orientation, and, for instance, limiting the right to the protection of private and family life or the protection of relationships with other family members.[96] The arguments of the Constitutional Court's ruling are based on a very systematic analysis of the case law of the ECtHR: the ruling mentions probably all the essential cases handled by this court in the area in question.

The Constitutional Court relies on the provisions of the Convention and the jurisprudence of the ECtHR even when adjudicating impeachment cases. In 2017, the Constitutional Court examined and assessed the actions of the Seimas member Kęstutis Pūkas by which that Seimas member had degraded the dignity of the persons holding the positions of his secretary assistants and that of the persons applying for these positions, interfered with their private life and discriminated against them. In the conclusion of 19 December 2017, the Court noted that sexual harassment amounted to a gross violation of the Constitution and breached the oath of a member of the Parliament. It was held that the actions of the Seimas member could be regarded as harassment based on gender in general and sexual harassment in particular. The Court noted that one of the forms of discrimination (including the degrading of human dignity), prohibited under Article 29 of the Constitution, is harassment based on gender and sexual harassment. In this conclusion, the Constitutional Court took into account that the obligation to protect and defend human dignity and the inviolability of private life and the prohibition of discrimination based on sex or social status are enshrined in numerous international legal acts on the protection of human rights, *inter alia*; the Convention, Article 3 whereof, *inter alia*, provides that no one shall be subjected to degrading treatment; Article 8 thereof states that everyone has the right to respect for his/her private and family life; and Article 14 thereof prohibits discrimination on any ground such as sex, race, colour,

[96] *The ruling of the Constitutional Court of the Republic of Lithuania of 11 January 2019*, Register of Legal Acts (2019, no. 439).

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or another status.[97]

Although these constitutional justice cases suggest that the jurisprudence of the Constitutional Court can be described as extremely favourable towards the Convention, the supremacy of the Constitution and, in particular, the system of values enshrined in it, determine the limits of openness to the Convention. It is no coincidence that, when talking about the ECtHR, most constitutional courts recognise that this is one of their main sources of inspiration, but many of them refuse to comply unconditionally with its interpretation. This tension is also well reflected by the so-called collisions of jurisprudence, where national constitutional courts and supranational courts give a different assessment of the same issues, as in the case of *Paksas v. Lithuania*.[98]

In its ruling of 25 May 2004,[99] the Lithuanian Constitutional Court formulated the official constitutional doctrine on the prohibition for a person removed from office through impeachment proceedings to hold office that requires taking an oath; however, the ECtHR found that the permanent and irreversible prohibition preventing a person who was removed from office through impeachment proceedings for a gross violation of the Constitution and a breach of the oath from standing for election to the Seimas is disproportionate and in violation of the right to stand for election to the legislative authority under Article 3 of Protocol No. 1 to the Convention.

Thus, the judgment of the ECtHR in the case of *Paksas v. Lithuania* revealed the incompatibility of the provisions of the Constitution and the Convention. In its ruling of 5 September 2012,[100] the Constitutional Court pointed out that, *inter alia*, the judgment of the ECtHR in itself may not serve as a constitutional basis for the reinterpretation (correction) of the official constitutional doctrine if such reinterpretation, in the absence of the respective amendments to the Constitution, changes the overall constitutional regulation in essence, violates the system of the values consolidated in the Constitution, and diminishes the guarantees for the protection of the supremacy of the Constitution in the legal system. The Constitutional Court held that the constitutional institutions of impeachment, the oath, and electoral rights are closely interrelated and integrated; the change of any element of these institutions would result in the change of the content of other related institutions and in the system of values entrenched through these constitutional

[97] *The conclusion of the Constitutional Court of the Republic of Lithuania of 19 December 2017*, Register of Legal Acts (2017, no. 20413).
[98] *The judgment of the European Court of Human Rights of 6 January 2011 in the case of Paksas v. Lithuania [GC]* (no. 34932/04).
[99] *The ruling of the Constitutional Court of the Republic of Lithuania of 25 May 2004*, Official Gazette (2004, no. 85-3094).
[100] *The ruling of the Constitutional Court of the Republic of Lithuania of 5 September 2012*, Official Gazette (2012, no. 105-5330).

institutions. The Constitutional Court ruled that it stems from the principle of the supremacy of the Constitution that the sole way to remove the said incompatibility between the provisions of the Constitution and the Convention is to adopt the necessary amendments to the Constitution. However, these amendments were adopted only on 21 April 2020.

Nevertheless, in the opinion of the author of this article, this collision of jurisprudence does not deny the extremely favourable attitude of the Constitutional Court towards the implementation of the ECtHR judgments; thus, the jurisprudence of the Constitutional Court can be described as "Convention-friendly". This is confirmed by the fact that, in its ruling of 5 September 2012, the Constitutional Court, revealing the limits of the openness of the Constitution to the Convention, emphasised that the constitutional principle of respect for international law determines the duty of the Republic of Lithuania to remove the incompatibility of the provisions of the Constitution with the Convention and to adopt the relevant amendments to the Constitution.

CONCLUSIONS

Although the significance of an individual constitutional complaint mechanism is mostly associated with the national constitutional protection of human rights, it is a no less significant remedy in the international system of human rights protection. Individual constitutional complaints can be considered an effective remedy to be exhausted before applying to the ECtHR. This enables the states to address human rights violations at the national level and eases the burden of the caseload in the ECtHR. However, the answer to the question of whether proceedings in a constitutional justice institution fall within the scope of such domestic remedies is very complex and may vary from case to case.

The normative constitutional complaint model does not in itself mean that such a procedure will not be considered an effective remedy within the meaning of Article 35(1) of the Convention. In such cases, the ECtHR uses a two-step test, and, if the situation meets the two requirements, the ECtHR may recognise that normative constitutional complaints may be an effective remedy in a particular case. The model of individual constitutional complaints is not the only criterion according to which the ECtHR decides whether the procedure of constitutional complaints will be recognised as effective. When deciding whether it is necessary to exhaust this remedy before filing a complaint with the ECtHR, this Court also takes into account the following: 1) the legal force of the decision of the constitutional court; 2) various procedural

requirements for the institution of constitutional complaints; and 3) whether the constitutional court interprets constitutional rights in a "Convention-friendly" manner.

The Lithuanian constitutional complaint procedure could be recognised as an effective remedy within the meaning of Article 35(1) of the Convention where the individual decision, which possibly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; however, this will not be an effective remedy in cases where the applicant complains about the erroneous application or interpretation of a legal act, when the legal act is not unconstitutional *per se.* Although the ruling of the Lithuanian Constitutional Court does not automatically quash an individual decision in relation to the lodged constitutional complaint, Article 107 of the Constitution grants the author of a successful constitutional complaint the right to renew the proceedings regarding the implementation of the violated constitutional rights or freedoms of that person. This two-step remedy can be considered capable of providing redress. The Lithuanian constitutional complaint model meets the requirements of the finality and bindingness of the decisions of the Constitutional Court, as well as various procedural requirements set out in the jurisprudence of the ECtHR. In general, it can also be stated that the Lithuanian Constitutional Court interprets constitutional rights in a "Convention-friendly" manner.

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