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Proceedings

TABLE OF CONTENTS

FIRST WORKING SESSION

presided by Mr Aivars ENDZINŠ,
Acting Chairman of the Constitutional Court of Latvia

a. Human Rights protection with the help of the individual complaint
by Mr Arne MAVCIC

b. The possibility of reviewing individual complaints at the Constitutional Court of the Republic of Latvia
by Mr Româns APSÎTIS

a. HUMAN RIGHTS PROTECTION WITH THE HELP OF THE INDIVIDUAL COMPLAINT

by Mr Arne MAVCIC, Constitutional Court of Slovenia, Ljubljana

I. Individual as an Applicant Before the Constitutional Court

The proceedings before the Constitutional Court have the nature of proposed proceedings (*juridiccion voluntaria*). In principle, the Constitutional Court cannot initiate the proceedings itself; as a rule, proceedings before the Constitutional Court are based on (restricted to) the corresponding application lodged by a special, duly qualified (privileged) constitutional institution (the so-called legitimate petitioners). Initiation of constitutional review proceedings on the own initiative of the Constitutional Court (*ex officio*) is quite rare. Still it may most often be traced to some of the constitutional review systems of Eastern Europe; it is indeed strictly preserved in Croatia and in Slovenia.[1] Elsewhere, *ex officio* proceedings are not as frequent. The Austrian Constitutional Court, for example, may on its own initiative begin proceedings for the constitutional review of a statute or a regulation only if it refers to a prejudicial question under proceedings before the respective Constitutional Court. All the above cases may be referred to as objective forms of constitutional review.

On the other hand, some constitutional review systems also allow for the private individual's access to the Constitutional Court (concerning abstract as well as specific review), based on constitutional complaint, or on *actio popularis* or on other forms of constitutional rights protection. This involves the so-called subjective constitutional review, violation of individuals' rights and protection of individuals' rights against the State (in particular against the Legislature). In those states with diffuse constitutional review and in some states with concentrated constitutional review the individual citizen is offered the possibility of requesting the constitutional review of statutes, administrative measures or judgments in special proceedings. Only after a complaint has been lodged will the Constitutional Court begin proceedings. Even then, as a rule, the complainant may withdraw his/her complaint in order to terminate the respective proceedings. The individual's standing as complainant before the Constitutional Court has been influenced by extensive interpretation of provisions relating to the constitutional complaint, as well as by ever more extensive interpretation of the provisions relating to the specific review.[2] In some systems the individual's access to Constitutional Courts has become so widespread that it already threatens the Constitutional Court's functional capacity.[3] Therefore, the Legislature is trying to find some way for Constitutional Courts to eliminate less important or futile proceedings (e.g. restriction of abstract review with standing requirements). All these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With the increase of the number of complaints the percentage of their efficiency decreases. Nevertheless, citizens should have many

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[1] Paragraph 2 of Article 15 of the Croatian Constitutional Court Act or in Article 39, Article 58 and Paragraph 4 of Article 61 of the Slovenian Constitutional Court Act.

[2] USA, Switzerland, Greece, Italy.

[3] Germany.

opportunities to apply for protection of their constitutional rights. France is a specific exception among these systems, where private individuals have no access to the Constitutional Council, except with reference to elections. In France, the protection of individuals' rights is, however, the task of the Conseil d'Etat acting on the basis of complaints against administrative acts.

II. Bodies Empowered for Human Rights Protection and Forms of Proceedings

The petition of an affected individual whose constitutional rights are claimed to have been violated is generally the basis of an appropriate procedure of protection in which protection of rights by the Constitutional Court is only one of a number of legal remedies for protection. Even the bodies intended to provide protection are different, depending on the specific system in question.

. Basic rights may be protected in **regular Court proceedings**.

a) Some legal systems provide protection of rights predominantly in proceedings before ordinary courts (general courts); for the most part these are States which have also adopted the so-called diffuse or American model of judicial review.[4]

The following are specific forms of protection of rights by the regular Courts:

b) *Habeas corpus* procedure i.e. the protection from unjustified deprivation of liberty; an appropriate application is lodged with the regular Court having such jurisdiction. Such proceedings are characterised by speed, simplicity and openness.[5]

c) *Habeas data*, which is a sub-form of *habeas corpus* and was introduced in Brazil with the Constitution of 1988. It is a constitutional guarantee of a personal decision about information, in essence the protection of personal data.

d) Further proceedings are recognised mainly by states which have adopted the American model of judicial review. [6]

- the *writ of mandamus*, whereby it is possible to annul a mistake of a lower Court by order of a higher Court;

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[4] USA, Barbados, Guyana, Jamaica, Trinidad and Tobago, Iceland, Great Britain, Ireland, The Netherlands, Denmark, Sweden, Norway, Finland, Greece, Japan and Australia.

[5] Habeas corpus is mainly used in the USA, Canada, Mexico, Cuba, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Colombia, Argentina, Brazil, Ecuador, Nicaragua, Panama, Paraguay, Peru, Bolivia, Chile, Uruguay and Venezuela as well as in the following Argentinean provinces: Chaco, Neuquen and Formosa; in Africa: Sierra Leone, Ghana, Nigeria, Uganda, Kenya, Tanzania, Malawi, Mauritius, Zambia, Zimbabwe, Botswana, Lesotho and Swazi; in Asia: Pakistan, India, Nepal, Sri Lanka, Bangladesh, Singapore, Malaysia, Indonesia, Philippines, Taiwan and Hong Kong.

[6] USA; in Africa: Sierra Leone, Ghana, Nigeria, Uganda, Kenya, Tanzania, Malawi, Mauritius, Zambia, Zimbabwe, Botswana, Lesotho and Swazi; in Asia: India, Nepal, Bangladesh, Sri Lanka, Philippines.

- prohibition, preventing the higher Court from usurping the jurisdiction of a lower Court;

- the *writ of certiorari*, as the right of a higher Court to resolve a case from the jurisdiction of a lower Court;

- *quo-warranto* preventing a specific person from performing a function of a public nature which she/he has usurped.

e) *Respondeat superior* is a compensation claim by an individual against the State.[7]

2. A specific form of protection of rights, which is reminiscent of constitutional complaint, is the so-called **amparo**. This is a universal and a traditional form of human rights' protection in the Hispanophone legal system: the protection of an individual from violations of constitutional rights by government acts of all categories. In the main, the Supreme Courts of the State in question are responsible for this form of protection. The aim of such proceedings is to restore the violated right to the State prior to its violation. It is also a characteristically fast procedure. Mexico is the classic *amparo* state. It is followed by many Central and South American States.[8]

3. **Subsidiary amparo** is still more similar to a constitutional complaint. This is a particular sub-species of *amparo*, in that the procedure takes place before the Constitutional Court.[9] This form of protection is also called *accion de tutela*. Colombian *accion de tutela* is comparable to the constitutional complaint. It was introduced by the Colombian Constitution of 1991. It is characterised by the fact that the circle of protected constitutional rights is explicitly defined. It is possible to annul legal or administrative acts (in addition to *actio popularis* and proceedings of *habeas corpus* in Colombia).

4. **Brazil introduced a number of specific legal remedies** for the protection of human rights in its Constitution of 1988, including:

- *mandado de seguranca*. A wider form of protection for which the Supreme Court is competent, for the protection of those rights not covered by *habeas corpus*;

- *mandado de injuncao*, a special individual complaint for a case of negligence of the Legislature.

5. **Chile** introduced a special modified version of **amparo**, the so-called *recurso de proteccion* in the Constitution of 1980.

6. An ***actio popularis*** may, equally, be lodged by an individual, generally without restrictions.[10] It is a special, individual legal remedy for the judicial protection of rights,

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[7] USA and on the American model, also Taiwan.

[8] Guatemala, El Salvador, Nicaragua, Costa Rica, Honduras, Panama, Colombia, Cuba, Haiti, Dominican Republic, Ecuador, Peru, Bolivia, Paraguay, Argentina, Uruguay, Venezuela and Seychelles.

[9] Spain, Colombia.

[10] The exceptions are Slovenia and Hungary, where it is restricted by demonstration of standing by the complainant.

although intended for the protection of fundamental rights in the public interest (while a constitutional complaint is lodged in the interest of the individual). An *actio popularis* is normally directed against a general act (usually statute) which is considered to have violated a constitutional right. The Constitutional Court is generally the competent body for reaching a decision, which deals with the disputed act in the sense of an abstract review of rules. *Actio popularis* is less common in Europe.[11] In Israel the *actio popularis* is common in cases arising within Israel proper, the right to standing is decided mostly by the Court's willingness to grant it. It is most extensive in Central and South America.[12] *Actio popularis* is a relatively rare approach in Africa[13] while in Asia, *actio popularis* is only recognised in Japan, and only in electoral matters (as people's action or objective action) and in Iran (complaint before the Court of Administrative Justice).

7. A specific group of systems of constitutional law guarantees the individual only an **indirect protection**, such that the individual does not have direct access to the Constitutional Court or other body of constitutional review. These are systems that consider the protection of the rights of the individual are satisfied through:

- abstract review of rules ;[14]
- specific (concrete) review of rules;[15] or
- preventative abstract review of rules.[16]

III. Constitutional Complaint and its Extent in the World

A constitutional complaint is a specific subsidiary legal remedy against the violation of constitutional rights, primarily by individual acts of government bodies, which enables a subject, who believes that his/her rights have been affected, to have his/her case heard and a decision made by a Court authorised to provide constitutional review of disputed acts. Generally, the impugnment refers to individual acts (all administrative and judicial acts), in contrast to the *actio popularis*, although it may also indirectly[17] or even directly[18] refer to a statute.

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[11] Bavaria - although in other German provinces and on a federal level there is no *actio popularis*; Hungary, Slovenia, Croatia, Liechtenstein, partly Czech Republic, Macedonia, Malta and FRY and within its framework, Montenegro.

[12] Costa Rica, El Salvador, Panama, Colombia, Venezuela, Brazil, Peru, Paraguay, Argentina. Argentina is an interesting example, where there is no *actio popularis* on a federal level, but individual provinces have introduced it: Buenos Aires, La Rioja, Entre Rios, Rio Negro, Chaco, Nequen and Santiago del Estero.

[13] Benin, Congo, Gabon, Burkina Faso, Ghana, Niger, Sierra Leone - according to its 1991 Constitution.

[14] Poland, Belarus, Cambodia, Bulgaria, Italy, Belgium, Latvia.

[15] Bulgaria, Kazahstan, Bosnia, Italy, Azerbaijan, Estonia, Lithuania, Yakutia.

[16] France.

[17] Slovenia, Spain.

[18] Germany.

Is constitutional appeal a right? The Slovenian Constitutional Court has taken the view that it is an institute of judicial proceedings, or a special legal remedy.[19]

The constitutional complaint is not an entirely new institute; its forerunner may be found in the Aragon law of the 13th to 16th Century;[20] in Germany from the 15th Century onwards;[21] while Switzerland introduced a special constitutional complaint[22] in the Constitution of 1874 and in the Statutes of 1874 and 1893.

The constitutional complaint is very common in systems of constitutional/judicial review. It is most widespread in Europe.[23] In Germany, the constitutional complaint appears on the federal and on provincial levels.[24]

In addition to Europe, some Asian systems recognise constitutional complaint.[25] It should additionally be noted that other Arabian countries, if they recognise judicial review at all, have in the main adopted the French system of preventative review of rules following the model of the French Constitutional Council of 1958, which does not recognise the right of the individual to direct access to specific constitutional/judicial review bodies. Also in Africa some countries recognise the constitutional complaint.[26] The only example of constitutional complaint in Central and South America is the Brazilian *mandado de injuncao*, i.e. an individual complaint in cases of negligence of the Legislature (the power of the Supreme Court) unless we also count the Colombian *accion de tutela* (the power of the Constitutional Court) usually considered to be a subsidiary *amparo*.

The particularity of individual systems is that they recognise a **cumulation of both forms, the**

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[19] Ruling No. U-I-71/94 of 6 October 1994, OdlUS III, 109.

[20] In the form of *recurso de agravios, firme de derecho, manifestacion de personas*.

[21] Incorporated in the institution *Reichskammergericht* of 1495, envisaged in the famous constitutional text, *Paulskirchenverfassung* of 1849, and in Bavaria it was envisaged in the Constitutions of 1808, 1818, 1919 and 1946.

[22] *Staatliche Verfassungsbeschwerde*.

[23] Russia, Cyprus, Malta, Czech Republic, Ukraine, Slovakia, Hungary, Albania, Macedonia, Croatia, Slovenia, Austria, Andorra, Switzerland-Supreme Court, Germany, Spain, Liechtenstein (1992), Portugal and FRY-on the federal level and in Montenegro.

[24] The federal constitutional complaint is the responsibility of the Federal Constitutional Court, and the provincial constitutional complaint is the responsibility of certain Provincial Constitutional Courts: Bavaria, Berlin, Hessen and Saarland.

[25] Georgia (the power of the Constitutional Court), Kirghizia (the power of the Constitutional Court), Uzbekistan (Constitutional Court), Mongolia (the power of the Constitutional Court since the Constitution of 1992), South Korea (the power of the Constitutional Court since the Constitution of 1987), Taiwan (Supreme Court), Papua-New Guinea (Supreme Court), Syria (Constitutional Court), Baskiria (Constitutional Court).

[26] Sudan (Supreme Court), Mauritius (Supreme Court), Senegal (Constitutional Council) and Benin (Constitutional Court).

popular and the constitutional complaint.[27] The two forms may compete in their functions. The rationale for both forms is protection of constitutional rights, the *actio popularis* in the public and the constitutional complaints in the private interest. In both cases the plaintiff is an individual. As a rule the subject disputed is different: *actio popularis* refers to general acts and constitutional complaints refer to individual acts.[28] The standing of the plaintiff or the personal effect the remedy might have upon the plaintiff is a precondition of constitutional complaint. Although it should be possible to exclude the standing of the appellant as a precondition for the *actio popularis*, individual systems do require it for *actio popularis*,[29] such that both in the case of constitutional and in the case of *actio popularis*, the standing or the personal effect on an individual works as a corrective with the aim to prevent the abuse and overburdening of the Constitutional Court or other constitutional/judicial review body. In both cases the same aim may be pursued through the introduction of the payment of tax upon submission. It is, however, characteristic that in practice the number of constitutional complaints is increasing everywhere. Therefore, many Constitutional Courts have adapted the organisation of their work to this principle either in the form of specialised individual senates for constitutional complaints[30] or by the fact that decisions on constitutional complaints be taken by narrower units of the Constitutional Court (senates, sub-senates).[31]

IV. Fundamentals of the Constitutional Complaint

The following are the elements of the institute of constitutional complaint:

- **system of prior selection of complaints in the proceedings** (integration of filters into the proceedings) most highly developed in the German system with intent to sift out potentially unsuccessful complaints, whereby the manoeuvring space of the Constitutional Court in rejecting a frivolous complaint is extended. This, in fact, involves the narrowing of the constitutional complaint as a legal remedy in principle open to everybody. As a matter of fact, there is a general problem in Constitutional Courts as to how to sift the wheat from the chaff and at the same time secure the efficient protection of human rights as the symbol of the democratic system. Individual systems of constitutional review still present this dilemma: in certain systems the proposals for the introduction of a constitutional complaint are of recent introduction; some of those familiar with this legal institution tend to introduce prior selection systems; on the other hand, certain systems tend towards the abolition of this legal institute;

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[27] Slovenia, Croatia, Macedonia, Bavaria, Hungary, Malta, FRY and Montenegro, Liechtenstein, Colombia and Brazil, partially Czech Republic.

[28] Except for the possibility of indirect impugning of the statute in Slovenia, Spain, FRY and Montenegro, and the direct impugning of the statute in Germany.

[29] Slovenia, Macedonia.

[30] e.g. the German Federal Constitutional Court and the Spanish Constitutional Court.

[31] e.g. in Slovenia, Czech Republic, Georgia.

- protection through constitutional complaint generally refers to constitutional rights and freedoms, and the **circle of rights protected by constitutional complaint** is less specifically defined in individual systems (e.g. Slovenia, Croatia, FRY and Montenegro, where "all" constitutionally guaranteed fundamental rights are supposed to be protected), while other systems mostly define (and thus narrow) the circle of protected constitutional rights.[32]

Special forms of constitutional complaint may also protect special categories of rights;[33]

- as a rule, for **acts disputed by constitutional complaint**, the suspected source of violations of constitutional rights and freedoms are individual acts, with some exceptions;[34]

- those **entitled to lodge a constitutional complaint** are generally individuals but in Austria, Germany, Spain, Switzerland, FRY and Montenegro, also legal entities explicitly, while in the Croatian system a legal entity is explicitly excluded as a potential appellant; in some systems, the complaint may be lodged by the Ombudsman (Spain, Slovenia, FRY) or by the public prosecutor (Spain, Portugal).

- the **standing**, or the personal effect the remedy might have upon the plaintiff, is a mandatory element although in the majority of systems the concept of standing is fairly loosely defined;

- the **prior exhaustion of legal remedies** is an essential precondition but with exceptions when the Constitutional Court may deal with a case irrespective of the fulfilment of this condition (Germany, Slovenia, Switzerland);

- the **time limit for lodging the application** ranges from 20 days to three months with an average of one month beginning with the day of receipt or delivery of the final, legally binding act;

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[32] See also Klucka, J., *Suitable Rights for Constitutional Complaint*, Report with the Workshop on the "Functioning of the Constitutional Court of the Republic of Latvia", Riga, Latvia, 3-4 July 1997, Offprint.

[33] In Germany, Hungary, Slovenia and in the Czech Republic communes have standing for the protection of self-government, the appellant in the latter so-called **"communal" constitutional complaint** being the commune (Germany recognises "communal" constitutional complaint on a federal level and on a provincial level in the provinces of Wuertemberg and North Westphalia). The German system also recognises a special constitutional complaint by an individual in relation to constitutional conditions for the nationalisation of land (*Sozialisierung*) in the province of Rheinland-Pfalz. A special form of constitutional complaint exists in Spain: there, the institute of citizen's legislative initiative is also protected by constitutional complaint.

[34] In Switzerland and Austria, a constitutional complaint can impugn only an administrative act, while in Germany, it can impugn acts at all levels (including a statute); in Spain, Slovenia, FRY and Montenegro, a statute may also be an indirect subject of a constitutional complaint; legislative negligence may be directly impugned by constitutional complaint in Brazil, and also according to the practice of the German Federal Constitutional Court and the practice of the Bavarian Constitutional Court.

- the **prescribed contents of the application** are prescribed in detail in the majority of systems: written form, sometimes language explicitly stated (Germany, Austria), citing of the particular state, the disputed act, definition of the violation of a constitutional right, etc.;

- the majority of systems (but not the systems of Middle and Eastern Europe) envisage the issuing of a **temporary restraining order (injunction) or ruling (of the Constitutional Court)** i.e. an order temporarily suspending the implementation of the disputed act until the adoption of a final decision;

- in some systems the **payment of the costs** of the proceedings is explicitly foreseen in cases of frivolous applications (Germany, Austria, Portugal, Spain, Switzerland);

- the **effects of the decision**: the Constitutional Court is limited in its decision to constitutional matters, to the violation of constitutional rights. However, where a violation is found, a decision may have a cassatory effect and as a rule *inter partes* (and *erga omnes* in a case in which the subject-matter of the decision is a legislative measure). The Constitutional Court here retains the position of the highest judicial authority. These Courts can be referred to as super Courts of cassation, because Constitutional Courts reviewing the decisions of the regular Courts act in fact as the third and the fourth instance. Although the Constitutional Court is not a Court of full jurisdiction, in specific cases it is the only Court competent to judge whether a regular Court has violated the constitutional rights of the plaintiff. It involves the review of microconstitutionality, maybe the review of implementation of the law, which, however, is a deviation from the original function of the Constitutional Court. Cases of constitutional complaint raise sensitive questions of defining constitutional limits. Anyway, the Constitutional Court in its treatment and decision-making is limited strictly to questions of constitutional law. The Slovenian system is specific in that the Constitutional Court may, under specified conditions, make a final decision on constitutional rights or fundamental freedoms themselves (Paragraph 1 of Article 60 of the Slovenian Constitutional Court Act, Official Gazette RS, No. 15/94).

The protection of fundamental rights and freedoms is an important function of the majority of Constitutional Courts, irrespective of whether they perform the function of constitutional judgment in the negative or positive sense. Whenever a Constitutional Court has the function of the "negative Legislature", constitutional review is strongest precisely in the field of fundamental rights. Even in other fields (concretisation of state-organisational and economic constitutional principles) in which the Legislature has the primary role even in principle, Constitutional Courts take care that fundamental rights be protected. Precisely in the field of the protection of rights, the Constitutional Court also has the function of the substitute "Constitution-maker" ("positive function"), which means that in specific cases Constitutional Courts even supplement constitutional provisions.

V. International Forms of Individual Complaint

1. The concept of "constitutional complaint" is usually connected with the national constitutional protection of fundamental rights. However, certain international documents also

envisage a specific legal remedy of protection of fundamental rights and freedoms in the form of a complaint.[35]

2. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 gives individuals the right to the so-called individual complaint.[36] An individual may lodge a complaint with the European Commission for Human Rights because of an alleged violation of rights guaranteed by the Convention. It is an explicit international legal remedy comparable with the national constitutional complaint. It fulfils its function of the individual complaint where national law does not guarantee any appropriate protection of rights. Individual complaint is a subsidiary legal remedy (preconditioned on the exhaustion of the national legal remedies), it is not an *actio popularis* and it does not have a retroactive or cassatory effect. It differs from the constitutional complaint in the way that, contrary to the latter, it leads merely to a finding (declaratory relief).

The position of the European Convention for the Protection of Human Rights and Fundamental Freedoms in national law specifies whether an individual may refer to the Convention or even base a national constitutional complaint thereon. It further narrows the manoeuvring space of the Constitutional Court itself in the interpretation of the provisions of the Convention. It has actually become a connection of the national Constitutional Court to the European bodies in cases in which a judicial decision as a final national outcome of decision-making becomes the subject of an individual complaint to a European forum.[37]

3. Slovenia signed the European Convention for the Protection of Human Rights and Fundamental Freedoms on 14 May 1993 and ratified it on 8 June 1994.[38] The Slovenian

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[35] e.g. Article 2 of the Facultative Protocol of the General Assembly of the UN to the International Pact on Citizenship and Political Rights of 19 December 1966 (Resolution No. 2000 A (XXI)) states that the Council for human rights must accept and debate reports from individual persons who claim that they are the victims of the violation of any right defined in this Pact. The right to individual complaint is contained in the following: Article 23 of the Declaration on Fundamental Rights and Freedoms of the European Parliament of 12 April 1989; section 18(2) of the Document of the Moscow Meeting of CSCE of 3 October 1991; Article 25 of the American Convention on Human Rights of 22 November 1969; Article 28 of the Contract on the European Community of 1 February 1992; Statute of 1979 of the Comision y la Corte Interamericanas de los Derechos Humanos; Statute of 1980 of the Inter-American Court on Human Rights; American Convention on Human Rights of July 18, 1978 (Article 44); Article s 55 through 59 of the African (Banjul) Charter on Human and People's Rights of June 27, 1981.

[36] Article 25 of the Convention.

[37] The European Convention for the Protection of Human Rights and Fundamental Freedoms:
- is of constitutional impact in Austria;
- is the basis for an internal national constitutional complaint in Switzerland where it has a status comparable with the constitutional level;
In both cases it is permissible to found the national constitutional complaint on the provisions in the Convention.
- it is higher than ordinary law (Belgium, France, Luxembourg, Malta, The Netherlands, Portugal, Spain, Cyprus);
- it is ranked as Common Law: Germany, Denmark, which introduced the national use of the Convention by special Statute on 1 July 1992, Finland, Italy, Liechtenstein, San Marino, Turkey;
- it does not have a direct internal state effect: Great Britain, Ireland, Sweden, Norway, Iceland. Some countries of Anglophone Africa are an exception regarding the latter group of systems (Kenya, Tanzania, Uganda, Nigeria) which expressly adopted the system of protection of rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms (e.g. Nigeria in the Constitution of 1960) influenced by the extension clause to the European Convention in terms of Article 63, which Great Britain signed on 23 October 1953, whereby only the Convention itself and Protocol 1 apply in these regions.

[38] Official Gazette RS, International Contracts, No. 33/94.

Constitution of 1991 resolves these questions in specific constitutional and legal provisions: Statutes and other regulations must be in accordance with the generally valid principles of international law and with international contracts to which Slovenia is bound. Ratified and promulgated international contracts must be applied directly.[39] The Constitutional Court decides on the accordance of statutes and other regulations with the ratified international contracts and general principles of international law.[40]

The institution of constitutional complaint and European complaint and the function of European bodies (above all the European Court of Human Rights) raises the question of national and supra-national (final) instance. The national (final) instance: the Constitutional Court as the highest body of judicial authority in a particular state for the protection of constitutionality and legality and human rights and fundamental freedoms[41] would be limited to the investigation of constitutional-legal questions only. Review of the correct finding of the actual circumstances and the use of simple rules of evidence is a matter for the regular Courts. The subsidiary nature of a constitutional complaint also lies in the division of responsibility between the Constitutional and the regular Courts. The gradation of instance could be established as ascending from the national Supreme Court through the national Constitutional Court to the European Commission or European Court. In fact, instance is not the essence of this gradation although it is essential in the role of supplementing, which means that the national constitutional complaint supplements national judicial protection while supra-national European complaint supplements national constitutional complaint.

VI. Slovenian Experience

1. History

With the introduction of the Constitutional Court by the Constitution of 1963 the then Slovenian Constitutional Court also acquired jurisdiction over the protection of fundamental rights and freedoms. It could also decide on the protection of self-government rights and other fundamental freedoms and rights specified by the then Federal and member states' Constitutions in case these were violated by an individual act or deed by a member state or communal body or company, in case such protection was not guaranteed by some other form of judicial protection or by statute.[42] The decision of the Constitutional Court in such proceedings had a cassatory effect in the case of an established violation (annulment or invalidation or amendment of an individual act and the removal of possible consequences; prohibition on the continued performance of an activity). The jurisdiction of the Constitutional Court was, therefore, subsidiary. It was possible to initiate proceedings only if, in a specific case, there was no judicial protection envisaged, or if all other legal remedies were exhausted.

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[39] Article 8 of the Constitution.

[40] Subparagraph 2 of Paragraph 1 of Article 160 of the Constitution; Subparagraph 2 of Paragraph 1 of Article 21 of the Constitutional Court Act.

[41] The status of the Constitutional Court is thus defined in e.g. Paragraph 1 of Article 1 of the Constitutional Court Act of 1994.

[42] Paragraph 3 of Article 228 of the Constitution of the SRS of 1963 and the Article s 36 through 40 of the Constitutional Court

However, in practice, the then Constitutional Court rejected such individualssuits on the basis of absence of power and directed the plaintiff to proceedings before the regular Courts. Such a practice also created a certain negative attitude of the Constitutional Court itself, since it knew in advance that it would reject such suits and thus carry out a never-ending task. The then Constitutional Court itself warned that in relation to individual acts, the most sensible solution would be for decisions to be transferred, as a whole, to the regular Courts. The negatively arranged jurisdiction of the Constitutional Court (whenever other legal protection was not provided) resulted in the fact that its activities in this field showed no results, although this activity was initiated precisely because of a complaint for the protection of rights. However, the then system of the constitutional review guaranteed through the individual the right of *actio popularis* without the appellant having to demonstrate his/her own standing.

From then on, the constitutional complaint no longer found any place in the system, until it was again introduced by the Constitution of 1991. This specific legal remedy thus remained combined with the previous system, i.e. with the possibility of lodging an *actio popularis*[43] with the Constitutional Court - despite the individual as petitioner having to demonstrate his/her standing - which in effect limits the procedural presumption. Accordingly, an individual may impugn all categories of (general) act by lodging a constitutional or *actio popularis* if he/she is directly aggrieved.

2. Slovenian System in Force

The provisions of the Slovenian Constitution of 1991 which regulate constitutional complaint in detail are relatively modest.[44] However, the Constitution itself[45] envisages special statutorial regulation of such matters.[46]

The Constitutional Court decides cases of constitutional complaints alleging violations of human rights and fundamental freedoms.[47] The protection thus embraces all constitutionally guaranteed fundamental human rights and freedoms[48] including those adopted through international agreements which have become part of the national law through ratification.

Act, Official Gazette SRS, Nos. 39/63 and 1/64.

[43] Paragraph 2 of Article 162 of the Constitution of 1991; Article 24 of the Constitutional Court Act of 1994.

[44] Article s 160 and 161 of the Constitution.

[45] Paragraph 3 of Article 160 of theConstitution.

[46] Provisions of Article s 50 to 60 of the Constitutional Court Act, Official Gazette RS, No. 15/94.

[47] Subparagraph 6 of Paragraph 1 of Article 160 of the Constitution.

[48] Such a formulation in the Slovenian, as well as in the Croatian and Montenegrin, arrangements and the arrangement of FRY, is rare, since other arrangements as a rule explicitly define the circle of rights protected by the constitutional complaint.

Any legal entity[49] or natural person may file a constitutional complaint,[50] as may the Ombudsman if directly connected with individual matters[51] with which he deals,[52] although subject to the agreement of those whose human rights and fundamental freedoms he is protecting in an individual case.[53] The subject-matter of constitutional complaint is an individual act[54] of a government body, a body of local self-government, or public authority allegedly violating human rights or fundamental freedoms.[55]

The precondition for lodging a constitutional complaint is the prior exhaustion of legal remedies.[56] As an exception[57] to this condition the Constitutional Court may hear a constitutional complaint even before all legal remedies have been exhausted in cases of *prima sacre* violations and if the carrying out of the individual act would have irreparable consequences for the complainant.[58]

A constitutional complaint may be lodged within sixty days of the adoption of the individual act,[59] though in individual cases with good grounds, the Constitutional Court may decide on a constitutional complaint after the expiry of this time limit.[60] The complaint must cite the disputed individual act, the facts on which the complaint is based, and the suspected violation of human rights and fundamental freedoms.[61] It shall be made in writing and a copy of the

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[49] Ruling taken by the Slovenian Constitutional Court No. Up-10/93 of 20 June 1995, OdlUS IV, 164.

[50] Paragraph 1 of Article 50 of the Constitutional Court Act.

[51] Standing: The constitutional complaint shall be rejected due to lack of standing: Rulings taken by the Slovenian Constitutional Court No. Up-29/93 of 17 May 1995, OdlUS IV, 155 and No. Up-60/94 of 25 March 1997.

[52] Paragraph 2 of Article 50 of the Constitutional Court Act.

[53] Paragraph 2 of Article 52 of theConstitutional Court Act.

[54] Ruling taken by the Slovenian Constitutional Court No. Up-319/96 of 22 November 1996 and No. Up-320/96 of 22 November 1996.

[55] Paragraph 1 of Article of theConstitutional Court Act.

[56] Rulings taken by the Slovenian Constitutional Court No. Up-104/94 of 29 March 1995, No. Up-32/93 of 29 March 1995, No. Up-36/93 of 29 March 1995, No. Up-28/94 of 4 April 1995 etc.; (Paragraph 3 of Article 160 of the Constitution; Paragraph 1 of Article 51 of the Constitutional Court Act).

[57] Only the German and Swiss systems recognise such an exception.

[58] Decision taken by the Slovenian Constitutional Court No. Up-147/96 of 13 March 1997, OdlUS VI; (Paragraph 2 of Article 51 of the Constitutional Court Act).

[59] Paragraph 1 of Article 52 of the Constitutional Court Act.

[60] Ruling taken by the Slovenian Constitutional Court No. Up-81/95 of 5 July 1995 ; (Paragraph 3 of Article 52 of the Constitutional Court Act).

[61] Paragraph 1 of Article 53 of the Constitutional Court Act.

respective act and appropriate documentation shall be attached to the complaint.[62]

In a senate of three judges[63] the Constitutional Court decides whether it will accept or reject the constitutional complaint for hearing (or its allowability) at a non-public session. The Constitutional Court may establish a number of senates depending on the need. The ruling of the Constitutional Court on the allowability of a constitutional complaint[64] is final. The constitutional complaint may be communicated to the opposing party for response, either prior to or after acceptance.[65] The Constitutional Court normally deals with a constitutional complaint in a closed session but it may also call a public hearing.[66] The Constitutional Court may issue a temporary restraining order or injunction in the proceedings, either against an individual act or statute, or against some other regulation or general act on the grounds of which the disputed individual act was adopted.[67]

The decision *in merito* of the Constitutional Court may lead to:

- The complaint being denied as being unfounded, [68]

- Abrogation, retroactive (*ex tunc*) or prospective (*ex nunc*), of an individual act and returning the case to the empowered body while deciding on a constitutional complaint;[69]

- Abrogation, retroactive (*ex tunc*) or prospective (*ex nunc*), of a general act while deciding on a constitutional complaint,[70]

- Final decision on a contested human right or freedom based on a constitutional complaint (replacement of the disputed individual act by the Court decision), in the case

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[62] Formally imperfect constitutional complaint shall be rejected: Ruling taken by the Slovenian Constitutional Court No. Up-35/95 of 11 October 1995; (Paragraph 2 and 3 of Article 53 of the Constitutional Court Act).

[63] Paragraph 3 of Article 162 of the Constitution; Paragraph 1 of Article 54 of the Constitutional Court Act.

[64] Paragraph 3 of Article 55 of the Constitutional Court Act.

[65] Article 56 of the Constitutional Court Act.

[66] Article 57 of the Constitutional Court Act.

[67] Rulings taken by the Slovenian Constitutional Court No. Up-61/94 of 22 July 1994, OdlUS III, 129; No. Up-102/94 of 29 March 1995; Decision No. Up-102/94 of 29 February 1996, OdlUS V, 59; (Article 58 of the Constitutional Court Act).

[68] Paragraph 1 of Article 59 of the Constitutional Court Act.

[69] Over the period from 1996 to 1997 the Slovenian Constitutional Court decided 29 such cases - e.g. 7% of total number of decided cases; (Paragraph 1 of Article 59 of the Constitutional Court Act).

[70] Decision taken by the Slovenian Constitutional Court No. Up-132/96 of 24 October 1996; (Paragraph 2 of Article 161 of the Constitution; Paragraph 2 of Article 59 of the Constitutional Court Act).

of retroactive abrogation (*ex tunc*) of an individual act, if such procedure is necessary in order to eliminate consequences that have already occurred on the basis of the abrogated individual act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of the information in the document.[71] At the beginning the above power of the Constitutional Court gave rise to discussions as to whether in this particular case the Constitutional Court represented an instance above the ordinary courts (especially above the Supreme Court). The present constitutional case-law, however, proves that the Constitutional Court is limited to the evaluation of pure constitutional issues, e.g. to the strict evaluation of breaches of certain constitutional rights.[72] Such an order is executed by the body having jurisdiction for implementation of the respective act which was retroactively abrogated by the Constitutional Court and replaced by the Court's decision on the same; if there is no such body having jurisdiction according to currently valid regulations, the Constitutional Court shall appoint one.[73]

In addition the Constitutional Court may take the following decisions:

- The possible suspension of the implementation of the individual act which is the subject of the constitutional complaint while deciding on a constitutional complaint,[74]

- The possible suspension of the implementation of a general act pending final decision while deciding on a constitutional complaint.[75] This possibility of temporary order represents a parallel to the temporary order, foreseen in the abstract review procedure.[76] Hitherto the Constitutional Court has not dealt with any such case.

The Constitutional Court shall decide on the temporary order in the procedure for examining a constitutional complaint and/or may withhold the implementation of a disputed individual act only in the case of acceptance of the constitutional complaint. In the case of absence of procedural prerequisites and/or if the constitutional complaint was not accepted, the Constitutional Court shall not decide on the applicant's proposal to issue the temporary order.[77]

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[71] Decision taken by the Slovenian Constitutional Court No. Up-132/96 of 24 October 1996; (Paragraph 1 of Article 60 of the Constitutional Court Act).

[72] Rulings taken by the Slovenian Constitutional Court No. Up-27/97 of 22 May 1996; No. Up-9/93 of 22 November 1995, OdlUS IV, 182; No. Up-150/95 of 17 January 1996; No. Up-325/96 of 4 February 1997; No. Up-49/96 of 23 April 1996, OdlUS V, 77; No. Up-81/96 of 25 September 1996; No. Up-78/96 of 1 October 1996; No. Up-95/96 of 25 September 1996; No. Up-16/94 of 11 October 1995, OdlUS IV, 178.

[73] Paragraph 2 of Article 60 of the Constitutional Court Act.

[74] Article 58 of the Constitutional Court Act.

[75] Article 58 of the Constitutional Court Act.

[76] Paragraph 1 of Article 161 of the Constitution; Article 39 of the Constitutional Court Act.

[77] Ruling taken by the Slovenian Constitutional Court No. Up-9/95 of 28 February 1995, OdlUS IV, 144.

Accordingly, the **particularities of the Slovenian regulation** are as follows:

- Exceptions from the precondition of legal remedies having previously been exhausted, for filing a constitutional complaint ;[78]

- Wide definition of constitutional rights as the subject of protection by constitutional complaint in comparison with other systems which specifically define the circle of the rights so protected;

- Judgment (of the ordinary Courts) as to the potential object of impugnment by constitutional complaint, which is relatively rare,[79]

- *Ex officio* proceedings inasmuch as the Constitutional Court is not bound to the complaint in the event of finding that an individual act annulled is based on an unconstitutional regulation or general act - in such a case, the regulation or general act may be annulled or invalidated; [80]

- Coexistence of constitutional and *actio popularis*, the latter restricted only by the standing requirements for the appellant;

- No particular court fee in the proceedings: each party pays its own costs in the proceedings before the Constitutional Court unless otherwise specified by the Constitutional Court; [81]

- Possibility of ultimate decision on constitutional rights.[82]

3. Currently Existing Slovenian Constitutional Case-Law

The Constitution of 1963 explicitly authorised the Constitutional Court to make decisions on protection of the right to self-government as well as other fundamental rights and freedoms specified by the Federal as well as by the member state Constitution, provided that these rights were violated through an individual act of government, communal body or by a work or other organisation and no other judicial protection was provided for by the statute.[83] Further details

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[78] Article 51 of the Constitutional Court Act.

[79] Since only Croatia, Macedonia, Portugal, Spain, FRY and Montenegro expressly envisage it.

[80] Paragraph 2 of Article 59 of the Constitutional Court Act.

[81] Paragraph 1 of Article 34 of the Constitutional Court Act.

[82] Paragraph 1 of Article 60 of the Constitutional Court Act.

[83] Paragraph 3 of Article 228 of the Constitution of the SRS.

were derived from the Constitutional Court Act.[84] Examples of constitutional case-law from that period reveal that Constitutional Courts mostly used to reject such individuals' complaints due to the lack of power of the Courts and they used to refer such complainants to the regular Courts. The activity of the Constitutional Court in the field of fundamental constitutional rights and freedoms was predominantly based on the petitions lodged by the citizens. In the initial period of activity of the Constitutional Court since the Constitution of 1963, the protection of human rights and freedoms by the Constitutional Court made no intensive progress. Maybe this was due to an insufficiently specific constitutional and legal basis, such that it would provide the Constitutional Court with enough practical standards for its decision-making. The reason perhaps lay in the whole system which was not in favour of the protection of basic rights by the Constitutional Court.

The Constitution of 1974, however, removed the jurisdiction of the Constitutional Court over individual constitutional rights and freedoms and attributed the protection of these rights to the regular Courts. Nevertheless, in the second period of the Constitutional Court's activity, from the Constitution of 1974 until the Constitution of 1991, the number of decisions explicitly relating to the constitutionally protected human rights and freedoms increased slightly. In this respect, the examples of concretisation of the Principle of Equality before the Law, the freedom of work, the right to social security and the right to legal remedies are of special significance. Unfortunately, most of these decisions taken by the Constitutional Court included few reasons. The reader may seem to be prevented from comprehending all the background reasons for the decision-making.

It was also characteristic of Slovenian Constitutional Case-Law prior to 1991 that, in comparison with Europe, it avoided the use of legal principles a great deal more, even those explicitly included in the text of the Constitution itself. In common with foreign practice, however, the principle of equality greatly predominated among otherwise rarely used principles. Decisions consistently remained within the framework of legalistic (formalistic) argument and no other values references were ever allowed: the Constitutional Court respected the principle of self-restraint and adhered to the presumption of the constitutionality of the statute.

The new Constitution of the Republic of Slovenia of 1991 along with the catalogue of classical fundamental rights in combination with the newly defined powers of the Constitutional Court set the ground for the intensification of its role in this domain. It is considered that the Constitutional Court now has sufficient space for such activity. The Slovenian Constitution contains adequate definitions of rights which allow for professionally correct understanding and reasoning. Almost all fundamental rights have the nature of legal principles and are thus open to such an extent that they require significant further concretisation and implementation.[85]

The question as to whether Slovenian constitutional case-law from the period after the introduction of the 1991 Constitution, in relation to fundamental rights and freedoms, has adapted to or is more comparable with foreign constitutional case-law, can be answered in the

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[84] Official Gazette SRS, Nos. 39/63 and 1/64.

[85] See from Pav_nik Marijan, *Verfassungsauslegung am Beispiel der Grundrechte in der neuen slowenischen Verfassung*, WGO Monatshefte fuer Osteuropaeisches Recht, 35th yearbook 1993, Heft 6, p. 345-356.

sense that Slovenian Constitutional Case-Law comes close to foreign case-law in its approach to fundamental rights. The number of examples from this field has increased. At this point it is necessary to bear in mind that the "frequency" of individual rights before Constitutional Courts mainly depends on what kind of problem appellants place before the Constitutional Court. The Constitutional Court now appears as the guardian of constitutionality in such a way that it decides not only on the conformity of general legal acts with the constitutional provisions on fundamental constitutional rights (in the sense of abstract and specific review of general legal acts) but also on constitutional complaints against the violation of human rights and fundamental freedoms by individual acts.[86] Here it is, however, necessary to add that in principle the new Constitution slightly limited the still broad possibilities for individuals' impugnment of general acts. In accordance with this principle any individual can still lodge the petition for the beginning of the proceedings, but on condition of being able to prove his/her standing.

VII. Core of Judicial Protection of Human Rights

The core of judicial protection of human rights lies in the constitutional complaint, since:

- Human rights are attributes of any democratic legal system;

- Constitutional complaint is (only) one of the legal remedies for protecting constitutional rights;

- Constitutional complaint is an important remedy for the protection of human rights connected with the human rights themselves;[87] the Constitution guarantees the constitutional complaint, in the same way as the rights it protects; at the same time, the constitutional complaint is limited by statute to the benefit of the operational capacity of the Constitutional Court;

- Its effectiveness is disputed, since successful constitutional complaints are in a clear minority, although that should be no reason for their restriction or abolition. The latter is also very often the result of the great burden of this kind of case on Constitutional Courts;

However, despite the internal contradictory properties of this institution, the possibility shall remain open of access by the individual to justice or to judicial protection of his/her constitutional rights. The very existence of the constitutional complaint ensures more effective review of violations of constitutional rights on the part of government bodies, especially over the period of transformation of social and legal order.

References:

[86] Paragraph 1 of Article 160 and Article 162 of the Constitution.

[87] Ruling taken by the Slovenian Constitutional Court No. U-I-71/94 of 6 October 1994.

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5. Mavcic, A., *The Protection of Fundamental Rights by the Constitutional Court and the Practice of the Constitutional Court of the Republic of Slovenia*, Report with the Seminar "The Protection of Fundamental Rights by the Constitutional Court", European Commission of the Council of Europe, Brioni, Croatia, 23-25 September 1995, Proceedings, p. 204.

6. Mavcic, A., *The Protection of Fundamental Rights by the Constitutional Court*, Report with the Seminar Constitutional Dimension of Judicial Reform and Judicial Organization, Kyrghyz Republic, Bishkek, 17-18 June 1997, Offprint.

b. THE POSSIBILITY OF REVIEWING INDIVIDUAL COMPLAINTS AT THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

by Mr Româns APSÎTIS, Judge of the Constitutional Court of Latvia

Honourable participants of the Workshop

All of us can find information on the formation of the Constitutional Court of Latvia in our folders. Being a scholar of the history of the Latvian science, I cannot refrain from specifying historical facts. After that I shall express my point of view on the topic that is closely connected with the short history of our Constitutional Court.

As is well-known, the independent Republic of Latvia legally exists since 18 November 1918. In fact, there has been a fifty-year-long break in the life of our state. Naturally, democratic traditions of the state of Latvia are quite new and quite fragile. Nevertheless, the idea of the necessity of establishing the Constitutional Court in Latvia was expressed from the platform of our Parliament - the Saeima - as far back as 8 May 1934, just a week before the coup that was followed by the dissolution of the Saeima. Then the deputy of the faction of the Baltic Germans, Ðtegmanis, expressed a motion to strengthen the judicial power of the State. He suggested that the Saeima supplement the fundamental law of the State - the Satversme (Constitution) - with Article 86, envisaging the formation of the Court of the State. The main obligation of the Court, to his mind, would be to verify compliance of laws and regulations issued by the Cabinet of Ministers as well as acts of the President of the State and the Cabinet of Ministers with the Satversme and other laws. Unfortunately, the Saeima rejected Ðtegman's motion: it did not receive the necessary two-thirds of votes.

Many years later "perestroika" - proclaimed by Michael Gorbachov - commenced in the Soviet Union. A certain process of democratisation of the State took place. At that time the Constitutional Supervision Committee of the USSR was formed. It was a signal that similar institutions were a must for the republics. The Supreme Soviet of the Latvian SSR, then in power, formed a special committee that by 16 March 1990 had worked out the draft law on the Constitutional Court of the Latvian SSR. Article 10 of the draft law determined that "the Constitutional Court of the Latvian SSR shall review cases on violation of rights and freedoms of the citizens of the Latvian SSR (guaranteed by the Constitution of the Latvian SSR) resulting from adoption of normative acts issued by state institutions of the Latvian SSR, if the laws of the Latvian SSR do not provide for it otherwise." The declaration on the Renewal of the Independence of the Republic of Latvia (of 4 May 1990) struck out the Soviet Latvia and its draft laws. Yet, the idea of the necessity of the Constitutional Court was retained in Article 6, paragraph 2 of the above Declaration. Unfortunately, the process of working out a new draft law was delayed because of the great amount of other different tasks. By 28 March 1993, the future Minister of Justice, Egils Levits, had worked out the project on the most important assignments of the legislature to the end of the year. The project envisaged passing the law on the Constitutional Court and establishing it, even though the Law on Judicial Power - adopted on 15 December 1992 - had vested the Supreme Court of the Republic of Latvia with Constitutional supervisory rights. The competence of the Constitutional Court was outlined. At that time it was pointed out that the Constitutional Court should also review the so-called Constitutional complaints submitted by individuals to initiate a case on compliance with the Satversme of regulations, violating the rights of a citizen and an individual.

At the beginning of 1994, the draft law on the Constitutional Court and the draft law on Amendments to the Law on Judicial Power were worked out at the Ministry of Justice. With time, the Legal Committee of the Saeima, under the guidance of the deputy Aivars Endziòð, took over the task of perfecting the draft law. After overcoming hindrances of a political character, the law was adopted by the Saeima on 5 June 1996 and it became effective on 28 June 1996.

Does our law envisage reviewing individual complaints at the Constitutional Court? No, it does not. And for just two reasons:

1) the second part of the Satversme (Constitution) of 1922 on the rights and obligations of citizens had not been passed at that time. Thus, there is no Constitutional basis for individual complaints. As a matter of fact, one of the first variants of the draft law on the Constitutional Court envisaged that the Constitutional Law on Rights and Obligations of an Individual and a Citizen of 10 December 1991 should be considered as part of the Satversme law to the date of the second part of the Satversme becoming effective. Later the above norm was deleted because the law was adopted by the Supreme Soviet of the Latvian SSR by a simple, not qualified majority of vote. Thus, the Law is a simple, ordinary law and cannot be considered the law of higher legal force;

2) our Constitutional Court Law does not envisage reviewing individual cases also because the members of the Saeima Legal Committee fear that the newly formed Constitutional Court will be buried in a sea of applications, if there is a possibility of submitting individual complaints. Our small experience, though, makes us believe that this fear is groundless.

Is reviewing individual cases at the Constitutional Court necessary or at least advisable? That is a debatable question. And one does not get an answer to it even when studying the experience of old and democratic European countries. We, three judges of the Constitutional Court of Latvia, made sure of the fact during our recent visit to Paris, where, following the invitation of legal institutions of France, we became acquainted with institutions of Constitutional supervision of the State. It is not in the competence of these institutions to review individual cases. At the same time, several European countries e.g. Austria, Germany, Spain are of a different opinion. The roads taken by the countries that were once part of the Soviet Union are also different. From October 16 to 18 an international workshop was held in Yerevan on Constitutional supervision and democratic processes in the countries which have regained their independence. A member of the Constitutional Court of the Republic of Armenia, Vladimir Oganesyan, expressed some ideas that should be taken into consideration. One could agree to his suggestion that citizens of the countries where individual complaints do not come under the jurisdiction of the Constitutional Court should be given the right of submitting an individual complaint. Of course, the Court need not review this or that violation of the rights of an individual. The Constitutional Court shall decide if the normative act which is the legal basis of the particular violation is in compliance with the Constitution. In the Russian Federation and Georgia, individuals exercise the right to submit individual complaints.

It would not be correct to say that a person in contemporary Latvia has no possibility of defending his/her rights. One can appeal to the Court or ask the Saeima deputy or the Human Rights Bureau to help etc. And yet, the possibility of reviewing individual complaints at the

Constitutional Court would be a new, higher stage of consolidation of judicial power in Latvia. At present the situation seems to be favourable for protecting individual subjective rights in the Constitutional Court as well.

First of all, the Saeima is discussing the issue of supplementing the Satversme (Constitution) with the second part on human rights. A Committee uniting members of different Saeima factions was formed to elaborate a draft law. The Committee has drafted the first working variant of the second part of the Satversme, consisting of 27 Articles. Their work is based on several instruments, such as: Universal Declaration on Human Rights, adopted by the General Assembly of the UN on 10 December 1948; the second part of the Satversme of 1922, drafted but not passed by the Satversme session of the Republic of Latvia in 1922; the Constitutional Law of 10 December 1991 as well as the draft of the second part of the Satversme, "The Fundamental Rights", elaborated by the Ministry of Justice in 1995. Second, it should be remembered that the duty of any democratic state is to put into practice the norm formulated by Article 8 of the Universal Declaration of Human Rights. The Article stresses that each individual has the right to defend his/her rights at a competent national court, when his/her fundamental rights - determined by the Constitution or by law - have been violated. An International Covenant on Civil and Political Rights was adopted by the XXI Session of the United Nations General Assembly on 16 December 1966, but it became effective only on 23 March 1976. Article 2, paragraph 3 of the above Covenant provides for guarantees of protection of the rights of every person.

Third, since 4 June 1997, when the Saeima passed a law on adoption of the Convention on the Protection of Human Rights and Fundamental Freedoms and its Protocols 1, 2, 4, 7 and 11 (adopted on 4 November 1950), the "bar" of protection of human rights in Latvia has been raised higher. The Convention sets additional obligations in the sector of respecting human rights for the State of Latvia. At the same time, it permits residents of Latvia to appeal to the European Court of Human Rights in Strasbourg (where a Latvian judge, Egils Levits, holds a post at present) if they cannot find settlement of issues on violation of human rights in the legal instances of their state. I am of the opinion that the prestige of Latvia will undoubtedly grow if our state does its utmost to envisage possibilities of reviewing the above cases in Latvian courts, including the Constitutional Court, and our people will have no need to seek justice in Strasbourg.

Fourth, scholars of the science of law in Latvia express the view that the Constitutional Court has to become more democratic, accessible to every person. Thus, for example, Professor Edgars Meïíisis of the Faculty of Law at the University of Latvia, scientifically reviewing the first verdict of the Constitutional Court in the article "Letter of the law, spirit of the law, the Constitutional Court", pointed out that legislators should considerably lower the high standard required for submission of applications to initiate a case at the Constitutional Court.

To sum up the above, one could conclude that our Constitutional Court has to consider seriously the possibility of reviewing individual complaints. And not in the remote future. In this connection it would be useful to revise, clarify and supplement the norms of the draft of the Constitutional Court Law that provided for reviewing individual complaints at the Constitutional Court. Thus, for example, Article 16 of the Law could be supplemented with a paragraph, determining that the Constitutional Court shall review cases regarding compliance of administrative acts with the rights of an individual and a citizen, guaranteed by the Satversme.

One should bear in mind, that the Constitutional Court will not review cases in essence, but only interpret normative acts, regarding their compliance with the Satversme and other laws. An additional Article could determine that the Constitutional Court shall consider any legal act issued in the branch of law on public rights to be an administrative act. Of course, the decision of the Court - that in each separate case charges a certain individual, physical or juridical person with a certain liability, permits or prohibits a certain activity or performance, grants or deprives a person of a benefit or legal status as well as rejects the claim of the addressee for a grant or status - is an exception.

Aside from this, Article 17 of the law should be supplemented with a paragraph indicating that any person shall have the right to submit an individual application to initiate a case regarding compliance with the rights of an individual and a citizen determined of an administrative act by the Satversme, if the above person happens to be the addressee of the administrative act, if the rights of the person have been violated by the act or if the person is interested in the adoption of the administrative act.

A special Article could be devoted to the procedure of accepting individual complaints on compliance of administrative acts with human rights issues. The person exercising the right of submitting an individual application on compliance of administrative acts with the rights of an individual and a citizen shall lodge a complaint only after seeking juridical relief in all the other lower court authorities and if the court has not satisfied the claim. In the above case, the individual has to submit an application to the Constitutional Court within one month from the date the decision of the last court session became effective.

The question of the necessity of including the State Bureau of Human Rights into the chain of institutions from whom one should seek juridical relief before submitting an application to the Constitutional Court is still uncertain and should be discussed. It would be useful to hear the opinion of the representatives of the Bureau. On the one hand, both institutions - the State Bureau of Human Rights and the Constitutional Court - have their own area of responsibility or competence and there is no need to disarrange the system. On the other, a tendency for both institutions to co-operate has recently been remarked. One should mention the supplement to the Constitutional Court law - which is being worked out by the Saeima at present - establishing that the State Bureau of Human Rights shall exercise the right of submitting applications to the Constitutional Court.

If an individual who has the right to submit an application on compliance of an administrative act with the rights of an individual and a citizen declares that his/her rights have been violated because a legal norm on which the disputed administrative act is based is invalid as it contradicts a norm with higher legal force, then he/she can petition the Constitutional Court directly. In cases like the above, the judge of the Constitutional Court, accepting the application shall, by a decision, establish that:

1) reviewing of the case at the Constitutional Court is of great importance, because the case is on a matter of principle, or

2) requiring the exhaustion of remedies before a case can be submitted to the Constitutional Court would cause severe material or other losses.

In such cases the applicant could submit his/her individual application directly to the Constitutional Court in the same time-limit as to any other court. If proceedings at other courts have started, petitioning the Constitutional Court is possible at any stage of the process. If the Constitutional Court accepts the application, proceedings at the general court are closed and can be started anew after the decision of the Constitutional Court becomes effective.

Article 32 of the Constitutional Court Law that deals with force of the verdict of the Constitutional Court should be supplemented with a paragraph determining that - if the Constitutional Court in its verdict declares that the disputed administrative act violates the rights of an individual and a citizen (the applicant) - then the administrative act shall be declared null and void as of the date of adopting the decision. If the necessity arises, the Constitutional Court - on the basis of an applicant's petition - could charge the institution or official who has adopted the above administrative act with an obligation to suspend the act causing violation and compensate the losses. In cases of disagreement on the size or quantity of losses, the Constitutional Court may hand the case over to a general court. The decision of the Constitutional Court shall be binding on the court.

To my mind, these are the main conclusions and proposals regarding the possibility of reviewing individual complaints at the Constitutional Court of the Republic of Latvia.

SECOND WORKING SESSION

presided by Mr K_stutis LAPINSKAS,
Judge, Constitutional Court, Vilnius, Lithuania

a. Suitable rights for constitutional complaint
by Mr Ján KLU_KA

b. The constitutional complaint: avoiding excessive case-load
by Ms Carola VON PACZENSKY

a. SUITABLE RIGHTS FOR CONSTITUTIONAL COMPLAINT

by Mr Ján KLU_KA, Constitutional Court, Košice, Slovakia

The main task of ensuring the respect of the constitution belongs in a majority of States to their constitutional courts. The supremacy of the constitution can be particularly well protected by judicial bodies having competence to decide whether other organs of state acted constitutionally. The introduction of constitutional review to protect supremacy of the constitution places certain demands, however, on the structure of constitutional laws, especially on their legal clarity and practicability. The constitutional courts fulfil this task by any or all of several possible means: the control of legislation and other acts resulting from the exercising of public functions, the settlement of conflicts arising between the chief organs of the state or between different levels of power, the adjudication of claims made directly by individuals for the alleged infringement of basic (fundamental) rights and freedoms. In this context the primary function of the constitutional complaint is to protect the individual's subjective rights guaranteed by the constitution (constitutional law), but such legal remedy operates at the same time to safeguard the constitution as part of the objective legal order. Constitutional complaints are generally characterised by four factors:

l) they provide a judicial remedy against violations of constitutional rights;
2) they lead to separate proceedings which are concerned only with the constitutionality of the act in question and not with any other legal issues connected with the same case;
3) they can be lodged by the person adversely affected by an act in question;
4) the court which rules on the constitutional complaint has the authority to annul the act that it deems unconstitutional.[88] Such annulment is indispensable to constitutional justice and it must be read as a corollary of the power of the constitutional court to interpret the constitution as a basic legal text of each State and to ascertain whether it has been violated.

Vesting a "specialised" constitutional court with the power to deal with constitutional complaints of the violation of individual constitutional rights can contribute to strengthening the respect of fundamental rights and freedoms, to intensifying the protection of these rights and emphasising their constitutional rank. It should be pointed out that the protection of fundamental rights and freedoms will enjoy the proper priority only if constitutional courts exercise review for constitutionality in practical cases. Constitutional complaints and the findings of constitutional courts bring the constitution into the everyday life of citizens and reveal the significance of fundamental rights and freedoms in a number of specific situations. Through and on the basis of constitutional complaints, constitutional laws (constitutions) cease to be for individuals only solemn proclamations and instead become legal documents providing them with practical opportunities to ask for a review of the constitutionality of a number of acts of various organs of state. Where the system of constitutional complaint is operating the constitutional "bill of rights" becomes living law protecting the individual. In

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88 B.Phillip: Constitutional Complaint: The European Perspective. International and Comparative Law Quarterly No. 1/1994, p. 142.

order for this legal remedy to come into play, the number (*numerus clausus)* and appropriate "quality" of the rights and freedoms must be *inter alia* determined as falling under the protection of the constitutional complaint. The main purpose of this paper is to identify both the general approach and concrete criteria which should be taken into account in fixing the nature and scope of such rights and freedoms.

I. Constitutional Rights and Freedoms

Most modern constitutions contain a bill of fundamental rights and freedoms which can be directly applicable and does not consist of mere declarations of good will. The legal "technique" by which these rights and freedoms become constitutional varies from country to country, from an exhaustive list of the fundamental rights and freedoms, to a chapter of the constitution itself devoted to human rights, to a passage in the preamble which simply refers to the human rights instruments. So-called derivative, independent and unwritten fundamental rights and freedoms can be found in the constitutional practice of particular states as well.[89] Once constitutions are laid down as supreme laws their observance needs to be guaranteed by judicial remedies. To be effective, constitutional rights and freedoms require some means of enforcement which may be achieved *inter alia* by providing a jurisdiction of the constitutional court to protect them. Through such a constitutional jurisdictions constitutional rights and freedoms acquire in general a sanctioning force and are enforceable by their holders. Such rights and freedoms cannot therefore be formulated only or primarily as a political declaration or as a mere programme that is not legally binding but must be formulated as legal norms i.e. positive enforceable law supported by sanctions. Each constitution that pretends to "guarantee" rights and freedoms which cannot be judicially enforced should not be considered as a serious legal document. This kind of protection generally refers to **constitutional rights and freedoms** and such a tendency is nowadays confirmed by the relevant constitutional and other legal regulations in more than 35 countries.[90]

The reasons leading States to include concrete rights and freedoms in their constitutions are naturally different but their common "background" reflects two principal aspects, namely **material and formal.** With respect to the material (substantial) aspect we refer to fundamental rights and freedoms embodying an objective system of values which serves as a basic constitutional determination for all areas of domestic law and being considered as an integral part of a constitutional order. Such rights and freedoms moreover bind all of the three State powers (legislative, executive and judicial) and may be limited in so far as it is indispensable for the protection of public interest. Every such limitation must however be appropriate, necessary in democratic society and proportional and cannot leave rights or freedoms without substance. Taking into consideration these factors an appropriate number ("circle") of concrete rights and freedoms will acquire the "top" priority within the framework of domestic legal order of state given that due to the constitutional rank of their regulation)

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89 The Constitutional Norm and its Function in the Protection of Fundamental Rights. (VIII Conference of European Constitutional Courts-Ankara May 7.-10.1990; Volume I., General Report, p. 244-245).

90 A.Mav_i_: Slovenian Constitutional Review; Zaloæba, Nova Revija, Ljubljana, 1995, p. 57.

they become an integral part of its constitutional order.

With respect to the formal aspect, the "constitutionalising" of human rights and freedoms guarantees first of all their legal stability necessary for each segment of constitutional order. Placing these rights and freedoms in the constitution at the same time prevents the legislator from changing, modifying or even reducing a number of the constitutional rights or freedoms by its "ordinary" laws. In such a way fundamental rights and freedoms represent a clear and unambiguous rejection of the principle of sovereignty of parliament.

States, in their legislative practices, usually "connect" constitutional complaints with the fundamental rights and freedoms forming part of their constitutional orders. The decision as to which concrete rights and freedoms shall acquire constitutional "status" as fundamental (basic) rights and freedoms is taken by each legislator. Among such rights there can however be simultaneously embodied civil and political rights, social, economic and cultural rights and even so-called third generation rights. One must distinguish at the same time between procedural and substantive (material) rights and freedoms, negative and positive rights etc. These rights can be distinguished by reference to their character and substance, wording of their content (the programmatic character of social, economic and cultural rights), and consequently by the nature and substance of the obligations of the State to respect their practical guarantee (negative and positive obligations). The constitutional rights may be therefore divided into fundamental rights of direct effect and fundamental rights whose realisation is subject to the economic power of the state. The first type of fundamental rights are the individual's civil and political fundamental rights and freedoms. The second type of fundamental rights are social and economic rights. "Negative" fundamental rights protect individuals against excessive governmental interference by limiting its role and "positive" fundamental rights require the government to do something for the benefit of the individual.

Each constitution has its own system and hierarchy of fundamental rights and freedoms but taking into account their above-mentioned complexity there is an important task for each legislator to decide if **all of them** (regardless of their mutual differences) are able to enjoy the legal guarantees provided by constitutional complaints. Possible "selection" among fundamental rights and freedoms able and suitable to be protected by constitutional complaints is pre-determined first of all by their nature and substance on the one hand and then by the necessity to respect the purpose and ensure the effectiveness of the constitutional complaint as an individual legal remedy (extraordinary legal remedy) on the other hand. From the point of view of the constitutional protection (its appropriate level and intensity) provided by constitutional complaints with respect to different fundamental rights and freedoms one can mention that civil and political rights as negative rights are "open" to the use of individuals within the framework of the constitution. Since the state does not contribute to the realisation of these rights economically they are kept only subject to a "negative" control by the constitutional court which prevents the organs of state from restricting these rights excessively (*status negativus*) and unconstitutionally. It is generally recognised that if the constitutional complaint is well-founded, the decision of the constitutional court should be either the cassation of the challenged unconstitutional act(s) or to declare null and void the contested act of legislation. Another criterion which should be pointed out is the legislator's intention to prevent diverse and divergent judicial practices in its ordinary courts with respect to certain fundamental rights and freedoms. By means of the individual's constitutional complaint the constitutional court may guide the action of the

judicial, executive and legislative powers in all matters concerning fundamental rights and freedoms and its decisions resulting from constitutional complaints have therefore a greater systematic rather than individual dimension.

It should be pointed out that the constitutional complaint as an individual legal remedy is fully able to comply with all of above mentioned requirements provided that a violation of civil and/or political rights has been alleged. With respect to the economic and social rights a question arises whether they are at all judicially enforceable when some of them are conditional on the existence of financial and other resources of state and cannot be implemented in practice if such resources are inadequate. From the point of view of their constitutional protection by constitutional complaint there is nevertheless no problem providing this protection with respect to economic rights if they are formulated as negative rights. One may note, for example, the protection of property and other forms of private economic activity against governmental action. Economic rights of this kind may be formulated as negative rights preventing the state from interfering with property. It should be noted that many of the social rights are themselves negative rights as well. Some of these such as a right to form unions are just variations of the right to associate freely, a traditional negative right. Similarly the right to strike includes a right to be free from interference with strikes, also a negative right.[91]. As regards other economic and social rights, these can be subjected to "positive" control by the constitutional court (*status positivus)* as the individual demands the realisation of these fundamental rights as far as the state's financial resources allow. Because of this the constitutional control of such economic and social rights by constitutional complaint cannot be qualified in many cases as an effective judicial remedy given that a positive finding of the constitutional court is not always followed by adequate action of the government to redress violated economic or social rights. This fact should therefore play a decisive role in the determination of a number of social and economic rights (formulated otherwise as negative rights) subjected to the constitutional complaint.

For completeness it is worthwhile to recall that determination of the appropriate number and "quality" of the constitutional rights and freedoms (respect of which shall be guaranteed by constitutional complaint) is however only one of the factors which should guarantee its effectiveness as an individual legal remedy. Amongst other factors having an impact on its effectiveness it is possible to add the number of subjects entitled to lodge complaints to the constitutional courts (juridical persons, natural persons, self-governmental bodies, communes etc.) and the scope of acts of which the unconstitutionality of which may be challenged. There is currently general agreement that constitutional complaints should be allowed against individual acts of administration. The practice of particular states moreover confirms that court decisions and even legislative acts may also be subjected to constitutional complaints. As a *de lege ferenda* remark it may appear appropriate to extend jurisdiction of constitutional complaints to all acts of public authorities, i.e. administrative acts, court decisions and even legislative (sub-legislative) norms.

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91 H.Schwartz: Do Economic and Social Rights Belong in a Constitution? The American University Journal of International Law and Policy No. 4/1995, p. 1236.

II. International Human Rights and Freedoms

In the process of the determination of rights and freedoms the respect of which should be guaranteed by constitutional complaints, the following question may raise. Should the legislator be confined to the rights and freedoms guaranteed only by domestic law or should it extend to those covered by international instruments? If the answer to this question is in the affirmative, selected international treaties (their provisions) securing human rights and freedoms will acquire constitutional status through their incorporation into domestic constitutions (constitutional laws) with or without the accumulated case-law. In such a case any violation of a treaty provision would inevitably be a violation of the constitution. Two jurisdictions of two different bodies (the constitutional court and/or the European Court of Human Rights, Commission of Human Rights) would then however be found, and the freedom of constitutional interpretation (solely by the "domestic" constitutional court) would be confronted with the risk of divergent interpretation of international bodies.[92] Each legislator has therefore to determine if such a legal position of its constitutional court is acceptable and subsequently decide if the "international" human rights and freedoms should also be embodied into the circle of the rights and freedoms falling under the protection of constitutional complaint. Generally speaking limiting constitutional complaint in such a way in many cases however would simply shift the workload from domestic courts (including the constitutional court) to the European Court of Human Rights and/or Human Rights Commission. It is therefore preferable that judicial redress of violations of constitutional rights and freedoms be available in the country where they have taken place before a case is brought to the international body(ies) for the protection of human rights.

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92 Protection constitutionnelle et protection internationale des Droits de l'Homme: Concurrence ou complémentarité? IXème Conférence des Cours Constitutionnelles Européennes, Paris, Mai 1993, Volume II., p. 838.

b. THE CONSTITUTIONAL COMPLAINT - AVOIDING EXCESSIVE CASE-LOAD

by Ms Carola VON PACZENSKY, Judge, Administrative Court, Hamburg, Legal Clerk, Constitutional Court, Karlsruhe, Germany

If the legal system of a country provides for the possibility of an individual constitutional complaint, the task is to master the narrow passage between Scylla and Charibdis: On the one hand there is the promise to the people that anybody can seek the protection of his/her constitutional rights by submitting his/her case to the highest court. Setting the standards to accept a case too high might result in undermining the whole concept. On the other hand it is necessary to limit the caseload of the constitutional court in order to guarantee its functioning and to ensure that a decision of relevant cases can be reached in appropriate time. Just recently the European Court of Human Rights in Strasbourg decided that the German Constitutional Court had violated the right to a court decision in due time stemming from Article 6 of the European Convention on Human Rights because it took more than five years in one case and more than seven years in a second case to reach a decision. Although these cases did not concern constitutional complaints but court applications about the constitutionality of certain legal provisions, a similar decision of the European Court with respect to a constitutional complaint is not unthinkable.

I will try to give you a short overview of the way German law tries to meet both requirements. Please note, however, that there are exceptions (which I will leave out for the sake of the overview) to every rule which I'm going to describe to you. Maybe we can go into some of them during the discussion.

The regulations which influence the case-load of the Constitutional Court can roughly be divided into three groups:

- admissibility requirements

- procedural provisions

- organisational structures

A. ADMISSIBILITY REQUIREMENTS

I.

Under Article 93 Basic Law and Article 90 paragraph 1 of the Federal Constitutional Court Act (BVerfGG) any person who claims that one of his/her basic rights or procedural rights set forth in the constitution has been violated by an act of public authority can launch a constitutional complaint.Several conditions must, however, be fulfilled:

- The complainant must be **entitled** to the basic right. Certain basic rights (e.g. the right to assemble Article 8 Basic Law) are granted to "all Germans", while others (e.g. the freedom of expression, Article 5 Basic Law) are given to "everybody". Therefore a

foreigner cannot claim a violation of those basic rights granted to Germans only. Domestic legal persons can claim the basic rights only "to the extent that the nature of such rights permits" (Article 19 Paragraph 3 Basic Law), which might sometimes be difficult to assess.

- Only **acts of public authority** can be challenged with the constitutional complaint, because the basic rights are primarily directed against the state and do not directly apply to relations between private parties. Under German law, an act of public authority can be a court decision, an administrative act or a legislative act. However, a court decision in a civil action is an act of public authority and the complainant may argue that the civil court has misinterpreted his/her basic rights and its influence on common law in its decision. Actually, most of the constitutional complaints are directed against court decisions. To require an **act** means that mere opinions by officials or inner-administrative regulations cannot be targeted by a constitutional complaint.

- The complainant **him/herself** must be the victim of the alleged violation. There is no constitutional complaint for someone else's right.

- The complainant must be **directly and presently** affected. This provision is mainly important for constitutional complaints which are directed against a legislative act. Whenever such act requires implementation by the administration, the complainant will not be directly affected. He/she will have to wait and bring a case against the implementing act in a lower court. Also, if the administrative act has been reversed, the complainant is no longer and therefore not presently affected.

II.

Article 90 paragraph 2 BVerfGG requires the exhaustion of remedies before a case can be submitted to the Constitutional Court. This means :

- The complainant has to seek judicial relief at the regular lower court first, if the legal system provides such a possibility. As all courts have to apply the Basic Law, it is likely that the violation of a basic right - if it happened - will be noticed by one of the courts while the case moves through the system. As the legal system in Germany very often grants three consecutive instances, usually at least two, there is a good chance for the plaintiff that any unconstitutional infringement on his/her rights will sooner or later be deleted. If, however, the courts do not share the complainant's point of view in a complicated legal matter, this requirement ensures that the Constitutional Court can already take note of the legal opinion of the courts having jurisdiction laid out in the decisions.

  If the complainant has failed to file an appeal in due form and time, he/she will not be preempted from raising a constitutional complaint, notwithstanding the fact that he/she can't make up for it. The criterion is not whether the complainant can still find relief at a lower court but whether he/she could have.

- The second meaning of "exhausting all remedies" has been developed by the Constitutional Court and implies that the complainant must have brought all the relevant facts to the attention of the lower court and raised the substantial issues. The appropriate court must have had a chance to evaluate the case thoroughly. Obviously, in a legal system where representation by lawyers is not mandatory at all courts, one cannot make too high demands with respect to legal arguments if a person has represented him/herself - even a lay person can lay out all the facts and point out why the courts should decide in his/her favour.

III.

For lodging a complaint against a court decision or administrative act the law (Article 93 BVerfGG) sets a time-limit of one month. If the constitutionality of a law is challenged, the time-limit is one year after the law comes into effect. Before expiration of this time-limit, the complainant has not only to lodge the complaint but also to substantiate it. He/she must submit the decision itself and lay out all the relevant facts and reasons. His or her brief has to explain in which respect a basic right has been violated and point out the causal connection between the act of public authority and the alleged violation. If for example a complainant claims the violation of his right to a hearing before a court, it is not sufficient for him to claim that the court reached its decision before he could take a stand on the case. He would also have to explain in some detail what he would have said or written if he had been granted the hearing to enable the Constitutional Court to determine if the court decision is really a result of the denial of the proper hearing. Ideally, the Constitutional Court should be able to evaluate the complaint without having to undertake any additional inquiries after the month has expired. This is especially important because the Constitutional Court does not normally request that files be transmitted from another court or agency prior to its first decision of acceptance (see below), but will base this decision solely on the information distributed by the complainant - at least if it denies acceptance.

Procedural Provisions

Before the Constitutional Court decides on a constitutional complaint, a special acceptance procedure takes place (Article 93a BVerfGG). Acceptance of a constitutional case is required and shall be granted

- if the case has a fundamental constitutional significance or

- if acceptance is indicated to enforce the basic rights, especially if the complainant suffers particularly grave disadvantages as a result of refusal to decide the case.

After more than 90 volumes of published decisions by the Constitutional Court, obviously many questions of fundamental relevance to the meaning of the constitution have already been decided. Of course new regulations and laws and therefore new questions about their compatibility with the Constitution keep coming up, but this is nevertheless not a way for many cases to reach the Constitutional Court. The second provision for acceptance is more important.

However, if a case has no prospective of being successful, its acceptance cannot be necessary to enforce the basic rights of any individual. Therefore a preliminary screening of each case takes place and those where obviously no violation of constitutional rights has taken place are denied acceptance at this stage. As mentioned before, most constitutional complaints are directed against court decisions. Because the Constitutional Court is not an additional regular court, it limits its scrutiny to the question of whether a basic right guaranteed in the constitution has been violated. The distinction between conformity with the constitution and conformity with the law in general is not always easy to make. Is the right to a fair hearing violated whenever a court disregards a provision of the code of procedure designed to ensure the observance of the right? Most laws and regulations can be traced back to one or the other provision in the constitution. To preserve the role of the Constitutional Court as an extraordinary court, it is important to leave the interpretation of the so-called "simple law" to the lower courts. The violation of a constitutional right requires more than a simple misreading of a provision in the law. The rough guideline which has emerged over the years reads as follows: decisions on the procedure, the ascertainment and evaluation of the facts, the interpretation and application of the provisions of "simple law" are entrusted to the other courts and not subject to the control of the Constitutional Court. The latter only intervenes if the deficiencies of the decision result from a **fundamental error** of the court below concerning the **significance and the reach of a basic right.**

Lately the criterion "suffers especially grave disadvantages as a result of refusal to decide the case" has gained importance. This is one of the reactions of the Constitutional Court to ward off a rising load of cases with minimal importance and to prevent itself from being seen as an additional court of appeals. The dividing line between "especially grave disadvantages" and the plain realisation that justice does not always win has a lot, but not everything to do with financial interest. A regular civil action involving a few hundred DM will normally not be accepted by the Constitutional Court on the grounds that even if a thorough examination of the court proceedings might succeed in finding an error, this is not worth the required amount of time and work, when by the same token the Constitutional Court lacks the time and resources for important cases. Let me point out though that this is not identical with setting a strict minimum value requirement. The decision whether a retired worker gets 5 DM more or less a month from his pension fund may also not involve a large amount of money. But a case like this may very well concern a matter of fundamental importance, e.g. if the question is raised whether years spent bringing up children contribute towards eligibility for a pension.

The acceptance requirements in combination with two more procedural provisions are the main tool to reduce the work-load of the Court in accordance with the general idea of the constitutional complaint. The two other provisions are Article 93b BVerfGG (the chamber i.e. three judges instead of eight, may refuse or accept the constitutional complaint) and Article 93d BVerfGG (the refusal does not require reasons). The chamber's decision shall be adopted by unanimous consent (Article 93d BVerfGG). The composition of the chamber should not remain unchanged for more than three years (Article 15a BVerfGG) to respond to the danger that a chamber may develop its own standards.

Each case is assigned to a "reporting judge", who prepares a written memo dealing with admissibility requirements and proposing acceptance or refusal. This memo is circulated in the chamber and if the two other members sign their consent with a refusal, the panel will never have to deal with the case. The fact that no reasons are required greatly simplifies this

procedure, because it is much easier to consent on the reasons set out in an internal memo than to a text which is sent to the complainant and may even be published.

Article 93c BVerfGG also provides for a positive decision of the chamber in cases where the constitutional issue has already been decided by the full panel of judges, the acceptance of the case is necessary to enforce the basic rights of the complainant and the complaint is clearly justified. This is especially helpful when one case has been decided by the panel and a number of parallel or similar cases can afterwards be decided in the chamber. Again, the requirement of a unanimous decision ensures that this procedure is used only in truly clear cases. No oral proceedings are necessary for the chamber's decisions (Article 93d paragraph 1 BVerfGG).

To give you an example of the work done through the chambers: From January to April 1997, 1612 constitutional complaints were lodged at the Constitutional Court. During the same period, 1441 were denied acceptance through a chamber decision, whereas 7 were granted a positive decision through a chamber and 5 were decided by whole panels. Incidentally, more than 95% of all constitutional complaints are not accepted.

Usually no fee is charged for the lodging of a constitutional complaint. For abusive complaints however the possibility of charging exists (Article 34 BVerfGG), although this provision is rarely used.

Organisational structures

The Secretariat of the court performs a first examination and sorts out those complaints which are manifestly inadmissible, e.g. for missing the time-limit. Although they cannot exert judicial power and decide to dismiss the case, they can prepare the decision very well. Also they can write to the complainants and point out the deficiencies of their briefs, ask them to submit the relevant documents or to withdraw manifestly inadmissible complaints. In Germany, the Secretariat also collects those "complaints" which are just general declarations of dissatisfaction without targeting a specific decision or letters from "regular clients", who are already known to the court as writing out of a slight mental disorder.

At the beginning of the business year, the panel decides on the principles according to which the incoming complaints are distributed among the judges in the capacity of rapporteurs. This means that the rapporteur shall prepare the proceedings for those cases he/she is assigned by submitting a written argument vote containing the case history and his/her preliminary legal opinion to the other members of the chamber or panel. The first panel of the court has for example distributed along the lines of the basic right which is allegedly violated. So one judge prepares all the cases where freedom of religion is the main issue, the next one all the cases where free choice of occupation or profession is at stake etc. This ensures that the constitutional judges can work efficiently, because they gain experience in their field.

In addition to the Secretarial staff, the Rules of Procedure of the Constitutional Court state that each judge shall have a number of research or legal assistants, whom they select themselves. The assistants are usually judges of lower courts, although sometimes they come from universities. They prepare the written votes for the constitutional judges, conduct legal research etc. For the time being, each constitutional judge has three assistants. Most of them

are experienced in those fields relevant to the cases of the judge they work. They are also trained to check if the admissibility requirements are met.

THIRD WORKING SESSION

presided by Mr Ján KLU_KA,
Judge, Constitutional Court, Košice, Slovakia

a. Procedure and practice of the Constitutional Court: Latvian experience and requirements
by Mr. Aivars ENDZI_Š

b. The "life cycle" of a case before the Constitutional Court
by Ms Britta WAGNER

c. Remarks
by Mr Francis J. LORSON of the Supreme Court of the United States

d. The role of documentation and international comparative studies
by Ms Halina PLAK, Head of the Library and Documentation Centre, Constitutional Tribunal, Warsaw

a. PROCEDURE AND PRACTICE OF THE CONSTITUTIONAL COURT: LATVIAN EXPERIENCE AND REQUIREMENTS

by Mr Aivars ENDZINŠ, Acting Chairman of the Constitutional Court of the Republic of Latvia

INTRODUCTION AND HISTORICAL SURVEY

The procedure and legal action of the Constitutional Court are of the utmost importance in ensuring qualitative review of cases.

The legal procedure of Constitutional Courts in various countries is quite different.

While drafting the Constitutional Court Law of the Republic of Latvia, the viewpoint on fundamental principles and procedure of the Constitutional Court has dramatically changed. The draft law of the Constitutional Court submitted by the Cabinet of Ministers to the Fifth Saeima (Parliament) in spring 1994 did not establish any regulations as to the procedure of reviewing cases, but only indicated that general principles of administrative and civil proceedings should be applied.

The Fifth Saeima considered the Constitutional Court Law in two readings and prepared the Law for the third reading. For political reasons, the draft law was not reviewed in the third reading. The draft law prepared for the third reading was much more extensive and elaborate as regards the course of proceedings in comparison with the draft law submitted by the

Cabinet of Ministers. Articles determining the procedure of submission of applications and preparation of the case for review as well as the procedure of the Court session had been included in the law. The above draft law did not mention the law of administrative proceedings. It was pointed out that general principles of civil proceedings should be taken into consideration.

After assembling, the Legal Committee of the Sixth Saeima revised the draft law prepared for the third reading by the Fifth Saeima and forwarded it to the Saeima. The project determined procedural norms of the review of a case. The Committee rejected the idea of applying general principles of civil proceedings when reviewing a case.

The Legal Committee has established that the Procedural Law of the Constitutional Court shall regulate the procedure of reviewing cases but, until it becomes effective, the Rules of Procedure of the Constitutional Court, adopted by a majority vote of the entire total of judges, shall establish the procedure.

Work on the Rules of Procedure of the Constitutional Court was started as soon as the judges had taken up duties of office. Normative acts regulating the procedure of different Constitutional Courts were investigated and the procedure of reviewing cases at our Constitutional Court - taking into consideration its specific demands - was elaborated. Our experience, though small, has proved that the Rules could serve as the basis of the Procedural Law of the Constitutional Court.

ARE SPECIAL PROCEEDINGS AT THE CONSTITUTIONAL COURT NEEDED?

As I have already stressed, the first versions of the Constitutional Court draft law made provisions for application of general principles of administrative and civil proceedings when reviewing a case. Therefore, the first issue to be mentioned when discussing the procedure of reviewing cases at the Constitutional Court is whether in fact special proceedings at the Constitutional Court are needed.

The majority of specialists in Latvia are positive about this. The Constitutional Court Law also stresses the necessity for a special process. At the same time, there exists a viewpoint that general principles of civil procedure shall be applied, when reviewing a case at the Constitutional Court. The draft project on amendments to the Constitutional Court Law, submitted by the Council of Sworn Advocates of the Republic of Latvia, is evidence of the above.

To my mind, a special process or procedure is needed for of the Constitutional Court, because the Constitutional Court is the court of law. Disputes reviewed by it are of a specific character and cannot be reviewed in accordance with the principles of civil procedure.

COMPETENCE OF THE CONSTITUTIONAL COURT - THE DECISIVE FACTOR OF SINGULARITY OF PROCEDURE

The procedure of review of cases before a court depends on what cases come under the

jurisdiction of the court. Article 16 of the Constitutional Court Law establishes competence of the Constitutional Court of the Republic of Latvia. As can be seen, the Article determines that the Constitutional Court shall review two types of cases: first, conformity of normative acts with the normative act of higher legal force and second conformity of regulations issued by higher state institutions or officials with the Constitution and other laws. In contrast with several Constitutional Courts of Europe, issues connected with results of elections, legality of activities of different parties, impeachment of the highest officers of state and, as was pointed out yesterday, violation of the Constitutional rights of individuals, do not come under the jurisdiction of the Constitutional Court of the Republic of Latvia.

Thus, first, the Constitutional Court of the Republic of Latvia shall review the compliance of normative acts issued by a state institution of any level with the Constitution or with any other normative act with higher legal force: compliance of laws with the Constitution, compliance of normative regulations issued by the Saeima with the Constitution and other laws, compliance of regulations and other normative acts issued by the Cabinet of Ministers,with the Constitution and other laws, as well as compliance of normative acts issued by institutions or officials subordinated to the Cabinet of Ministers with the Constitution, other laws and Regulations of the Cabinet of Ministers, compliance with the Constitution and other laws of other normative acts issued by institutions or officials confirmed, appointed or elected by the Saeima; compliance with the Constitution, other laws and regulations of the Cabinet of Ministers, of binding regulations and other normative acts issued by the Dome (Council) of municipalities as well as compliance of the national legal norms of Latvia with the international agreements entered into by Latvia which are not contrary to the Constitution. Furthermore, the Constitutional Court shall review cases regarding compliance with the Constitution of the international agreements signed or entered into by Latvia.

Second, the Constitutional Court of the Republic of Latvia shall review cases on resolutions issued by the State institutions and officials that may not be appealed in general courts i.e. acts of the President of the State, the Chairman of the Saeima and the Prime Minister. Amendments to the Constitutional Court law that have been adopted in the second reading by the Saeima, provide for a possibility of reviewing the compliance of Regulations issued by the Cabinet of Ministers with the Constitution and other laws.

THE RIGHT TO SUBMIT AN APPLICATION

As in most Constitutional Courts in Europe, the Constitutional Court of the Republic of Latvia has no right to initiate a case. This allows the Court to stay out of political activities and maintain the independent status of an arbitrator of disputes. Article 17 of the Constitutional Court law determines the scope of persons having the right to submit an application to the Constitutional Court. We have to admit that the scope is narrow and it could be one of the reasons why only a small number of applications have been submitted to the Court. The President of the State, the Parliament, the Cabinet of Ministers, not less than one-third of the members of the Saeima, the Plenum of the Supreme Court and the Prosecutor General have the right to submit an application to initiate a case. The Dome (Council) of a municipality also has the right to submit an application to initiate a case, regarding compliance of normative acts with the Constitution and other laws, if the normative acts

regulate activity or performance of the Dome (Council). In addition, the Dome (Council) of a municipality may submit an application to initiate a case regarding compliance with the law of an order by which a minister, duly authorised by law to do so, has rescinded the binding regulations issued by the Dome (Council) of a municipality. At the same time a minister - duly authorised by law - has the right to submit an application to initiate a case regarding compliance with the Constitution, other laws and regulations of the Cabinet of Ministers, of binding regulations and other normative acts of the Dome (Council) of municipalities.

Debate has been started in the Saeima to enlarge the scope of persons having the right to submit an application to the Constitutional Court. The draft law to amend Article 17 of the Constitutional Court Law envisages changing the number of deputies who have the right to submit an application to initiate a case from one third of the members of the Parliament (deputies) to one fifth. The draft law also envisages granting the State Audit Office and the Director of the Bureau of Human Rights the right of submitting an application to initiate a case.

SUBMISSION OF APPLICATIONS TO AND INITIATION OF CASES IN THE CONSTITUTIONAL COURT

The Constitutional Court Law regulates the procedure of submission of applications to the Constitutional Court to initiate a case (hereafter - the application).

Article 18 of the Law determines that the application shall be made in writing. The application must indicate the applicant, the institution or official who issued the act which is disputed, an account of the true circumstances of the case, the legal justification of the application and the claim presented to the Constitutional Court. The application shall be signed by the applicant.

If the application is submitted by a collegiate institution, it shall be signed by the managing director, and a written decision of the collegiate institution shall be attached to the application.

If the application is submitted by not less than one-third of the members of the Saeima, it shall be signed by each of the members and accompanied by an authorisation from the person entitled to perform the procedural actions on behalf of the applicant.

In any case, the application must be accompanied by explanations and documents, necessary to determine the circumstances of the case.

Article 20 of the Constitutional Court Law envisages that, upon receiving an application, the Chairperson of the Constitutional Court or a judge, authorised by him/her shall determine whether the case comes under the jurisdiction of the Constitutional Court, whether the applicant is entitled to submit an application and if the application complies with the general requirements for accepting an application.

If the case comes under the jurisdiction of the Constitutional Court, if the applicant is entitled to submit the application and the application complies with the general and special

requirements for accepting an application, the judge shall adopt a decision to initiate a case. But if the case does not come under the jurisdiction of the Constitutional Court or if the applicant is not entitled to submit the application, or the application does not comply with the general requirements for accepting an application, the judge shall adopt a decision to refuse to initiate a case.

The Law does not determine whether the judge has the right to indicate shortcomings of the application and give some time to eliminate them. The Constitutional Court in its previous practice has allowed the applicant to do so within the time limit,indicated by the judge. For instance, one of the applications submitted by the deputies of the Saeima,was not correctly formulated. The deputies petitioned to evaluate the action of the Cabinet of Ministers, non-compliance of the Regulations of the Cabinet of Ministers with the norm of higher legal force. Another application, submitted by the deputies of the Saeima lacked legal justification. In both cases the judge reviewing the case pointed out the shortcomings to the representative of the applicant, and the shortcomings were eliminated.

The Law determines that the decision to initiate or to refuse to initiate a case is to be adopted by the judge within one month from the date on which the application was submitted. In complicated cases the Constitutional Court, consisting of three judges, may adopt a decision to extend the time limit to two months. Recent practice has not proved the necessity to extend the time limit. Perhaps when physical persons are given the right to submit a Constitutional complaint after exhaustion of remedies in general courts, the time limit of one month could become problematic.

The Law determines that a decision on initiating a case may not be appealed, but a decision to refuse to initiate a case may be appealed to the Constitutional Court by the applicant within two weeks of receiving a copy of the decision. In such cases the Constitutional Court, consisting of three judges, reviews the appeal within one month of receiving the appeal and adopts a decision to satisfy it and initiate a case or to dismiss the appeal.

PREPARING A CASE FOR REVIEW

If a judge or the Court has initiated a case, a copy of the decision is forwarded to the participants.

A copy of the application is also forwarded to the institution or official who issued the act which is disputed, and it is requested to submit a written reply, describing the true circumstances and legal justification of the case by the date set by the judge of the Constitutional Court. In addition, a copy of the decision is forwarded for publication in the newspaper “Latvijas Vçstnesis”.

The fact that the decision to initiate a case is published is of great importance, as the community gets information about the processes and activities of the Constitutional Court.

A judge, appointed by the Chairperson of the Constitutional Court, prepares the case for review. The Law determines that in preparing the case, if necessary, the judge may request additional explanations and documents from the applicant, the institution or official who

issued the act which is disputed, or any state or municipal institution, office or official. The judge may also invite experts to give their opinion.

While preparing cases, the Constitutional Court has had a number of problems and it would perhaps be a good idea to discuss them.

First of all, as I have already mentioned, the institution or official who has issued the act which is disputed is requested to submit a written reply detailing the true circumstances and legal justification of the case by the date set by the judge or the Court. The Law does not determine what is to be done if the written reply is not submitted in time. The case cannot be considered ready for review, if the viewpoint of both parties has not been heard. On the other hand, it is inadmissible that the institution or official who issued the act which is disputed deliberately tries to delay review of the case by not submitting the written reply in time, thus ensuring that the act which is disputed remains effective.

A similar situation can arise if the judge preparing a case requests material or documents from state or municipal institutions or their officials.

Evidently, when drafting the Constitutional Court Procedural Law, the possibility of applying sanctions in cases when submission of a written reply or other material is maliciously delayed shall be determined. To prevent establishment of too short a time limit for preparation of the respective documents the decision on the sanction shall be reached by three judges.

The second problem arising while preparing a case for review is connected with the right of a judge to assess compliance of an act with an act of a higher legal force. For example, if compliance of a normative act of a lower legal force with the norm of higher legal force is disputed, but it is evident that the act is not in conformity with the law for other reasons as well, does the judge have the right to compile material on all the reasons of non-conformity? I would gladly like to hear the viewpoint of my more experienced colleagues.

The third problem is connected with inviting experts. The Constitutional Court would be greatly interested to listen to the point of view of experts, but it is next to impossible to invite experts in legal issues, as the Constitutional Court does not possess any means to reimburse their services.

The law establishes that a case shall be prepared within not more than three months. In especially complicated cases the Constitutional Court, consisting of three judges, may adopt a decision to extend this time limit but by not more than two months. The time limit is sufficient to prepare the case qualitatively for review and not too long to delay the process and leave the disputed legal norms and acts valid, as it would not improve stability and legal order.

When the judge is of the opinion that the preparation of the case is completed, he writes a conclusion, attaches it to the case file and forwards it to the Chairperson of the Court. Having examined the case, the Chairperson of the Court completes the preparation of the case by a decision to forward the case for review, setting the time and place for the session of the Constitutional Court.

A problem could arise, if the viewpoint of the Chairperson of the Court and the judge, on completion of preparation of the case for review, differs.

The Law indicates that a judge appointed by the Chairperson of the Court,shall prepare a case for review. At the same time, the preparation of the case is completed by a decision of the Chairperson of the Constitutional Court.

The Law establishes that the Court session shall be set down not later than three months after the adoption of the decision to forward the case for review. Not later than fifteen days before the session, participants in the case are notified of the time and place of the session and an announcement is forwarded for publication in the newspaper “Latvijas Vçstnesis”. Thus, anybody who is interested can follow the development of the case.

Following the adoption of the decision to forward the case to review and on the time and place of the session, participants in the case may examine the case material. The question whether new case material may be added after the participant has examined the case material has not yet been answered. On the one hand it would be unfair to the participant who has examined the case material, on the other if documents or material concerning the case exist, the judges themselves during the Court session decide whether to supplement the case with the above documents or not.

THE COMPOSITION OF THE COURT

The Law envisages that cases at the Constitutional Court are reviewed either by the entire total of the judges or by three judges. The entire Constitutional Court reviews cases concerning compliance of laws with the Constitution, compliance with the Constitution of international agreements signed or entered into by Latvia, compliance of resolutions of the Saeima with the Constitution and other laws, compliance with the Constitution and other laws of regulations and other normative acts of the Cabinet of Ministers, compliance of acts of the President of the State, Chairperson of the Saeima and the Prime Minister with the Constitution and other laws. Cases not mentioned above shall be reviewed by three judges.

If the entire Constitutional court reviews a case, it shall include all the judges of the Constitutional Court who have not been excused from participating in the Court session for health or other justified reasons. In this case there may not be less than five judges of the Constitutional Court. The session is chaired by the Chairperson of the Court or his/her deputy. If a case is reviewed by three judges of the Constitutional Court, the participating judges are selected by the Chairperson of the Constitutional Court and these judges shall elect the Chairperson of the session from among them.

As to the composition of the Court, the issue as to whether the judge may be challenged or he/she refuse to take part in the session, has become topical. The Constitutional Court Law does not provide for such a case.

At present there are six judges at the Constitutional Court. The law determines that the Constitutional Court shall have seven judges. If several judges are challenged, it is next to impossible to review cases by the entire total of the judges. Thus, during the session of the

very first case, the representative of the Cabinet of Ministers advanced the issue of challenging three judges, because their spouses or they themselves had voted for the law, compliance with which the Regulations of the Cabinet of Ministers was disputed. The case had to be reviewed by the entire Constitutional Court i.e. by at least five judges. If the issue had been taken up and resolved in favour of the representative of the Cabinet of Ministers, the Court would not have been able to review the case.

SESSION OF THE COURT
Openness of the Court Session

The court session is one of the most important stages of reviewing a case. The Law indicates that sessions of the Constitutional Court shall be open, except in cases when this is contrary to the interests of protecting state secrets.

At present the Constitutional Court hall is rather small, therefore Rules of Procedure of the Constitutional Court envisage that representatives of the mass media as well as other persons who are interested in the case shall contact the secretary of the Court session, after the announcement of the Court session has been published. The maximum amount of persons present in the Court hall shall be determined by the secretary of the Court session, taking into consideration the number of participants and other persons involved in the case as well as the space in the Court hall. If it is impossible to find room for everybody, these persons,who approached the secretary of the Court session earliest shall be given the possibility to attend the Court session first of all.

As the mass media are usually interested in sessions of the Constitutional Court, special care should be taken to make sure that journalists and operators are able to accomplish their tasks without intruding upon the process of the Court session. Therefore the Rules of Procedure establish that recording of the process of the Court session on audio or video tape may be made only with the permission of the Chairperson of the Court session and it shall not inconvenience the process of the Court session. Persons wishing to record the process of the Court session shall inform the secretary of the Court session in advance.

The question whether representatives of the mass media shall be given the possibility of getting acquainted with the case material seems to be significant as well. The opinion of the Constitutional Court judges, expressed in the Rules of Procedure, is that the journalists shall have access to the case material. The Rules of Procedure determine that the time and place of examining the case material should be co-ordinated with the secretary of the Court session. This is necessary in order not to violate the right of participants in the case to examine the case material as well as to ensure that the judges also have the possibility to do so.

Proceedings during the Court session

The Court session can be divided into several successive parts. First of all there is the preparatory part of the court session, which is opened by the Chairperson of the Court session, who announces the members of the Court, participants in the case and other persons involved in the case, and checks their identity and authorisation.

After that follows the review of the case in essence. It begins with the report of a judge. During the drafting of the Rules of Procedure of the Constitutional Court, different opinions were expressed on the above report: should it be comprehensive, should it include much information etc. On the one hand, judges and participants are well acquainted with the case material, while on the other, the persons present in the Court hall are not. It was decided to point out the main issues and to remind the judges and participants of the case material.

It was also decided that only facts should be set forth in the judge's report, but no conclusions expressed. In addition, the Rules of Procedure determine that the report shall indicate the applicant's name; the act which is disputed and the statement if the whole act or only a part of it is disputed; the normative act with higher legal force, compliance with which is disputed; an account of the facts relating to the case and its legal justification; the institution or official who issued the act which is disputed; a statement as to whether the institution or official who issued the act which is disputed has submitted its reply and - if it has been done - its legal justification; the fact that the participants have been requested to submit additional explanations and documents (if this is the case) and whether the explanations and documents have been received; whether experts have been invited and their conclusions received; the documents,attached to the case file; the date on which the decision to forward the case for review was adopted; the number of the newspaper "Latvijas Vçstnesis" in which the announcement on review of the case was published; a statement that participants in the case have been duly notified about the Court session; a statement that participants have examined the case material and, if necessary, additional information on the case.

After the report, the judge answers questions of the judges of the body of the Court.

Continuing to review the case in essence, the participants in the case describe the facts relating to the case and its legal justification. The applicant is given the floor first. The Rules of Procedure establish that the duration of the report on circumstances of the case and its legal justification shall not exceed thirty minutes. Additional time may be given by the Court, if the participant requests it.

When one of the participants has described the facts of their case and its legal justification, first the judges then the other participant in the case may put questions to him/her.

When all the participants in the case have described the true circumstances and legal justification, opinions of experts are heard and witnesses are questioned (if experts and witnesses have been invited).

Next follow Court debates. Participants in the case may take the floor in the Court debate. They shall not refer to circumstances and material not verified by the Court. No questions shall be asked during the debate. The Court - taking into consideration the viewpoint of participants - may set a time limit for the speaker.

Then the participants in the case are given the opportunity to make comments.

The Constitutional Court Law determines that the session of the Constitutional Court ends with the announcement by the Chairperson of the Court session of the time the verdict will be

announced. Thus, differing from other court processes, announcement of the verdict is not a constituent part of the Constitutional Court session, but a separate stage of proceedings. The verdict shall be announced not later than fifteen days after the session of the Constitutional Court.

The most essential problems one comes across in a Court session

With regard to proceedings during the Court session, one can mention a couple of problems.
First: should one express a claim connected with verification of compliance of a disputable norm with a legal norm of higher legal force that has not been pointed out in the application. For example, in the application of the first case reviewed at the Constitutional Court, the applicant stressed the fact that Regulations of the Cabinet of Ministers were not in compliance with Article 81 of the Satversme (Constitution) of the Republic of Latvia as they altered the law adopted by the Saeima which was then in power. Another argument was expressed during the Court session, stressing that the Regulations were not in compliance with the above Article also because one more precondition - urgent necessity - had not been in existence.

Second: does the judge have the right to ask only exact questions or may he "provoke" participants to mention facts and arguments, not fixed in the case material. In fact, this is the same issue I pointed out when speaking about preparation of the case, namely, permissibility of the Court initiative when collecting arguments and evidence.

THE VERDICT

Reaching the verdict is the most important stage in the process of the Constitutional Court. The Constitutional Court Law determines that, following the session of the Constitutional Court, the judges shall meet to reach a verdict in the name of the Republic of Latvia.

In elaborating the Rules of Procedure, quite some time was spent discussing the problem of the confidentiality of the conference chamber, which is essential in civil and criminal proceedings. There is a peculiarity of the Constitutional Court verdict: it is not only the statement whether the disputed legal norm (act) is in compliance with a norm of higher legal power, which is of importance but also arguments and proof justifying the conclusions of the Constitutional Court are material. Therefore the Rules of Procedure determine that, while reaching the verdict and voting for it, only the body of judges reviewing a case shall be present in the conference chamber. In accordance with the decision of the conference, the verdict is worked out and drawn up by one or several judges. If the necessity arises, they may invite the officials of the Constitutional Court to participate. The judge is under the obligation to retain confidentiality of the conference chamber. The officials of the Constitutional Court shall not make public any information, they have learned during the period of drawing up the verdict.

The law determines that the verdict shall be reached by a majority vote. The judges may vote only “for” or "against". In the event of a tied vote, the Court shall reach a verdict that the disputed legal norm (act) complies with the legal norm of higher force. A problem may arise when deciding what to do if there is an equal amount of votes on inclusion of an argument or proof in the verdict.

Also debatable is the issue of presenting individual opinions of the judges in writing.

The Law indicates that a judge, who has voted against the opinion given in the verdict shall present his/her individual opinion in writing which is attached to the case file, but is not announced at the Court session.

The Rules of Procedure - in their turn - determine that the secretary of the Court session shall attach an unsealed envelope to the case file with the number of the case and an inscription "Individual thoughts of judges" on it. The Chairperson of the session shall put the written individual opinions on the verdict into the envelope and apply the seal of the Constitutional Court to it. If the verdict is passed unanimously, then the Chairperson of the session shall put a written statement into the envelope, pointing out that no individual thoughts on the verdict have been expressed. After that the seal of the Constitutional Court is applied to it. The above envelopes shall be kept attached to the case file up to the moment of compilation of a collection of the Constitutional Court verdicts.

When publishing the collection of the Constitutional Court verdicts, the individual opinions of judges are published as well.

Thus, no discussion on votes or opinions of judges follows the announcement of the verdict and it protects the Court from a fever of political excitement, at the same time retaining individual opinions of judges for the science of law.

The Law states that the verdict of the Constitutional Court shall indicate the time and place of reaching the verdict, the composition (body) of the Constitutional Court and secretary of the Court session, the participants in the case (indicating the applicant), the provision of the law pursuant to which the Constitutional Court has reviewed the case, the disputed legal norm (act), the circumstances established by the Constitutional Court, arguments and proof justifying the conclusions of the Constitutional Court, arguments and proof by which the Constitutional Court rejects this or that proof, the provision of the Constitution or other law pursuant to which the Constitutional Court considered whether the disputed legal norm (act) complies with the legal norm of higher force, the ruling of the Constitutional Court whether or not the disputed legal norm (act) complies with the legal norm of higher force, and a statement that the verdict of the Constitutional Court is final and may not be appealed.

The law stresses that any legal norm (act) which the Constitutional Court has determined as incompatible with the legal norm of higher force shall be considered invalid as of the date of the announcement of the verdict by the Constitutional Court, unless the Constitutional Court has ruled otherwise. But if the Constitutional Court has recognised any international agreement signed or entered into by Latvia as incompatible with the Constitution, the Cabinet of Ministers is immediately obliged to see that the agreement is amended, denounced or suspended or that the accession to that agreement is recalled. The verdict of the Constitutional Court is final and comes into legal effect at the time of announcement. It is binding on all State and municipal institutions, offices and officials, including the courts, and on all natural and juridical persons.

The verdict is published in the newspaper "Latvijas Vçstnesis'' not later than five days after its announcement. The deciding part of the verdict is published also in the gazette "Latvijas Republikas Saeimas un Ministru Kabineta Ziòotâjs". Once a year the Constitutional Court

publishes a collection of verdicts of the Constitutional Court, including all verdicts in full, together with the individual opinions of judges that have been attached to the case files.

CLOSING OF PROCEEDINGS

Proceedings are not always completed by announcement of the verdict.

The law establishes that proceedings in a case may be closed before the verdict is announced by a decision of the Constitutional Court upon a written request of the applicant, if the disputed legal norm (act) is no longer in effect or if the Constitutional Court finds that the decision to initiate a case does not comply with the provisions of the Law.

Proceedings in one of the cases of the Constitutional Court of the Republic of Latvia were closed, because - after submission of the claim - the institution which had issued the disputed legal act rescinded it.

The Constitutional Court exercises the right of closing of proceedings in a case, though it is not its duty. If the Constitutional Court decides that - not taking into consideration the above circumstances - proceedings shall be continued, the Court (with a motivated decision) may refuse to close proceedings.

CONCLUSIONS

The above gives an insight into process and procedure of the Constitutional Court of the Republic of Latvia in a nutshell. The number of cases reviewed by the Court, though small, have proved that it is capable of functioning. Still, as I have already pointed out, there are bigger and smaller problems to be solved. The most urgent is on the competence and initiative of the Court in discovering all the facts relating to a case. Evidently, one comes across the same problems in other courts as well.

b. THE "LIFE CYCLE" OF A CASE BEFORE THE CONSTITUTIONAL COURT

by Ms Britta WAGNER, Secretary General, Constitutional Court, Vienna, Austria

I. INTRODUCTION

The Austrian Constitutional Court has been established in 1920. It is - apart from a Constitutional Court in Czechoslovakia, which has been founded at the same time but has never taken up its work - the oldest Constitutional Court in Europe. It is located in Vienna and consists of a President, a Vice President, twelve members and six substitute members. The substitute members replace the members in their absence.

The President, the Vice President, six members and three substitute members are appointed by the Federal President on the recommendation of the Federal Government. Six other members and three substitute members are appointed by the Federal President on the basis of the recommendations of the two Chambers of Parliament. The members and substitute members are judges under the Constitution. They are independent and can be removed from office only by a judgement of the Constitutional Court itself for special reasons (loss of nationality, incapability, etc.) The members are appointed for lifetime, but their office ceases with the end of the year in which they reach seventy years of age. Members of the Federal Government, a Land Government, of the two Chambers of Parliament or any other general representative body or persons who are employed by a political party cannot become members of the Constitutional Court. If they take over any such office after their appointment, they have to resign from the Constitutional Court.

The Constitutional Court elects permanent reporting judges from among its members for a term of three years. The Vice President may also act as a reporting judge. Presently, nine out of fourteen judges act as permanent reporting judges. Each of them is supported by two scientific assistants and a secretary.

The Austrian Constitutional Court does not sit permanently, but gathers in general four times a year to Court sessions which last about three weeks each. The sessions regularly take place in March, in June, in September and in December of each year. The President can summon the Vice President and the members also to intermediate court sessions. The Court sessions are exclusively reserved for oral hearings and deliberations of pending cases. The time in between the Court sessions is dedicated to the preparation of draft decisions and to the finalisation of decisions taken by the Court, as well as to the preparation of their service on the parties.

The rules governing the competences, the organisation and the procedure of the Constitutional Court are partly laid down in the Federal Constitution Act (Bundes-Verfassungsgesetz - B-VG) itself, partly in the Federal Law on the Constitutional Court (Verfassungsgerichtshofgesetz 1953 - VerfGG 1953).

II. COMPETENCES OF THE CONSTITUTIONAL COURT

Art. 137 B-VG: Monetary claims under public law

Art. 138, Art. 126a and Art. 148f B-VG:	Disputes as to jurisdiction; declaration of competence
Art. 138a B-VG:	Applications for the determination of the existence and implementation of agreements between the Federation and the Länder or among the Länder
Art. 139 B-VG:	Review of the lawfulness of regulations
Art. 140 B-VG:	Review of the constitutionality of laws
Art. 140a B-VG:	Review of state treaties
Art. 141 B-VG:	Supervision of elections, popular initiatives and referenda, and declaration that a person has been removed from office
Art. 142 and Art. 143 B-VG:	Impeachment
Art. 144 B-VG:	Complaints against the breach of constitutionally guaranteed rights
Art. 145 B-VG:	Violations of international law (inapplicable)

III. GENERAL PROCEDURAL REQUIREMENTS (FOR ALL TYPES OF PROCEDURES BEFORE THE CONSTITUTIONAL COURT):

In its proceedings the Constitutional Court applies the Federal Law on the Constitutional Court. Save as otherwise provided in this Law, the Code of Civil Procedure and the Introductory Law thereto shall apply by analogy (Art. 35 VerfGG).

Each application addressed to the Constitutional Court is registered by the Registry under a reference number which is composed of three elements: a capital letter indicating the type of proceedings (e.g. B for Beschwerden - complaints against the breach of constitutionally guaranteed rights according to Art. 144 B-VG), a consecutive number, and the year of registration.

1. General requirements for applications:

Applications addressed to the Constitutional Court shall be submitted in writing (Art. 15 subparagraph 1 VerfGG).

The application shall contain a reference to the article of the Federal Constitution Act which forms the basis of the application to the Constitutional Court, a statement of the facts and a precise claim (Art. 15 subparagraph 2 VerfGG).

If an application does not satisfy the above mentioned requirements, it will be rejected by the

Constitutional Court on procedural grounds without giving the applicant the possibility to correct it.

Apart from a few exceptions, applications to the Constitutional Court must be submitted by a duly authorized lawyer. If an applicant cannot afford such a lawyer, he can apply for legal aid.

After the registration of the application the President assigns each case to a permanent reporting judge (Art. 16 VerfGG). The distribution of the cases among the reporting judges is not regulated by law or regulation; in theory, the president is not bound to any rules when exercising this important task. In practice, however, he has to take into account the following criteria: Have equal or similar cases already been prepared for decision by one of the existing reporting judges? Are equal or similar cases pending? Is the workload of the Court well balanced among the reporting judges? Does a particular case require a specialist in a certain field (e.g. tax law)? Are various applications of a particular applicant concentrated with one of the reporting judges ("regular customers")? In order to answer these questions, the Constitutional Court is equipped with a computerized file information system which - contrary to the documentation of judgements and decisions - also contains details of the still pending cases (i.e. reporting judge, registration number, date of entry, name of applicant, the opposing authority involved, a brief statement on the contents of the application, as well as the legal provisions on which it is based).

Once an application is assigned to one of the reporting judges, this judge conducts the preparatory proceedings independently. Regularly, the formal requirements will be checked at first. An application which does not satisfy the requirements laid down in the VerfGG will be returned to the applicant in order to enable him to correct it (Art. 18 VerfGG). A number of defects, however, cannot be corrected and lead directly to the rejection of the application (see above).

It lies especially in the discretion of the reporting judge to initiate preparatory proceedings in the technical sense (see below) or to propose the immediate rejection on procedural grounds or - in case of a complaint against the breach of constitutionally guaranteed rights based on Art. 144 B-VG - the refusal because the complaint does not have any reasonable prospect of success or when the clarification of a constitutional question cannot be expected. It is, however, never the reporting judge himself, but always the Constitutional Court which takes - after deliberation - the final decision.

2. Preparatory proceedings (Art. 20 VerfGG)

When a case cannot be finalized in such a simple way the reporting judge initiates the preparatory proceedings. Decisions whose sole purpose is to resolve procedural issues which at this stage and those solely concerned with preparations for the hearing shall be adopted by the reporting judge without any need for a decision by the Court.

In the preparations for the hearing (the deliberation) the reporting judge may decide, inter alia, to hear the interested persons, witnesses and expert witnesses, to secure production of official documents or files and to obtain information from the opposing authorities involved. The authority involved shall be required to produce these documents and files. Where the authority involved has not submitted these documents and files or pleadings in defence or only part of it, the Constitutional Court, after first expressly informing the authority of the consequences of its

failure, may deliver judgement on the basis of the applicant's claim.

In the majority of cases the preparatory proceedings consist only in serving copies of the application on the opposing authority which issued the impugned act and possible other parties involved. The opposing authority is being informed that it is at liberty to draw up pleadings in defence within a certain period of time. Other parties involved can draw up statements. Pleadings and statements are registered and served on the applicant, who again is allowed to comment on them.

When the reporting judge considers a case ready for deliberation he prepares a draft decision which is copied and distributed - together with further necessary information (application, pleadings in defence, statements) - to all other members of the Constitutional Court. The draft decision also contains the proposals of the reporting judge as to a possible oral hearing and to the composition of the Court (plenary session or "reduced composition" - see below) in which the case shall be deliberated. The case will be included in the agenda for the next court session.

3. Composition of the Constitutional Court (Art. 7 VerfGG):

According to the intention of the B-VG, cases, as a rule, shall be deliberated and decided by the plenary session of the Constitutional Court, i.e., in the composition of President, Vice President and twelve members. In order to constitute a quorum, the presence of the President and at least eight voting members is sufficient.

In the following matters there is a quorum when the President and four voting members are present: monetary claims under public law (Art. 137 B-VG), disputes as to jurisdiction between courts and administrative authorities (Art. 138 B-VG), practically all cases which are resolved in private and, upon application of the reporting judge and with the consent of the President where the Court is dealing with complaints in disputes in which the legal problem has already been sufficiently clarified by case law.

Because of the enormous caseload of the Constitutional Court (presently 4000 to 5000 cases per year) and the long standing tradition of its case law, the vast majority of cases is deliberated and decided without an oral hearing in the above mentioned "reduced composition" consisting of President, Vice President (whose presence is not required by law) and four voting judges.

The basis for the "reduced compositions" is a list of the (presently nine) reporting judges in an alphabetical order. A specific reduced composition consists - apart from President and Vice President - of the reporting judge and the three judges that follow him alphabetically.

The "reduced compositions" cannot be regarded as panels, for the following reason: Every member of the Constitutional Court is provided with the draft decision and further information drawn up by the reporting judge and is entitled to demand that a specific case shall be deliberated in the plenary session.

4. Oral hearing in public

Art. 19 VerfGG states that judgements of the Constitutional Court shall regularly be delivered after an oral hearing in public to which the applicant, the opposing authority and any parties interested shall be summoned.

According to this provision, an oral hearing in public shall take place as a rule. Art. 19 VerfGG, foresees, however, an - over the years ever increasing - catalogue of exceptions based on which the Constitutional Court can refrain from oral hearings. The most important exception is that the Court may dispense with an oral hearing when it is apparent from the written submissions of the parties to the constitutional proceedings and the documents submitted to the Constitutional Court that no further light can be expected to be shed on the dispute in an oral discussion. In addition, upon application by the reporting judge , the Court, sitting in private and without an oral hearing may dismiss an application where there has been clearly been no breach of a constitutionally guaranteed right; settle any dispute where the legal problem has been raised in sufficiently clear terms in a previous judgement of the Constitutional Court and allow an application which led to a declaration that an unlawful regulation or an unconstitutional law or an illegal treaty was void (Art. 19 subparagraph 4 sub-subparagraph 4 VerfGG).

Without an oral hearing in public, sitting in private, the Constitutional Court may also refuse to examine a complaint as provided for in Art. 144 subparagraph 2 B-VG or reject an application upon procedural grounds (i.e. if the Constitutional Court clearly has no jurisdiction to deal with it, if the statutory time limit has not been observed, if the defect is not covered by the formal requirements, if the case has become definitive and if the applicant was not entitled to bringing the application). Without an oral hearing the Court also decides upon the discontinuation of the proceedings on the grounds that the application has been withdrawn or that the claim has been satisfied (Art. 19 sub-subparagraphs 2 and 3 VerfGG).

It is because of this variety of exceptions to the rule, that oral hearings in public in fact take place only about twenty to forty times per year.

The President determines the date of the oral hearings prior to the Court sessions. It must be published beforehand by being fixed to the official notice board of the Court and published in the "Wiener Zeitung" (Art. 22 VerfGG).

The summons served on the parties of the proceedings regularly contain questions which still need to be clarified. The oral hearing begins with the reporting judge's account which contains a statement of the facts as disclosed by the documents in the case file, the tenor of the applications submitted by the parties and the outcome of any inquiries which may have been conducted. Then the parties are given the possibility to make statements to the questions.

According to Art. 26 VerfGG, the judgement shall - where possible - be delivered immediately after the oral hearing has been closed; it shall be pronounced orally immediately with the essential grounds of the decision. The parties need not be present when the judgement is pronounced. Where the judgement cannot be delivered immediately after the oral hearing it shall be either pronounced in a special hearing in public, notice of which shall be served on the persons concerned immediately after the oral hearing has been closed, or communicated, in pursuance of the Constitutional Court's discretionary power, in writing in a document served on the parties.

5. Deliberations (Art. 30 VerfGG)

The deliberation and the vote shall not be held in public. The deliberation begins with the submission of the opinion (i.e. the draft decision, which has been provided to all the members) of the reporting judge, which serves as the basis for the discussion. The vote is taken following the closure of the discussion. The President determines the order in which a vote shall be taken on the different opinions submitted. The voting members give their vote beginning with the oldest (Art. 30 VerfGG).

Decisions are being delivered with an absolute majority of the votes expressed. The President does not take part in the vote. However, where one of a number of different opinions expressed receives at least one half of the total number of votes the President shall cast his vote. If he supports the opinion which received half the votes that opinion shall be established as the decision. (Art. 31 VerfGG).

This latter voting procedure does not occur very often, since regularly the plenary session is composed of thirteen voting judges, the "reduced compositions" of five. It may and does, however, happen when the post of the President, who cannot be replaced by a substitute member, is vacant and the Vice President acts in his place; when a member - for reasons whatsoever (illness, reaching of the age limit, death, etc.) can no longer take part in a case whose deliberations have already begun (at this stage the member can no more be replaced by a substitute member); or when a member is suddenly - for reasons whatsoever (see above) - prevented from attending a deliberation and a substitute member cannot be reached in time.

Decisions concerning the refusal of a complaint against the breach of constitutionally guaranteed rights based on Art. 144 B-VG or the dismissal of such a complaint on the grounds that a constitutionally guaranteed right has obviously not been violated have to be adopted unanimously.

Except for those cases in which unanimity of vote is required by law, the results of votings remain secret.

Dissenting opinions are not being published. The introduction of the possibility to dissent into the VerfGG has been discussed several times in the past and is also of present interest. The most important advantage of such an instrument is evident, since it makes the jurisdiction of the Constitutional Court more transparent. Among the members of the Court this topic is highly controversial. The opponents among the judges fear a loss of authority of the judgements of the Constitutional Court where a dissenting opinion is being published.

6. Costs of the proceedings (Art 27 VerfGG)

Costs shall be awarded only where expressly provided for in the VerfGG.

Accordingly, in some types of proceedings costs are imposed on the losing party. This is provided for especially in proceedings concerning financial claims under public law (Art. 137 B-VG), in proceedings for the review of statutes or regulations initiated by an individual (Art. 139, Art. 140 B-VG), and in the case of complaints for the protection of fundamental rights (Art. 144 B-VG). In the case of actions concerning financial claims under public law the costs of the proceedings are awarded to the winning party by reference to the provisions on lawyer's fees connected to the sum in dispute. In all other above mentioned cases costs are awarded by reference to a regulation issued by the Constitutional Court itself which fixes lump sums for various stages in the course of the proceedings (e.g. application, oral hearing, etc.).

7. Effect of decisions

The effect of decisions of the Constitutional Court depends on the type of competence exercised by the Court.

a. Erga omnes effect/temporary effect

In the following, reference will be made only to the two most important types of proceedings before the Constitutional Court.

aa. Norm review proceedings (Art. 140 B-VG)

When the Constitutional court has declared that a Federal or a Land statute is void, the judgement will be served on the Federal Chancellor or the Land Governor concerned who are obliged by the Constitution itself to publish the judgement without any delay in the respective Law Gazette. Generally, the statute becomes ineffective on the day of the promulgation of the judgement, with the effect that the statute no longer forms part of the legal order.

The Constitution also provides the Constitutional Court with the possibility to decide that a statute shall become ineffective only after a certain period of time which must not exceed eighteen months. The consequence is that a statute that has been considered unconstitutional continues to remain in force for the period of time fixed by the Constitutional Court and has to be further applied until the date the Court has determined for its annulment. An exception to this rule is always the case that has caused the particular proceedings before the Constitutional Court ("Anlaßfall"), to which the overruled statute never applies any more.

The Constitutional Court usually makes use of this possibility in order to provide the legislator with sufficient time to produce a new statute that is in conformity with the Constitution, or when the sudden lack of legal provisions would cause problems.

All courts and administrative authorities are bound to the judgements of the Constitutional Court. An overruled statute is, however, still applicable to those cases which have materialized before the statute has been overruled (except for the "Anlaßfall"), e.g. cases pending with the administrative authorities or the Administrative Court. It lies then in the discretion of these authorities to adjourned their decision until the promulgation of the Court's judgement or until the time limit set by the Constitutional Court has expired. The authorities can also decide the case on the basis of an unconstitutional statute. A complaint challenging such a latter decision before the Constitutional Court again attacking the (unconstitutional) statute on which it is based would be rejected on the grounds of res iudicata.

The Constitution provides the Constitutional Court also with the possibility to state in his judgement that the statute that has been found unconstitutional shall not be applied to pending cases either. This instrument can be considered as a sort of retroactive annulment.

bb. Complaints against the breach of constitutionally guaranteed rights (Art. 144 B-VG)

In this type of proceedings the Constitutional Court's judgement shall state whether a violation of a constitutionally guaranteed right of the applicant has occurred, or whether the applicant has been violated in his rights because an unconstitutional statute, an illegal regulation or an illegal state treaty have been applied. When this is the case, the Constitutional Court declares the administrative act void. The administrative authorities are bound to the legal opinion of the Court and are obliged to use whatever means available to restore the applicant's legal position in accordance with the legal conception of the Court.

The decision has no effect erga omnes, but concerns only the parties involved.

b. Res iudidata effect

In principle, a decision taken by the Constitutional Court is final. If an applicant whose case has been decided by the Court brings the same case before the court again, his application or complaint will be rejected on the grounds of res iudicata.

It is, however, important to remark that the res iudicata effect has certain limits in the case of proceedings concerning the review of norms. Alleged doubts about the constitutionality or legality of a general abstract norm determine to some extent the subject matter of the Constitutional Court's proceedings. Consequently, as regards expressly described doubts as to the constitutionality/legality of a legal norm, the Court can decide the issue only once. Such a decision a creates res iudicata effect vis à vis the same doubts about the same norm in all possible directions. A negative decision, however, does not impede the examination of the same legal norm in the light of other doubts.

8. Enforcement of decisions (Art. 146, Art. 126a B-VG)

a. The question to which extent a Constitutional Court's decision can be enforced appears to be enormously important at the first glance. In many cases it is, however, of theoretical importance only and has little practical significance.

According to Art. 146 subparagraph 1 B-VG the enforcement of judgements of the Constitutional Court regarding claims under public law (Art. 137 B-VG) is carried out by the ordinary courts.

The enforcement of all other decisions is incumbent on the Federal President (Art. 146 subparagraph 2 B-VG). Implementation shall in accordance with his instructions lie with the Federal or State authorities, including the Federal Army, appointed at his discretion for the purpose. The request to the Federal President for the enforcement of such decisions shall be made by the Constitutional court.

An important amendment to Art. 126a B-VG became necessary in 1993 following a judgement of the Constitutional Court in proceedings regarding a difference of opinion between the Court of Audit, on the one hand, and the Federal Government as well as the Vienna State Government, on the other hand, as to the interpretation of legal provisions governing the competence of the Court of Audit to examine the orderly conduct of affairs of a major Austrian bank. In its judgement, the Constitutional court pronounced that the Court of Audit was competent to carry out the examination. When the Court of Audit officers wanted to start their examination, they were, however, denied access to the premises of the bank.

On the basis of the legal situation in force at that time, no legal instrument existed to enforce the decision of the Constitutional Court. This situation entailed an amendment to Art. 126a B-VG. The revised version now obliges all legal entities to make an examination by the Court of Audit possible, in accordance with the legal opinion of the Constitutional Court. The enforcement of this obligation will be implemented by the ordinary courts.

b. Which decisions are accessible to enforcement?

The question of which type of judgement can at all be subject to enforcement in a wider sense is controversial.

In cases of disputes as to jurisdiction and declaration of competence (Art. 138 B-VG), enforcement of judgements impossible because the decision itself has - as a declaratory act - resolved the competence question.

In the case of differences of opinion between the Ombudsman institution and the Federal Government or a Federal Minister on the interpretation of provisions governing competence (Art. 148f B-VG), the decision of the Constitutional Court provides an authentic interpretation of the legal provisions in question in a declaratory judgement which is not accessible to enforcement.

The declaration that a statute, a regulation or a state treaty is null and void is not enforceable as such because the annulment occurs eo ipso together with the promulgation of the judgement of the Constitutional Court.

Since - as stated above - the competent Federal or State authorities are obliged by the Constitution to promulgate the Constitutional Court's judgement, the question arises, whether the judgement is enforceable as far as this particular obligation is concerned. In the literature, most authors answer this question affirmatively. On the other hand, it can be argued that the

obligation to carry out the promulgation is not part of the content of the judgement, but one of its consequences. Since, however, only the content of a judgement can be subject to enforcement, the promulgation cannot be enforced. Only when the Constitutional Court states the obligation expressly in its judgement - which it usually does - enforcement is possible.

As regards the supervision of elections (Art. 141 B-VG), execution of the Constitutional Court's judgement cannot be considered, since all acts that have to be taken have a constitutive legal effect.

In impeachment cases enforcement is impossible in as much as a conviction under Art. 142 B-VG leads to removal from office. Only when the Constitutional Court imposes a penalty, enforcement is possible.

As regards complaints against the breach of constitutionally guaranteed rights provided for in Art. 144 B-VG (constitutional complaint), the judgement declares the contested administrative act void. Accordingly, enforcement is impossible. The obligation of the administrative authorities to act according to the Constitutional Court's judgement is only a consequence of this decision and not part of the contents. It can therefore not be subject to enforcement.

9. The documentation of decisions of the Constitutional Court

Art. 13a VerfGG determines that a documentation service ("Evidenzbüro") shall be set up within the Constitutional Court.

The "Evidenzbüro" shall have particular responsibility for the summary inventory of judgements and decisions of the Constitutional Court and, where necessary, decisions of other supreme courts, and for the associated documents.

The President has the possibility of appointing a member of the Constitutional Court to direct the "Evidenzbüro" . This member shall then be treated in the same way as a permanent reporting judge as regards salary and retirement pension.

Since 1987 no such director has been appointed from among the members of the Court. Head of the "Evidenzbüro" is the President himself without additionally benefitting from the specific salary and pension regulation. Three jurists and two secretaries are employed in the "Evidenzbüro".

The rapidly increasing caseload has confronted the Constitutional Court with severe problems. Without an efficient use of the possibilities offered by electronic data procession the Court would not have been able to adjust capacity to demand. The implementation of new information technologies has helped to cope with these problems without additional personnel. Moreover, the length of procedure could have been kept within tolerable limits and the documentation of the various procedural and final decisions could even have been improved.

The Constitutional Court also uses the new information technologies in order to make its judgements and decisions rapidly available for a wide range of interested users in a cost-advantageous way. The Court thereby closely cooperates with the law information system ("Rechtsinformationssystem") in the Federal Chancellory as well as the publishing house "Österreichische Staatsdruckerei".

c. REMARKS
by Mr Francis J. LORSON, Chief Deputy Clerk, Supreme Court of the United States

Mr Chairman,

It is an honour for me to represent the Supreme Court of the United States at this first international meeting of members of the Constitutional Courts of Latvia, Armenia, and Georgia. I look forward to the presentations by delegates from the judiciary of Estonia, Lithuania, Poland, Germany, Austria, Slovakia, and Slovenia.

In the United States, an individual does not have standing to file a constitutional complaint directly to the Supreme Court of the United States as one may do in a number of European nations that have Constitutional Courts. The Supreme Court of the United States is an appellate court for individuals seeking relief. In our system, one must file the complaint in the appropriate state or federal trial court. In the American federal system the trial court is the United States District Court. If the complaint is dismissed or judgment entered in favour of the defendant, an appeal may be taken to the United States Court of Appeals. Should the judgment be affirmed, the next step is to seek review in the Supreme Court. If the case is in the state court system and one loses, an appeal is taken through the appropriate state appellate courts. Once a judgment in a state court case has been entered by the highest court of the state in which a judgment could be had, one may then petition the Supreme Court of the United States.

By Act of Congress, and by rule of the Supreme Court, one has only 980 days within which to file a petition for a writ of certiorari that seeks to review an alleged constitutional, or statutory, deprivation. The rules of the Court, as written by the Court itself, are very specific about what must be contained in the petition and the order in which they must appear. If the petition does not comply with the Rules, or is jurisdictionally out-of-time, the Clerk is directed by the Rules to refuse to file the petition.

The petition is a prayer asking the Court to take the case and set it down for oral argument following briefing on the law of the case. In deciding whether to grant or deny a petition, the Court considers whether the lower court judgment is in conflict with a judgment of another Court of Appeals or another state high court, or presents an important federal question. Should the petition not present a federal question, in other words a question that arises under the Constitution of the United States or the laws enacted by the Congress, the Court has no authority to review the matter. If the case has come from a state court, and the state court has decided the case based solely upon the state constitution, then the United States Supreme Court may not review the matter. The Court sits to review federal questions.

The Supreme Court has complete discretion in deciding whether to grant or deny a petition. In this way, the Court has total control over its docket. Should the petition be denied, the Court does not have to give reasons for the denial. Of the nearly 7OOO cases the court reviewed this term that ended on June 27, 1997, the Court heard oral argument in only 90 cases. These 90 cases, resulted in 85 signed opinions. In my more than 25 years at the Supreme Court, there has never been a backlog on the Court's docket.

There are a number of differences between the Supreme Court of the United States and the

Constitutional courts of the several European nations. In the United States, there must be an actual case or controversy between two or more parties. The Court may not render advisory opinions as many constitutional courts may do. And there must be complete exhaustion of lower court remedies before the Supreme Court will review the matter.

Even though our legal systems are very different, I look forward to sharing my experiences on the issues that will be discussed at this workshop.

Thank you.

d. THE ROLE OF DOCUMENTATION IN COMPARATIVE STUDIES

by Mrs Halina PLAK, Head of the Library and Documentation Centre, Constitutional Tribunal, Warsaw

It is difficult to imagine somebody who, without having an efficient documentary workshop, can make use of achievements in a given field of knowledge. It is impossible because of multitude of sources and their diffusion. It is also true that one of the elements of the workshop's correctness is basing research on the comparative studies. It concerns not only historical or empirical research but also, or rather above all, theoretical and practical one. Basing most of research on the comparative studies is necessary also in the field of widely understood law. Nowadays, a lawyer can not limit himself to knowing exclusively the law of his country. Regardless of international relations, the international contexts should be taken into account. Improving the law and eliminating mistakes, as well as juxtaposing results based on different legal regulations are the effects of the comparative studies. More and more cases must be settled by application of foreign law based on the international law. The comparative studies allow for standardization and classification of the law as well as development of the theory of the state and law. Application of comparative methods may facilitate further development and improvement of research and teaching legal sciences, for example in the fields of law requiring additional, more detailed reference books.

The scope of necessary comparative research in the field of law include the comparison of:

1. norms, legal and political institutions;
2. branches of law;
3. domestic and foreign legal systems allowing critical assessment of particular solutions, as well as determining similarities and discrepancies;
4. political legal cultures;
5. history and theory of law including detailed issues concerning, among others, the philosophy of law, jurisdiction, sociology and ethnology of law;

Basic functions of the comparative studies in the legal sciences:

1. cognitive;
2. didactic;
3. formation of law;
4. interpretation of law;
5. standardization of law;
6. political;

The basis of the comparative studies in the field of law is domestic law and analysis of foreign legal systems. As far as the analysis of foreign legal systems is concerned, one should be aware of certain dangers resulting from differences among various constitutional systems and especially difficulties with translating terminology. In order to be able to name an institution having similar function in a similar way, knowledge of the whole legal system of a given country is necessary. For example, two years ago we started to prepare a multi-volume reference book containing legal regulations regarding the way of functioning of European Constitutional Courts. The book was translated into Polish in order to make knowledge about constitutional

jurisdiction available to more people. [Volume I was published regarding: Austria, France, Germany, and Italy; volume II is being edited regarding: Bulgaria, the Czech Republic, Spain, Slovakia, and Hungary; we plan to publish 5 volumes and their order results only from the order of acquiring source materials, as well as time available to translators and specialists on constitutional law preparing theoretical introductions]. Each volume consists of general characteristics of constitutional system of a given country, an excerpt from the constitution concerning the Constitutional Court, legislation and the organizational regulations of the Court. We have received a very interesting comparative material regarding the role of the Court in protecting the constitution in the functioning of the democratic law abiding state, especially useful in connection with the works upon the Constitution of the Republic of Poland. The changes that have been taking place since 1989 lead to formation of a democratic system of government. Constitution is the basic element stabilizing this system. Work connected with drafting a new Constitution require solving many institutional problems. One of them is the position of the Constitutional Tribunal. In the work of the Parliamentary Constitutional Commission and in various discussions, taken into account are solutions used in other countries - both in countries having well established democratic traditions and in countries which, like Poland, undergo a transformation period. The most difficult task for a documentalist preparing the above mentioned reference book was standardization of the names of legal institutions occurring in different countries. The theoretical introductions preceding the legal regulations included in the book are an important element of it. This problem was also taken into account in the works of the Documentation Centre on Constitutional Justice - Venice Commission - one of the special issues of the Bulletin discusses in short the constitutional systems of respective countries.

Today's Europe again has broadened its geographical and intellectual boundaries. Changes in the international relations in Europe influenced also forms of functioning of the multilateral international cooperation. Therefore, we need the tools making the cooperation possible in these new conditions. The role of the documentary workshop is not overestimated. One could say that documentation and scientific information are of greatest importance in every professional activity. Also the amount of time in which an information can be obtained is crucial - a basic task of a documentary service is to organize work in such a way as to shorten to minimum the time needed to obtain the initial materials.

Documentation as an organized system has its beginnings in the activities of the International Bibliographic Institute founded in 1895 in Brussels [Institut International de Bibliographie, the name later changed into the International Federation of Scientific Documentation and Scientific Information] and its founders P. Otlet and H.M. Lafontaine.

In the following discussion I would like to concentrate mostly on the problems connected with the scientific documentation, at the same time, stressing the importance of the office and administrative documentation.

For the sake of the following discussion let me define the „scientific documentation" as a number of activities connected with gathering, recording, elaborating, searching for, presenting and rendering accessible the materials connected with a given branch of knowledge and based on the fields of science being important for its theoretical and practical bases such as: scientific organization of the keeping of archives, bibliography, library administration, computer science, linguistics and semiotics, cybernetics, organization and management, as well as sciences using

new technologies making data processing more efficient. In case of creating the documentary base for the constitutional jurisdiction (constitutional tribunals and courts as well as their equivalents) it is a widely understood law and some related fields connected with jurisdiction of these courts such as: political science, demography and sociology.

The discussed topic is too broad to be exhausted in one short discussion. Therefore, I will try to enumerate the problems connected with the documentary activities in the field of law and especially present their important role in the process of exchanging scientific thought in the comparative studies. Methodology of the documentary work is rather similar regardless of where it is done. The differences in the organizational solutions in different countries result mainly from the financial possibilities of the documentary service and its position in the organizational structures of the court.

Users of legal documentation:

1. judges;
2. employees of the state institutions;
3. lawyers - practitioners (barristers, employees of the legislative branch centers, labour institutions, etc.);
4. scientists (lecturers at universities, employees of the science and research institutions), students of the faculty of law;
5. librarians and employees of the scientific documentation and information centers;
6. other persons - looking for, e.g. decisions of the Tribunal as additional arguments for a case at court;

Tasks of the documentary service

A documentalist is a go-between data bases and their users and his main responsibility is to give a possibly exhaustive information and to quickly provide the users with an access to the documents concerning a given problem. A judge interested in a particular topic, e.g. „privatization of real estates ceased after World War II", „protection of the human rights", or „abortion", must receive not only bibliography for the subject, but also suitable documents containing legal regulations, expertise, official publications, documentation of the work of parliamentary commissions, interpretations by appropriate Ministries, judgments issued so far together with glosses, as well as a selection of press articles and other materials connected with the case. Documentation prepared on the basis of foreign sources is also necessary. However, it is clear that preparing such complex and detailed information requires systematic work of many people starting from preparing a policy of gathering and elaborating documents and finishing at rendering a document or its copy accessible. If some documents are not available in a given library, they can be brought from another library on the basis of inter-library exchange.

There are three basic stages of cooperation between an employee of the documentary service and a user:

1. specification of a topic, determining the domain and type of information, form of a document, as well as specification of certain problems to look for formulated in the form of key words. Quite often specification of a subject and clear formulation of a keyword is a difficult task for a user. Using technical terminology poses another problem;

2. providing the user with the information in the form of bibliographic descriptions, abstracts or summaries or factual information;

3. providing the user with full source texts or selected excerpts in the original form or copy;

Completeness, scope, access time and relevancy of obtained scientific information and, in turn, source documents are strictly dependent on the information base and, above all, on the information „tools" offered by the library and the scientific information center, as well as on the extent of scientific documents which can be provided to the user.

Types of documentation data bases of the Constitutional Courts:

2. alphabetical and thematic catalogues of the library's resources and of the collection of judges and their assistants' books and magazines - with a possibility of multi-aspect searching for data;

2. thematic files including: specialized bibliographies, synthetic registers of sources of law with extensive thematic bibliographic juxtapositions, files regarding articles from scientific magazines as well as home and foreign collective publications; search for materials for a particular case conducted especially for judges with the use of comparative materials, register of newly purchased materials and information about addresses where one can find materials for a given subject which are not available in the library recourses. It is also possible to use the Internet in order to search for information about scientific conferences, etc.;

3. information of the „current contents" type taken from Polish and foreign scientific magazines;

4. press information including contacts with the media, elaboration of the informative bulletins, documentation of the press cuttings, review of the more important television journalistic programs, etc.;

5. jurisdiction (jurisdiction of the Constitutional Tribunal, the Supreme Court, Supreme Administrative Court, the Arbitration Court, and other) with the possibility of multi-aspect searching for data with the help of the thematic indexes. [Documentation of the judiciary jurisdiction plays a very important role in comparative studies of many problems, e.g. in those concerning protection of the human rights];

6. documentation of written statements of claim or defense in a court action;

7. courts' own publications: publishing of judgments, comments on judgments resulting from Court jurisdiction as well as concerning theoretical legal problems, thematic bibliographies, glosses to the judgments;

8. data bases of Polish and international legal regulations;

9. CODICES - system of the Venetian Commission of the Council of Europe containing the documentation of the selected judgments of special importance in the precedential law system of the constitutional courts and their equivalents (including The European Tribunal of Human Rights, the European Tribunal of Justice and the Supreme Court of the USA), judgments concerning compliance of the law with the constitution. There is an English and French version of the system with the possibility of multi-aspect searching for data. So far about 40 countries are involved in creating the above mentioned data base which allows to conduct comparative studies on a large scale. Let me quote some examples of topics which were very popular in the practice of the Polish tribunal and to which the source of documentary information were the Bulletins: „protection of the human rights", „inspection of the former communists", „abortion", „privatization of real estates ceased after World War II", „access to information, freedom of the press, censorship, media,", „participation of the prosecutor in the legal proceedings before the constitutional court". I know that also my colleagues - documentalists from different tribunals, looked for materials to some of the above issues;

10. documentation of the normative acts regulating functioning of the European Constitutional Courts;

Typology of the legal documentary service at the Constitutional Courts

Documentary work is conducted in the following organizational units:

-. library;
-. scientific documentation and information center;
-. analyses and expert's report unit;
-. archives;
-. press department;
-. publishing department;
-. computer science unit.

The above units function together or as separate organizational units in different countries. In case they function separately, they closely cooperate with one another.

Libraries and their integral parts - the scientific documentation centers of the Constitutional Courts and of courts functioning as constitutional ones are technical libraries serving mainly judges and Court practice staff. Basically, these libraries are closed for the public, however, most of them render their resources accessible to other readers for the scientific purposes. The library's resources include mainly constitutional law and related fields reference books as well as documentation connected with the organizational and jurisdiction activities of courts - particularly Polish and foreign jurisdiction and materials which are especially helpful in the Tribunal's work (articles, statistics, etc.).

The libraries publish information in the form of: Register of Newly Purchased Items, Bulletins of the Magazines - Current Contents, different kinds of Documents Bulletins containing source materials of primary importance for the court. For example, The Library of the Constitutional Tribunal of Spain publishes in such a bulletin most important decrees of the State and Autonomous Commonwealths, as well as all documents concerning the Tribunal; drafts of bills passed to the Chambers of Cortes and the rest of parliamentary documents which may be of use for the Tribunal.

The libraries cooperate with domestic and foreign documentation centers which keep data bases which are of interest to the tribunals.

Some libraries perform the function of the Central Legal Library, e.g. the Library of the Supreme Court of Canada - it belongs to the network of the federal libraries which makes it possible to have access into the university libraries, the Parliament's library, the National Library and other libraries. The library is open to all readers. Judges also have their personal collection of books in their offices. The library closely cooperates with the computer science department in the following areas: preparing legal data bases, improving the process of data automatization, searching for data software, on-line information searching system.

Activities of the libraries are supported by the library commissions, e.g. (in Belgium, Poland, Germany and Italy) with judges currently holding offices acting as their members and with heads of the libraries acting as their secretaries. Some commissions allow retired judges to act as the consultants (e.g. in Italy - maximum 2 judges). The documentary service, among others, consists also of the translation unit. Library and documentary activities in the sphere of correctness of data processing are aided by the computer specialists who provide technical help and advise what kind of computer equipment should be bought. On the basis of the documentary department's experience, the computer specialists are given guidelines for the creation of data bases.

Press department:

-. provides media with the information about the activities of the Constitutional Tribunal;
-. gathers and prepares press documentation;
-. manages the press archives;
-. press bulletins are prepared in courts which have well developed press service. For example, in Spain each issue of the Bulletin prepared daily contains legal information which may be interesting for the judges. It also contains information concerning all the cases heard by the Tribunal. The information is taken from Spanish newspapers and magazines, as well as from some of the most important foreign weeklies. Moreover, a monthly informative bulletin is published - reporters accredited to the Constitutional Tribunal receive the statistical data concerning cases lodged into the Tribunal and the information about the settled cases. Usually, a copy of the sentence or judgment of the Tribunal is enclosed.

Publishing department: publishes judgments of the Tribunal, prepares monographic elaboration and information about organizational structure and activities of the court.

Archives, connected with elaboration of the Court documentation (e.g. press or jurisdiction documentation) may be situated either in the documentary units (e.g. in Germany and Romania), or function as separate organizational units (Spain - press archives, Poland - press archives in the Chairman's Office and jurisdiction documentation at the Tribunal Secretariat).

Thematic elaboration of the possessed documents so that the largest possible number of users could use them poses a serious problem. It especially concerns such materials as expertise, opinions, etc. As experience has shown, it is necessary to prepare a detailed thematic elaboration of particular documents so that it is possible to find a particular expertise and not only receive an information that the resources contain a file entitled „Expertise".

It is widely known that the descriptor languages (thesauruses) suit best the requirements of the automatized systems. Such system is used in the works of, for example, the Documentation Centre on Constitutional Justice - Venice Commission. Such a legal documentation system has not been built in Poland so far. Libraries and the documentary centers use their own systems or translate foreign thesauruses. For example, the Parliament's Library serving as the Central Legal Library has chosen „EUROVOC", the system elaborated and propagated by the informative services of the European Parliament. As far as I know, the Czech Republic and Lithuania are interested in this system as well. When choosing the „EUROVOC" system, the Library took into account its universal character in communication, its availability, and possibility of using European Community's data bases where documents are registered by means of it. Naturally, the need to use possibly detailed thematic description evoked another need to use more specific and Polish descriptors. And that is how „STEBIS", the system of micro-thesauruses was created.

Organizational notes

-. thematic access: nowadays, one looking for sources to one's research is, practically, unable to find what one needs in the vast amount of documents without an efficient documentary workshop. Concern about order and proper arrangement of the possessed resources is a natural effect of gathering of anything. Basing research on the sound documentation is the most important factor necessary for the information to be quickly obtainable;
-. current documentary organizations like UNESCO with its General Informative Program preparing international documentation and documentation in particular countries use the newest techniques and technologies, especially computer ones, e.g. automatized data banks, world-wide informative networks;
-. it is very important to work out informative language making possible communication and the exchange of information among possibly largest number of users regardless of the systems they use. The thematic index used in document elaboration constantly undergoes modifications;
-. resources of documents are becoming accessible as the catalogues are automatized.

This means that knowledge included in most of the important information resources will gradually be accessible. Degree to which the documents themselves will be accessible depends

on whether libraries and documentation centers are interested in rendering accessible the documents and if they are technically prepared to transmit them;

-. storage and electronic transmission of full texts is much more expensive than in case of bibliographic data and the problem of copyrights much more complicated. However, it is important not to eliminate source materials being the cultural heritage of a country and replace them with those electronic imaging of documents;
-. necessity of conducting systematic research of the scientific documentation users' needs both for the purpose of correcting the documentary workshop and for foreseeing of the future needs;
-. necessity of properly choosing the documentary service's staff (lawyers, documentalists, librarians, translators and technical employees);
-. the role of international cooperation. It is important to closely cooperate and exchange scientific documentation especially with the research centers having well established position like: French Group d'Etudes et de Recherches sur la Justice Constitutionelle, Max Planc Instiute, as well as important documentation centers of the European Commission, the Tribunal of the Human Rights in Strasbourg, the Tribunal of Justice of the European Community in Luxembourg, and the Supreme Court of the USA. There is a great necessity to use the international data bases. Organization and initiation of the system of the constitutional jurisdiction documentation is a great success of the Center's management and secretariat. I hope that development of the base and elaboration of certain topics like, e.g. glosses will be the next step;
-. it seems that organizing the system of training and exchange of the scientific documentation service's staff would be very helpful;
-. documentary functions have an interdisciplinary character;
-. many institutions put information concerning the field of the constitutional law in the Internet - information from the general outline of the legal system in a given country to the selected normative acts and judiciary judgments.

FOURTH WORKING SESSION

presided by Mr. Andrejs LEPSE, Judge, Constitutional Court,
President of the Latvian Association of Judges, Riga, Latvia

The effects of decisions by the Constitutional Court
by Mr Kestutis LAPINSKAS, Judge, Constitutional Court,
Vilnius, Lithuania

THE EFFECTS OF DECISIONS BY THE CONSTITUTIONAL COURT

by Mr Kestutis LAPINSKAS, Judge, Constitutional Court, Vilnius, Lithuania

1. The implementation and legal force of decisions adopted by institutions of constitutional supervision confront us with a multi-faceted problem. First of all the problem can be tackled taking account of the model of constitutional supervision, that is, taking into account specific organisational forms of supervision. The American model, where courts of justice are in charge of constitutional supervision, apparently favours the implementation of court decisions according to general rules applying to them. In this case, we will deal only with some peculiarities of acts of constitutional supervision, as compared with other legal acts.

Essentially different problems arise when considering decisions adopted by constitutional courts and their implementation. In fact, even in this case I doubt whether we can talk about any uniformity or identicalness of problems. The decisions adopted by constitutional courts and their realisation to a large extent depend on such forms of constitutional supervision as preliminary or *ex post facto*, concrete or abstract, as well as on the jurisdiction of constitutional courts, the way a particular country views the institution of constitutional supervision and the settled legal traditions of the country.

In this report, most attention will be paid to special constitutional supervision, that is, to the problems of implementation of decisions adopted by constitutional courts which are illustrated by and based on legal regulation and partly on the practice of the Constitutional Courts of the Republic of Lithuania and the Republic of Latvia.

2. According to the law, the Constitutional Court of the Republic of Lithuania collectively adopts 3 kinds of acts: rulings, conclusions and decisions. They are all often referred to generally as decisions. However, each kind of act has its own purpose and legal meaning and triggers off different legal consequences. From this point of view, the aforesaid acts may be grouped into 2 main classes: procedural documents (decisions) and final acts (rulings and conclusions). Having investigated and settled a case in essence, the Constitutional Court passes a ruling. In certain cases defined by the law, the final act of the Constitutional Court is called the conclusions, while decisions are adopted on various procedural questions which arise in the process of preparing a case and considering it in a court sitting.

A ruling is adopted as the final act having investigated a case on compliance with the Constitution or legality of a disputed legal act (i.e. a law or other act of the Seimas, the President of the Republic, or a governmental act), while conclusions are adopted as the final act by the Constitutional Court having investigated a case on an inquiry, when it is requested to express an opinion on one of the following issues:

1) the violation of election laws during presidential elections or elections to the Seimas;

2) whether the health of the President of the Republic of Lithuania is limiting his/her capacity to continue in office;

3) the conformity of international agreements of the Republic of Lithuania with the Constitution, and

4) the compliance with the Constitution of concrete actions of Seimas members or other State officials against whom impeachment proceedings have been initiated.

Thus, rulings and conclusions may be defined as the most important acts, since they are adopted only after a respective case has been considered. They express the will of the Constitutional Court, which is final and not subject to appeal. The will is binding on everybody, with the exception of conclusions which are always presented only to the party which made an inquiry. By means of these acts the Constitutional Court implements its major function: it executes constitutional justice.

3. Decisions of the Constitutional Court, as mentioned above, are usually procedural documents which establish significant procedural activities (to join two petitions into one case, to assign the case for hearing in the Court sitting, to postpone and renew investigation of a case on the request of the parties to a case, etc.). Most often these acts are of single application, they establish the important procedural activities and to follow and express the Court's will concerning requests of the parties. Such acts usually only state legal facts, therefore normally no problems arise as to the execution of most of the acts, because the times of their adoption, coming into force and implementation coincide. However, the analysis and practice of application of the Law on the Constitutional Court of Lithuania show that not all procedural decisions of the Court are equal in force. Apart from the aforesaid ordinary procedural decisions, another group of decisions is made up of decisions which in their import and legal consequences are nearly equal to the final acts (rulings and conclusions). They are also worth discussing because of the fact that they often have their own peculiar mechanism of coming into force and their own particular effect. There are the following types of Constitutional Court acts in Lithuania:

1) A decision to refuse to investigate a petition or an inquiry. Such a decision is adopted only on the bases established in Articles 69 and 80 of the Law on the Constitutional Court (when the petition is submitted by a non-authorised subject, when the issue does not fall under the jurisdiction of the Constitutional Court, when the question raised has already been investigated or is being examined by the Constitutional Court, when the petition is grounded on non-legal motives). Reasons must be given for decision and its duplicate presented to the petitioner. Such a decision, according to its legal consequences, may be considered amongst the final acts: it puts an end to the preliminary investigation of respective material and after it the final decision, which is not subject to appeal, is adopted. This means that the same subjects cannot address the Constitutional Court on the same issue and on the same grounds.

2) A decision to dismiss initiated legal proceedings may also be considered as one of the final acts. The grounds for its adoption may be of the same nature as in the first case; however, stages of proceedings at which these decisions are made are essentially different. In the first case, we have a refusal to investigate a request, that is to say, to prepare a case for court hearing; while in the second instance, such a case has already started to be investigated. Apart from the aforesaid grounds for dismissing initiated

legal proceedings, the law provides for yet other grounds: the cancellation of a disputable legal act (part 4 of Article 69). It should be noted that so far in the practice of the Constitutional Court of the Republic of Lithuania this has been the only ground used to dismiss initiated legal proceedings. Attention should be paid to the fact that a decision to dismiss initiated proceedings can be very similar in its inner structure to the main final act (a ruling): after the introductory section both contain "establishing", "holding" and "resolutionary" parts. The holding part, as usual, contains legal analysis of the disputed act (or part thereof): the arguments and assessments of the Constitutional Court are set out herein. Thus the holding part of this kind of decision has a similar residual value for the practice of legal application and the doctrine of constitutional law to that of the holding part of the ruling of the Constitutional Court. However, the contents of the resolutionary parts are different: the resolutionary part of the ruling gives an answer to the question whether a disputed act (or part thereof) is legal (i.e. whether it contradicts the Constitution (the law), or not), while the resolutionary part of the decision establishes the will of the Constitutional Court to dismiss initiated proceedings or not.

3) A decision to accept the motion of the President of the Republic or Seimas resolution which requests an investigation as to whether a legal act conforms with the Constitution. It should be noted that such a decision has a double nature: first of all it is regarded as an ordinary procedural act establishing the Court’s will to start a case of constitutional justice based on the motion of the President of the Republic or Seimas resolution; second, it is an act of exclusive supplementary legal force, because on these grounds the provision concerning the suspension of a disputed act, established in part 4 Article 106 of the Constitution, comes into force. Therefore, the Law on the Constitutional Court establishes special rules for the adoption of such decisions, and provides for special procedures for suspending a disputed act and the cancellation of the force of the decision. Namely, the Law on the Constitutional Court establishes that such motions of the President of the Republic and the Seimas are to be preliminarily considered within three days and a decision has to be made in the Court hearing whether to accept the request for investigation in the Constitutional Court. In the cases where the Constitutional Court makes a decision to accept the request, the Chairman of the Constitutional Court must make an official announcement either in the *official gazette* “Valstybes zinios” (*The News of the State*) or in a special publication of the Seimas, or in the press through the Lithuanian News Agency (ELTA). The *communiqué* must contain the exact title of the act in question, the date of its adoption, and, in accordance with Article 106 of the Constitution, the validity of the act is suspended from the day of its official announcement until the ruling of the Constitutional Court concerning the case is announced. Two outcomes are then possible. First, if the Constitutional Court having investigated a case, adopts a decision that a disputed act contradicts the Constitution, from the day of the official announcement of the ruling the disputed legal act (or part thereof) loses its legal force as it cannot be applied in practice any more. This means that on the same day the temporal suspension of that act expires. Second, in cases where the Constitutional Court, having investigated a case, adopts a decision that the disputed act is in compliance with the Constitution, the Chairman of the Constitutional Court immediately makes an official announcement about it in the aforesaid publications. In this announcement, the Chairperson must state the exact title of the act in question,

the date of its adoption, the main point of the ruling of the Constitutional Court concerning this issue, the date of the adoption of the ruling, and that the validity of the suspended act shall be restored from the day that this ruling is announced.

It should be noted that during the first three years work of the Constitutional Court of Lithuania, the aforesaid mechanism of suspending disputed acts was not used. Only once, on 25 June 1996, the Seimas adopted a resolution to appeal to the Constitutional Court with the request to investigate whether the norms of two laws were in compliance with the Constitution.

4) A decision to impose penalties on officers or citizens (pursuant to Article 40 of the Law on the Constitutional Court). It is also a final act, not subject to appeal, which is sent to the bailiff to be executed.

5) A decision to correct a ruling. Pursuant to Article 58 of the Law on the Constitutional Court, the Constitutional Court having promulgated a ruling may, on its own initiative or at the request of the parties to the case, correct inaccuracies or obvious editor's mistakes present in the ruling providing they do not change the essence of the ruling. On account of this, the Constitutional Court adopts a corresponding decision which is sent and announced pursuant to the procedure established by this law. Thus such a decision becomes something like a constituent part of the ruling.

6) A decision to interpret Constitutional Court rulings. Constitutional Court rulings may be interpreted only by the Constitutional Court at the request of the parties to the case, other institutions or persons to whom it was sent, or on its own initiative. A decision on an interpretation of the Constitutional Court ruling is passed at the Constitutional Court hearing as a separate document; it is sent and announced pursuant to the procedure established by law. Such a decision is also treated as a constituent part of the ruling, therefore general rules regarding the coming into force and application of rulings are applied to it.

7) A decision to review Constitutional Court rulings. Pursuant to the Law (Article 62), Constitutional Court rulings may be reviewed on its own initiative, if:

"1) new, vital circumstances arise which were unknown to the Constitutional Court when the ruling was passed; or

2) the constitutional norm on which the ruling was based has changed."

If some of the aforesaid grounds arise, the Constitutional Court adopts a decision on reviewing a corresponding ruling and starts the investigation of the case *de novo*. A decision of the Constitutional Court concerning its ruling may also be reviewed if the ruling was not interpreted according to its actual content. This type of decision differs from ordinary procedural decisions as on their grounds the validity of the final acts - rulings - is terminated. So far the Constitutional Court of Lithuania has not adopted such a decision.

4. Turning now to the decisions of the Constitutional Court of Latvia and their legal

force, a short review of the bases of legal regulation of all these issues is absolutely necessary. In this context, we may speak about two levels of regulation: constitutional regulation and regulation by laws. Article 85 of the Constitution of the Republic of Latvia (5 June 1996 version) establishes the chosen model of constitutional justice - the Constitutional Court, the bases of its competence, and principal provisions of the order of its composition. Those short constitutional provisions are elaborated in the Constitutional Court Law of the Republic of Latvia, which establishes that "the Constitutional Court shall hear cases pursuant to the Constitution and this Law only" (Paragraph 1, Article 1). The aforesaid Law also provides that work procedures of the Constitutional Court shall be set out in the Rules of the Constitutional Court which shall be adopted by an absolute majority vote of the entire total of the judges (Article 14). However, Article 26 of the Law reads that "the procedure for reviewing cases is provided for by this Law and the law on the procedures of the Constitutional Court." We may judge on the reciprocity of the aforesaid Rules and the Law on the procedures from Paragraph 1 of the Transitional provisions of the Law: "Until the day when the Law on the procedures of the Constitutional court is enforced, the procedure for reviewing the cases shall be regulated by this Law and the Rules of the Constitutional Court." It should be noted that at the time of the seminar, neither the Rules nor the aforesaid Law have yet been passed, therefore the issues of legal force of acts of the Constitutional Court of Latvia will be reviewed on the basis of constitutional provisions and of those of the Constitutional Court Law.

5. The main provisions concerning acts adopted by the Constitutional Court are formulated in the Constitutional Court Law of Latvia. The law speaks of two forms of such acts: decisions and verdicts. While considering general issues, for example those about the classification of acts, for the sake of convenience all the acts will be referred to as Constitutional Court decisions.

According to the procedure of adoption, one-person and collective decisions may be distinguished. One-person decisions, on behalf of the Constitutional Court, are adopted by the Chairman and judges of the Constitutional Court. The decision is adopted after having carried out a preliminary investigation of a received request. Usually these are procedural acts which settle the fate of the issues submitted to the Court: to start preparing a judicial case, or to refuse to do so. Consequently corresponding acts, according to their contents, may be called positive or negative decisions. A positive decision is the grounds for carrying out other legal actions in the initiated proceedings, while a negative decision is regarded as the final decision on the request submitted to the Constitutional Court. However, the law gives a petitioner the right to appeal against a negative decision to the Constitutional Court within 2 weeks. So actually a negative decision adopted by the Chairman or judges of the Constitutional Court is only considered final if an appeal has not been lodged against it (i.e. it has come into effect).

The decisions of the Constitutional Court Chairman to forward the case to be prepared for judicial investigation (review) are considered to be individual decisions. It is a typical intermediate procedural decision which establishes the end of one stage of proceedings (preparation of a case for investigation), and produces legal preconditions to start another - that of judicial investigation. As compared with Lithuania, here such a procedural decision is adopted collectively by the Constitutional Court in a procedural sitting.

6. Collective Constitutional Court decisions are adopted either by 3 judges or by all the

judges of the Court (not less than 5 judges). According to their purpose and contents, collective decisions may be classified as procedural and final. In the Constitutional Court Law of Latvia, the final act is called the verdict (this will be discussed later). Procedural collective acts are called decisions, and the following are some examples:

1) decision to extend the term of preliminary investigation of the petition submitted to the Court to 2 months;

2) decision to extend the term of preparation of a case for judicial investigation (review) to 2 months;

3) decision on an appeal on an adopted decision to refuse to initiate a case;

4) decision on holding a closed session of the Constitutional Court;

5) decision on the dismissal of legal proceedings.

Two of the aforesaid procedural decisions have features characteristic of a final act, i.e. they actually terminate further legal proceedings concerning the investigated issue. The first case relates to a complaint on individual decision to refuse to initiate legal proceedings. The submitted complaint is investigated collectively by 3 judges, who adopt one of two possible decisions: 1) to satisfy the application and to initiate a case, or 2) to refuse to initiate a case. According to legal consequences, these collective decisions are equal to the aforesaid individual procedural decisions of judges. However, negative collective decisions are final and not subject to appeal.

The second decision is aptly called the closing of proceedings. These are cases where, after instituting legal proceedings, it becomes clear that there is no point pursuing these proceedings and adopting a verdict. The cases are directly indicated in Article 29 of the Constitutional Court Law of the Republic of Latvia, namely: 1) upon a written request of the applicant; 2) if the disputed legal norm (act) is no longer in effect; 3) if the Constitutional Court finds that the decision to initiate the case does not comply with the provisions of this Law.

7. One of the main problems of implementation of decisions adopted by institutions of constitutional supervision is the establishment of the moment at which invalidity of unconstitutional laws begins. Possible variants: 1) from the moment of recognition of a law as contradictory to the Constitution, i.e. as soon as the Constitutional Court ruling has been announced in the Court room; 2) from the moment of official publication of the ruling in the press, which is the date of its publication (this is the case in Lithuania now); 3) from the day of the adoption of an unconstitutional law; 4) from the date set by the Constitutional Court. There are quite solid arguments for each of these variants.

Professor M. Römer, basing himself on H. Kelsen’s doctrine of constitutional supervision, draws a conclusion that the termination of validity of unconstitutional laws is possible only *pro futuro*. It is a distinctive feature of constitutional court practice making the system more superior and advanced than the casual constitutional quasi-control, according to which unconstitutional laws are held not to be laws and to have no legal force from the very

beginning (i.e. from their passing and coming into force). According to the Anglo-Saxon system, unconstitutional laws are not laws at all and cannot be applied. However, it is doubtful whether such a conception increases the authority of the law and public trust in the law, strengthens law and order and legal discipline.

Meanwhile, a constitutional court practice with invalidity of the law only *pro futuro* raises confidence in the law and strengthens law and order, creates the feeling of being legally safe, and increases respect in the existing legal system.

H. Kelsen even maintains that for the aforesaid reasons a constitutional court may not suspend the validity of unconstitutional laws immediately but only from a definite date in the future. Attention should also be paid to the fact that in this case quite a paradoxical situation is created:

1) corresponding laws (or parts thereof) are recognised as anti-constitutional by a court decision;

2) the same decision prolongs the period in which unconstitutional laws are in force for some time;

3) this allows new legal consequences to be created on the basis of laws recognised as unconstitutional. It is doubtful, however, whether such a situation is unquestionably compatible with the conception of constitutional justice.

8. The main collective act of the Constitutional Court of Latvia is called the verdict. It is not a constitutional title since Article 85 of the Constitution of the Republic of Latvia, whose purpose is to establish constitutional grounds of the status of the Constitutional Court, contains not a single term “decision”; though it says “the Constitutional Court shall be empowered to declare laws and other normative acts or parts of same as null and void”. Of course, such an action of the Constitutional Court must have a specific form of legal expression, which may only be a particular Court decision in a specific case. The importance of the aforesaid provision manifests itself first of all in the fact that it establishes the legal force of Constitutional Court decisions: these Court decisions may be the basis for recognising disputed acts (or parts thereof) as having lost their legal force. This 1) means that the corresponding Constitutional Court decisions are final and not subject to appeal (they settle the question of constitutional legality of disputed legal acts, which cannot and will not be either denied or reviewed, nor may a complementary confirmation of its force be demanded); 2) entirely and clearly settles the fate of legal acts (or parts thereof) recognised as unconstitutional: by the Constitutional Court decision they are recognised as having lost their legal force. Therefore, institutions that had adopted such acts are relieved from technical troubles which involve taking care of revoking unconstitutional acts (or parts thereof) in the future. Taking account of the features mentioned above, we may speak about a special legal force of final decisions of the Constitutional Court of Latvia. On the other hand, this raises (or at least makes topical) the known theoretical problem concerning the participation of the Constitutional Court in legislative activities, and the threat which therefore arises to the principle of division of powers.

9. The verdict is adopted by a majority vote of the judges after the case of constitutional

jurisdiction has been considered according to all the procedural rules at the court session. The Constitutional Court Law of Latvia requires that reasons be given for the verdict reached, that is, it must indicate the following things: the disputed legal norm (act); circumstances established by the Constitutional Court; arguments and proof justifying the conclusions of the Constitutional Court; arguments and proof by which the Constitutional Court rejects this or other proof; provision of the Constitution or other law pursuant to which the Constitutional Court considered whether the disputed legal norm (act) complies with the legal norm of higher force; ruling of the Constitutional Court whether or not the disputed legal norm (act) complies with the legal norm of higher force.

The Law strictly states that the verdict of the Constitutional Court is final and may not be appealed. It shall come into legal effect at the time of announcement, and it shall be binding on all state and municipal institutions, offices and officials, including the courts, also natural and juridical persons. The timing of the verdict announcement is thus very important as it is this moment that causes respective legal consequences. According to the Constitutional Court Law of the Republic of Latvia, the timing of the verdict announcement should be considered the time of the public announcement of the verdict at the Court session (see Articles 27 - 30). This shall be done not later than 15 days after the session of the Constitutional Court. Having announced the verdict, its duplicate shall be forwarded to the parties to the case not later than three days afterwards, and shall be published in the press not later than five days after the verdict is announced.

Legal consequences of the Constitutional Court verdict generally, as it has already been mentioned above, are defined in the Constitution, and they are specified in the Constitutional Court Law which establishes that any legal norm (act) which the Constitutional Court has determined as incompatible with the legal norm of higher force shall be considered invalid as of the date of announcement of the verdict of the Constitutional Court, unless the Constitutional Court has ruled otherwise; moreover, if the Constitutional Court has recognised any international agreement signed or entered into by Latvia as incompatible with the Constitution, the Cabinet of Ministers is immediately obliged to see that the agreement is amended, denounced or suspended or that the accession to that agreement is recalled (Paragraphs 3 - 4, Article 32).

10. Although we may come across gaps of legal regulation in the legal system, most often new laws substitute for previous laws. Usually it is indicated in a new law that from the day of its coming into force the previous law loses its validity. Therefore, in practice a question often arises whether in cases when a law is recognised as unconstitutional the validity of the act that was in force before should be automatically restored. Such reasoning is mostly based on practical reasons - so that there would be no vacuum (gaps) in the legal system. A formal argument is also presented: having recognised a new law as unconstitutional, the reference concerning the substitution of a previous law with a new one also loses its legal force. Thus it is essentially suggested in such cases to return to the state that had existed till the passing of the unconstitutional law. However, such arguments are hardly acceptable though they do have some common sense. First this would mean that a constitutional court decision is given retroactive validity. Secondly, in this case a constitutional court practically would start performing functions of the legislature, as removal of gaps from legislation is an exclusive prerogative of the legislator.

11. The question of retroactive validity of Constitutional Court rulings is solved in different ways. For example in Italy, once a decision on unconstitutionality of laws or norms thereof has been promulgated, from the day of the promulgation of the decision the law (norm) is prohibited to be applied not only to the future relations but also to those relations which were formed before the announcement of the act as unconstitutional. In order to prevent retroactive validity, the Constitutional Court of Italy in its decisions on the cancellation of acts directly indicates this (i.e. restricts retroactive validity or indicates that an act is cancelled *pro futuro*). In Austria, pursuant to the law, restricted retroactive validity is applied, i.e. such validity is applied to a suspended case in the court which appealed with a respective claim to the Constitutional Court. In other cases, the cancelled laws (norms) are invalid only *pro futuro*, and the act that was recognised as unconstitutional is applied to the relations that arise till the adoption of a decision. Perhaps owing to such a paradoxical situation, in 1976 the Constitutional Court of Austria was granted the right to establish either retroactive or *pro futuro* validity of laws (norms) at its own discretion. The federal Constitutional Court of Germany also has some freedom in establishing validity of their laws in time. Meanwhile, retroactive validity of Constitutional Court decisions of Turkey is not provided for. In fact, H. Kelsen had provided for one case when a constitutional court decision should be retroactive: namely, when the case of unconstitutionality is filed by a court of justice. In this case, i.e. when a judicial case is suspended, a constitutional court decision should be applied retroactively because otherwise it would be impossible to finish the suspended case. In this case, it should not be forgotten that the judicial case is suspended in order to adopt a constitutional court decision on a doubtful law (or any other legal act); the adopted constitutional court decision is the grounds for renewing investigation of the case and adopting a decision taking account of the constitutional court decision.

The law of Lithuania does not directly mention retroactive validity of acts of the Constitutional Court, but it is possible to discern this indirectly. Article 110 of the Constitution establishes: “In cases when there are grounds to believe that the law or other legal act applicable in a certain case contradicts the Constitution, the judge shall suspend the investigation and shall appeal to the Constitutional Court to decide whether the law or other legal act in question complies with the Constitution.” Only afterwards, when the Constitutional Court adopts a decision on a disputed act, the court of justice renews the investigation of the suspended case and settles it taking into consideration the Constitutional Court ruling that has already been passed. Thus in this case, the ruling passed by the Constitutional Court undoubtedly is of retroactive validity. It should be noted, however, that in some rulings of the Constitutional Court of the Republic of Lithuania it is directly stated that a ruling on an act that was recognised as unconstitutional has no retroactive validity. Thus the Constitutional Court practice concerning retroactive validity of acts adopted by the Court should be regarded as dualistic.

12. The Constitutional Court decision on complying with a request, i.e. recognition of a disputed act (or part thereof) as unconstitutional, means that such an act cannot be applied in practice. However, a formal cancellation of acts recognised as unconstitutional, i.e. their removal from the legal system, varies from country to country. For example in Austria, they speak about *abrogation* of such an act, in Spain and Germany about *invalidity*, in Italy about *annulment* of an unconstitutional act, and in Latvia, about the declaration of such acts as *null and void* (that is, such are the terms used in constitutional court rulings).

Pursuant to the Lithuanian law, the Constitutional Court, having finished the investigation of a case concerning conformity of a legal act with the Constitution, passes one of the following rulings:

1) to recognise that a legal act is in compliance with the Constitution or the law;

2) to recognise that a legal act contradicts the Constitution or the law.

Thus the resolutionary part of the Constitutional Court ruling mainly only states the fact and does not indicate the further fate of the act recognised as unconstitutional (or illegal), i.e. the means of its annulment, cancellation or removal from the legal system.

It should be noted that in Lithuania the consequences of Constitutional Court rulings on recognition of legal acts as unconstitutional are defined in Article 107 of the Constitution which reads: “Laws (or parts thereof) of the Republic of Lithuania or any other acts (or parts thereof) of the Seimas, acts of the President of the Republic of Lithuania, and acts (or parts thereof) of the Government may not be applied from the day of official promulgation of the decision of the Constitutional Court that the act in question (or part thereof) is inconsistent with the Constitution of the Republic of Lithuania.” The same consequences occur when the Constitutional Court adopts a decision that acts of the President of the Republic of Lithuania, or acts (or parts thereof) of the Government contradict the law.

The aforesaid constitutional provisions are still more specific in the Law on the Constitutional Court, where it is established that rulings passed by the Constitutional Court have the force of law and are binding on all authorities, courts, enterprises, institutions and organisations, as well as all officials and citizens.

The above method is the means used to achieve the most important aim: the act, recognised as unconstitutional (illegal), is “paralysed” it cannot be applied in practice. At the same time the necessary distance among state powers is retained. Thus a court avoids participation in legislative activities. It is held to the presumption that a formal cancellation of acts, recognised as unconstitutional, is the right and duty of the legislator and respective institutions of the executive. Such a provision is partly established in Article 72 of the Law on the Constitutional Court: “All government institutions as well as their officials must revoke executive acts or provisions thereof which they have adopted and which are based on an act which has been recognised as unconstitutional.” Such practice is being formed in the Government and partly in the Seimas.

Moreover, the Law on the Constitutional Court establishes that the decisions based on legal acts which have been recognised as contradicting the Constitution or the law should not be implemented unless they had originally been implemented only until a relevant Constitutional Court ruling came into force.

The force of the Constitutional Court ruling to recognise legal acts or parts thereof as unconstitutional may not be overcome by a subsequent adoption of the same legal acts or parts thereof.

13. Obligatory execution of constitutional acts is provided for in some countries. For

example in Austria, though it is not a pervasive practice, obligatory execution is carried out by courts of justice (concerning claims on financial affairs) or by the Federal President, who is obliged to do this under the Constitution (when the Constitutional Court addresses the President with a corresponding requirement, the President through bodies under him, including the military forces, must ensure execution of the Court's decisions). In Austria, however, the bulk of the Constitutional Court decisions (e.g. those on distribution of competence, on legality of legal acts, on interpretation of laws, etc.) are of a declarative nature (they become obligatory after they have been promulgated), therefore obligatory execution is not applied to them.

In Lithuania only one kind of Constitutional Court act may be subject to obligatory execution: Constitutional Court decisions on imposing penalties on officials and citizens. The decisions are sent to the bailiff of a court of justice to be executed. In the practice of the Constitutional Court of Lithuania, no such decisions have been adopted as yet. It is worth noting that the Constitutional Court of Lithuania almost exceptionally considers cases on compliance of legal acts with the Constitution and laws. So, rulings in these constitutional cases are declarative, their universally binding nature is guaranteed by the Constitution and the Law on the Constitutional Court. As a matter of fact, no serious problems concerning execution of Constitutional Court rulings (i.e. refusal to execute them) have occurred in Lithuania.

According to the Constitution of the Republic of Lithuania, Constitutional Court rulings on issues which are ascribed by the Constitution to the competence of the Court are final and not subject to appeal. First this applies to the final acts - rulings which undoubtedly are of a universally imperative nature and may not be reviewed or changed by anybody else but the Constitutional Court whose competence is also restricted by the Law.

14. Another type of final act should be discussed separately: the conclusions of the Constitutional Court in Lithuania. The aforesaid general rule also applies to them, namely, they are final and not subject to appeal. Nevertheless, after this rule part 3 of Article 107 of the Constitution establishes that: "On the basis of the conclusions of the Constitutional Court, the Seimas shall have a final decision on the issues set forth in part 3 of Article 105 of the Constitution." First of all it is important to pay attention to the fact that issues listed in part 3 of Article 105 of the Constitution are ascribed to joint competence of the Constitutional Court and the Seimas, which means that these issues are to be tackled by both institutions. Moreover, a specific form of activity and power limits are established for each institution: the Constitutional Court presents conclusions on the aforesaid issues (when requested by the subject in power - the Seimas or the President of the Republic of Lithuania), while the right of the final decision belongs solely to the Seimas. Therefore in this case a rule that the conclusions of the Constitutional Court are final and may not be subject to appeal is of relative nature and they still can be subject to discussions as there are no legal guarantees that a final decision on a specific issue will invariably coincide with the conclusions of the Constitutional Court. In this case, the aforesaid rule at best means that, when the Seimas adopts a different final decision, the conclusions of the Constitutional Court do not change and may not be cancelled because of that. Of course, such situations are not desired, because this would mean some sort of conflict (or its beginning) among powers. It can only be added that from this point of view the legal force and meaning of the conclusions of the Constitutional Court of Lithuania undoubtedly differ from Constitutional Court rulings.

15. To conclude this report, I would like to summarise briefly the issue of the implementation of the final decision of the Constitutional Court of Latvia: the verdict. First, the time of coming into effect of the Constitutional Court verdict - from the moment of its oral announcement at the Court session - presents some doubts.

The legal force of Constitutional Court verdicts is regarded as equal to the legal force of laws and other legal acts at issue, because an act contested by the Court verdict may be directly recognised as invalid. Taking account of these facts, a conclusion may be drawn that rules similar to those established for the procedure of coming into force of laws and other legal acts are to be applied to the procedure of coming into force of the verdict. Compare the aforesaid procedure of coming into force of the verdict with the procedure of coming into force of passed laws which is established in the Constitution: “If no other term is fixed, the laws shall take effect fourteen days after their promulgation” (Article 69 of the Constitution). Evidently, the time of coming into force of the Constitutional Court verdict is essentially different from that of the law and their amendments, and it is doubtful whether this might be regarded as a positive thing as it does not aid the harmonisation of the legal system.

Second, this drawback is at least partly removed by the norm of the Constitutional Court Law which gives the Constitutional Court a large discretionary power to determine the time of coming into force of the verdict.

Such vast rights of the Constitutional Court allow the presumption that the Constitutional Court when necessary will set a different time from that defined in the Law for the coming into force of the verdict. In this case, one of the main principles of the rule of law should be followed, namely, that only promulgated laws are in effect (enlarging this postulate to cover Constitutional Court decisions). Of course, the aforesaid discretionary right enables the Constitutional Court to treat the issues of retroactive validity of laws (and other legal acts) in a much freer and wider way. However, this may cause additional problems in the activities of the Constitutional Court.

Third, the Constitutional Court Law mentions the possibility of reviewing cases (Article 26), but these issues are not regulated in a wide way. First of all, attention should be drawn to the respective concepts used in the Constitutional Court Law of Latvia, namely “application” and “case”. The term "application" is used when an authorised subject addresses the Constitutional Court requesting an investigation as to whether a law or other legal act is constitutional and legal. Once a positive decision has been made on such an application, a concrete judicial case is instituted on its basis, which usually ends up with the adoption of a verdict. Taking into consideration that the Constitutional Court of Latvia provides for two methods of investigation of cases - by three judges collectively and by the entire total of the judges - we may presume that the norm of Article 26 of the Law can first of all be applied to the cases which are investigated by three judges collectively. Nevertheless, in any case reviewing of a case means that the verdict adopted before should be recalled or that its soundness be reviewed. At the same time the legal principle which states that “the verdict of the Constitutional Court is final and may not be appealed” based on constitutional norms becomes problematic.