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## INDIVIDUAL CONSTITUTIONAL COMPLAINT IN THE REPUBLIC OF AZERBAIJAN

**Summary.** The individual constitutional complaint is an effective means of protecting constitutional rights and freedoms. The individual constitutional complaint, as a constitutional procedural tool, provides a legal opportunity that propels the defense of the rights and freedoms of everyone. Therefore, countries should strive to implement a full normative individual constitutional complaint in the practice of constitutional courts. In July 2023, the Constitutional Court's authority to review individual complaints was somewhat narrowed. However, it should be noted that the Venice Commission has always advocated for a full individual constitutional complaint, considering that it would alleviate the workload on European institutions and especially the ECtHR. The broad scope of individual constitutional complaints allowed the Constitutional Court to become an effective tool in safeguarding human rights and freedoms. These decisions covered civil, family, tax, labor, and other legal relationships. At the same time, a relatively small number of the complaints considered can be explained by the subsidiary nature of constitutional proceedings. The body of constitutional control in Azerbaijan selectively addresses complaints and only takes into consideration those that are generally important for judicial practice and the law as a whole. In July 2023, the powers of the Constitutional Court regarding the examination of individual complaints were modified. The new changes in the Law on the Constitutional Court provide for an evaluation of Supreme Court decisions only in terms of the constitutionality of the applied legal norm. Thus, one of the most important functions of the constitutional control body in terms of reviewing individual constitutional complaint, namely the assessment of the constitutionality and constitutional meaning of the applied legal norm, is strengthened. The requirements set out for individual constitutional complaint essentially indicate a formal-legal examination of the dispute. The complainant's justification of the violation of constitutional rights by a judicial act obliges the constitutional control body to assess the criteria for applying the normative act in line with the Constitution.

**Key words:** individual constitutional complaint, constitutional rights, constitutional courts, European Court of Human Rights, constitutionalism.

**The introduction.** The topic of this article is dedicated to the current issues of the individual constitutional complaint. This matter gained relevance towards the end of the 90s when constitutional courts were established in post-Soviet countries, and currently, there is a renewed wave of relevance on the topic as countries like Ukraine, Kyrgyzstan, Kazakhstan, and others have started actively utilizing this type of complaint.

Modern Constitutions and constitutional law, as a model of justice in society, reflect the steadily and balanced developing relationships between the individual, society, and the state. Undoubtedly, personal freedom of the individual prevails in these relationships, which is the very essence of the Constitution. Therefore, the responsibility for upholding the Constitution rests with the state or the highest state officials. As when we talk about human rights, the state is inevitably one of the parties involved.

Here one can draw a lot of parallels between the individual constitutional complaint and the complaint to the European court of human rights.

It might seem, that individual constitutional complaint and complaint to the European court of human rights (ECtHR) are two distinct legal mechanisms that allow individuals to seek redress for violations of their rights, but they operate within different legal frameworks and have some key differences. Here are some distinctions between the two: legal jurisdiction, scope of application, admissibility and exhaustion of remedies, enforcement of decisions. In summary, both the individual constitutional complaint and complaint to the European court of human rights provide avenues for individuals to seek redress for rights violations, but they operate at different levels (national vs. supranational) and under different legal frameworks (national constitution vs. ECHR). The choice of which mechanism to use depends on the nature of the violation and the applicable legal framework.

Individual constitutional complaint and complaint to the European court of human rights are quite similar in their legal procedures for protecting human rights. The goal of these procedures is the same – to protect fundamental human rights. In broad terms, the requirements for these complaints are similar (the deadline for submission after exhausting domestic remedies, the structure of the complaint, etc.). Both of these highest judicial bodies also share a subsidiary nature.

**The literature reviews.** There have been numerous developments in this field, encompassing both classical works and those addressing modern issues, written by Western authors as well as Ukrainian scholars. In this article, I draw upon the ideas of Professor Orzikh as the theoretical foundation, along with publications by his Ph.D. students, as well as the publications of European practitioners and scientists, that deal with human rights protection (see [1–8]).

**The aim of the article** is to describe the current developments of the individual constitutional complaint based on the practice in the Republic of Azerbaijan.

**The main text.** In the theory of constitutional law, objects of constitutional responsibility are sometimes classified quite broadly.

Individuals who may be subject to constitutional responsibility can include individuals who could lose a certain legal status in the process of being held constitutionally responsible (heads of state, members of parliament, etc.), or individuals deprived of refugee status. However, it's important to note that the process of implementing constitutional responsibility has a positive character towards the individual, similar to administrative justice. As a result, in the constitutional process, individuals must have broad access to constitutional control bodies.

Thus, constitutional courts, which generally serve a positive function in safeguarding individual legal freedoms, must have jurisdiction to influence both the establishment of legal justice and legal practice. In this context, all branches of power should be subject to constitutional control.

Normative individual constitutional complaint is an effective means for individuals to influence the constitutional order. Therefore, in the absence of the individual constitutional complaint, neither the body of constitutional control can effectively fulfill its function of safeguarding constitutional norms and values, and naturally, constitutional responsibility is rarely initiated.

Here, we specifically mean the broad form of individual constitutional complaint, including normative and judicial control. Global models distinguish forms such as *actio popularis*, *quasi actio popularis* (when proving one's legal interest), individual application, constitutional petition, and normative individual constitutional complaint.

Practically all mentioned models of individual constitutional complaint have an abstract character, except for the last one. Although even Kelsen was against the abstract form of individual constitutional complaint. However, normative individual constitutional complaint is linked to a specific case of the complainant and is the most common form of individual constitutional complaint. In turn, normative individual constitutional complaint exists in either complete (Germany, Belgium, Spain, Czech Republic, etc.) or partial (Poland, Latvia, etc.) forms. It's worth noting that virtually all democratic countries strive for the complete form of individual constitutional complaint where control efficiency is absolute.

Thus, in the majority of constitutional courts, the subject of the complaint concerns the compliance of normative legal acts or acts of normative nature with the constitution. Alongside this, there are limitations on the types of normative acts that can be challenged through individual constitutional complaint. For example, in some countries laws are subject to individual constitutional complaint, while in Spain, other normative acts are included. The subject of individual constitutional complaint can also extend to legal application acts, i. e., judicial decisions, administrative resolutions, etc. (Switzerland, Austria, Germany, etc.).

In Azerbaijan, in 2023, the subject of individual constitutional complaint was partially reduced. I will try to consistently and briefly outline the dynamics of the development of this type of complaint in Azerbaijan, considering its current state.

The Constitutional Court in Azerbaijan has been operating since 1998. Initially, neither the Constitution nor the primary law "On the Constitutional Court" of 1997 envisaged the individual constitutional complaint. There were certain concerns that the body of constitutional control might be perceived as a 4th instance.

However, it didn't happen and over time, the Constitutional Court became objectively perceived by society, and during the first constitutional reforms in 2002, the constitutional right to individual

individual constitutional complaint was granted "to everyone" for their specific cases already heard in courts. According to the Law, individual constitutional complaint can be submitted within 6 months after the Supreme Court decision and in cases of restricted access to court within 3 months.

Indeed, initially, the term "everyone" concerning the application of individual complaints was sometimes interpreted broadly. However, in accordance with the Constitution and established practice, the concept of "everyone" refers to individuals regardless of citizenship, social associations, legal entities, municipalities, and all subjects possessing legal freedom.

It should be noted that since 2002, the right to submit a specific case (already under consideration) has also been granted to the courts. This significantly strengthened the close and active collaboration between the Constitutional Court and the courts of general and administrative jurisdiction. Local and appellate courts currently refer to the Constitutional Court, invoking the principle of "legal certainty," in anticipation of a decision on uniform interpretation of legal norms or their specific parts.

The Constitutional Court in many of its decisions has referred to the principle of legal certainty, provided interpretations of law and the Constitution, and established uniform judicial practice, effectively carrying out the functions of the Supreme Court's Plenum.

I won't delve into the question of "legal certainty" as it's a voluminous principle and could be the topic of a separate conversation, but I'll mention that the Constitutional Court of Azerbaijan, in 95 out of 550 of its decisions, citing the principle of legal certainty in the context of uniform legal understanding, significantly influenced the reinforcement of individual rights protection overall.

Using a broad scope of individual constitutional complaint, the Constitutional Court of Azerbaijan, in rare cases overturning the Supreme Court's decisions, has effectively drawn attention not only from judges but also from the entire legal community. Such decisions were based on criteria for a clear understanding of constitutional principles, norms, and values.

The broad scope of individual constitutional complaints allowed the Constitutional Court to become an effective tool in safeguarding human rights and freedoms. These decisions covered civil, family, tax, labor, and other legal relationships. At the same time, a relatively small number of the complaints considered can be explained by the subsidiary nature of constitutional proceedings. The body of constitutional control in Azerbaijan selectively addresses complaints and only takes into consideration those that are generally important for judicial practice and the law as a whole.

As previously noted, in July 2023, the powers of the Constitutional Court regarding the examination of individual complaints were modified. The new changes in the Law on the Constitutional Court provide for an evaluation of Supreme Court decisions only in terms of the constitutionality of the applied legal norm. Thus, one of the most important functions of the constitutional control body in terms of reviewing a individual constitutional complaint, namely the assessment of the constitutionality and constitutional meaning of the applied legal norm, is strengthened.

Subsidiarity is mainly characteristic of international judicial bodies. However, even constitutional courts, due to the unique nature of the judicial process as a means of protecting human rights within the domestic legal system of states, operate facultatively.

This is precisely why considering constitutional courts as the final instance in the domestic legal system could be seen as a barrier to individuals' access to international legal protection means and could overly burden constitutional courts. On the other hand, it should be considered that constitutional courts function within a specialized jurisdiction and fulfill a policy-legal function, obliging them to remain outside the hierarchical structure.

The inadmissibility of considering the Constitutional Court of Azerbaijan as the final instance within the domestic legal system was also confirmed by the decision of the European Court of Human Rights in the case of *G. Babayev v. Azerbaijan* on May 24, 2004. In this decision, the European Court expressed its position regarding the exhaustion of domestic legal remedies in the Republic of Azerbaijan. The Court noted: "In the Republic of Azerbaijan, for the purpose of submitting a complaint to the European Court, the moment of exhaustion of domestic legal remedies is the decision of the cassation panel."

Thus, the Constitutional Court, based on its subsidiary role, approached constitutional control with caution regarding judicial practice. However, as the Venice Commission of the Council of Europe stated, constitutional control over judicial acts causes certain frictions in the approaches to interpreting law in the context of the highest cassation instance. Accordingly, the 'broad' individual constitutional complaint in Azerbaijan was not an exception.

In July 2023, the Constitutional Court's authority to review individual complaints was somewhat narrowed. However, it should be noted that the Venice Commission has always advocated for a full individual constitutional complaint, considering that it would alleviate the workload on European institutions and especially the ECtHR.

Thus, the recent changes to the Law "On the Constitutional Court" provide for the assessment of Supreme Court decisions only in terms of the constitutionality of the applied normative-legal act. For example, in Latvia, in the early 2000s, a similar limited procedure for individual constitutional complaints was initially adopted and caused much debate over the reduction in the effectiveness of constitutional control.

Unfortunately, in Azerbaijan, they have moved from a broad form to a limited form of complaints. Presumably, this is due to discrepancies in the approaches to interpreting legal norms among the courts. However, as I noted, the priority number of the Constitutional Court's decisions based on appeals from general courts and the increase in the number of appeals from the Supreme Court suggest otherwise.

Thus, the criteria for evaluating the applied law by the courts or the legal procedures used by the courts are outside the scope of constitutional control. However, one of the important functions of the constitutional control body in reviewing individual constitutional complaints is to assess the constitutionality and constitutional meaning of the applied legal norm, therefore, its proper application.

It should be noted that recent changes did not affect the provisions of Article 34.7 of the Law on the Constitutional Court, which specify the requirements for the content of a individual constitutional complaint, where the complainant must justify the violation of their rights and freedoms by the contested normative-legal, judicial, or municipal act.

The requirements set out for a individual constitutional complaint essentially indicate a formal-legal examination of the dispute. The complainant's justification of the violation of constitutional rights

by a judicial act obliges the constitutional control body to assess the criteria for applying the normative act in line with the Constitution.

**In summary**, it worth emphasizing that the individual constitutional complaint is an effective means of protecting constitutional rights and freedoms. The individual constitutional complaint, as a constitutional procedural tool, provides a legal opportunity that propels the defense of the rights and freedoms of everyone. Therefore, countries should strive to implement a full normative individual constitutional complaint in the practice of constitutional courts.

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#### **Гараджасв Дж. Індивідуальна конституційна скарга в Республіці Азербайджан**

**Анотація.** Індивідуальна конституційна скарга є ефективним засобом захисту конституційних прав та свобод. Індивідуальна конституційна скарга, як конституційний процедурний інструмент, надає правову можливість, яка сприяє захисту прав та свобод кожного. Тому країни повинні прагнути впровадити повну індивідуальну конституційну скаргу в практику конституційних судів. У липні 2023 року повноваження Конституційного Суду Азербайджанської Республіки щодо розгляду індивідуальних конституційних скарг були деякою мірою обмежені. Однак варто зазначити, що Венеціанська Комісія завжди підтримувала повну індивідуальну конституційну скаргу, вважаючи, що це полегшить завантаження на європейські інститути, особливо ЄСПЛ. Широкий зміст індивідуальної конституційної скарги дозволив Конституційному Суду Азербайджанської Республіки стати ефективним інструментом у сфері захисту прав і свобод людини. Ці рішення охоплювали цивільні, сімейні, податкові, трудові та інші правові відносини. При цьому відносно невелика кількість розглянутих скарг пояснюється субсидіарним характером конституційної процедури. Орган конституційного контролю в Азербайджані ставиться до скарг вибірково і приймає в розгляд лише ті, які загалом є важливими для судової практики та права взагалі. Як вже зазначалося, в липні 2023 року повноваження

Конституційного Суду Азербайджанської Республіки щодо розгляду індивідуальних скарг були змінені. Нові зміни в Законі про Конституційний суд передбачають оцінку рішень Верховного Суду Азербайджанської Республіки лише в частині конституційності застосованого нормативно-правового акта. Таким чином, посилена одна з найважливіших функцій органу конституційного контролю щодо розгляду індивідуальної конституційної скарги, а саме – оцінка конституційності та конституційного змісту застосованої

норми права. Вимоги, передбачені для індивідуальної конституційної скарги, вказують на формально-правовий аналіз суперечки. Обґрунтування скажника про порушення конституційних прав судовим актом зобов'язує орган конституційного контролю оцінити критерії застосування нормативного акту відповідно до Конституції.

**Ключові слова:** конституційна скарга, індивідуальна конституційна скарга, конституційні права, конституційні суди, Європейський Суд з прав людини, конституціоналізм.