

THE CONSTITUTIONAL COMPLAINT IN THE POLISH SUPREME LAW

A QUEIXA CONSTITUCIONAL NA LEI FUNDAMENTAL DA POLÔNIA

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Abstract: The article presents the institution of the constitutional complaint in the 1997 Constitution of the Republic of Poland. For the first time in the history of Polish constitutionalism the current supreme law made it possible for the citizens to directly appeal to the Constitutional Tribunal in order to protect their laws and liberties guaranteed by the supreme law. The article describes the origin of the institution of the constitutional complaint in Europe and in Poland. The main focus, though, is on the extended analysis of the scope and coverage of the constitutional complaint, together with the conditions set by the legislators that must be met for the complaint to be filed. The paper is concluded with the observations on the constitutional regulations and the practice of their applications in the work of the Constitutional Tribunal.

Keywords: Constitutional Complaint. Constitutional Tribunal. Human Rights. Constitution Poland.

Resumo: Este artigo apresenta a Queixa Constitucional na Constituição da República da Polônia de 1997. Pela primeira vez na história do constitucionalismo polonês, os cidadãos podem postular diretamente ao Tribunal Constitucional a fim de proteger os seus direitos e liberdades garantidos na Lei Fundamental. O artigo apresenta a gênese da instituição da queixa constitucional na Europa e na Polônia. No entanto, a principal atenção foi dedicada a análise extensiva do âmbito de aplicação pessoal e material de queixa constitucional, e também as condições da sua apresentação, estabelecidas pelo legislador. O trabalho termina com os comentários finais sobre a regulação constitucional e a prática da sua aplicação pelo Tribunal Constitucional.

Palavras-chave: Queixa Constitucional. Tribunal Constitucional. Direitos humanos. Constituição. Polônia.

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Introduction

The constitutional complaint “can be in the most general manner defined as a claim, to which an individual in relation to the state is entitled, for the protection of his/her fundamental rights in special proceedings before the constitutional court.” (CZESZEJKO-SOCHACKI, 1998, p. 31). Another definition says that

[...] the constitutional complaint is an institution which may be used by a natural person or a legal person (both of civil law and public law) in special proceedings before the constitutional court in order to protect his/her fundamental civil rights in the case of their infringement by the acts of state authorities or their inaction. (WIERZBOWSKI, 1996, p. 209).

It must be stated that the constitutional complaint is not another appellate measure extending the course of proceedings for any of the procedures. Legal literature unanimously emphasizes that this is an exceptional legal measure to protect constitutional rights and freedoms. The complaint is therefore outside the closed systems of ordinary remedies provided by conventional procedures (administrative, civil and criminal). The constitutional complaint as an instrument for the protection of constitutional rights and freedoms is associated with the European model of constitutional judiciary. Genesis of the constitutional complaint should be sought in the circle of German legal culture. The term “constitutional complaint” has German roots and was used in legal literature at the beginning of the second half of the nineteenth century in the context of the solutions proposed in the draft of the constitution of the Reich from 1849 (BANASZAK, 2000, p. 10-11). The origins of the constitutional complaint can be traced in Bavaria. In 1814 a complaint was introduced there which could be filed by an individual in the event when his rights guaranteed by the Constitution were violated by the act of the executive power. Four years later, the newly enacted Constitution of Bavaria granted citizens the right to apply to the king in the case of a violation of the Constitution.¹ However, it was not a constitutional complaint, but a kind of petition (BANASZAK, 2000, p. 10). A proper prototype of the modern constitutional complaint appeared only in the Austro-Hungarian Constitutional Act of 1867, by virtue of which the Court of the Reich was established to which citizens could apply because of the infringement of their constitutional rights (ZWIERZCHOWSKI, 1994, p. 167-168; SCHEUNER, 1976, p. 23). The complaint, however, could not be applied in relation to legislative acts. However, as underscored by the Austrian doctrine, in 1867-1918 the Court of the Reich was the only court in Europe hearing citizens’ complaints against the violation of their constitutional rights by organs of state authorities (including those autonomous).² In the interwar period the institution of constitutional complaint was in force in Austria by virtue of the Constitution of 1920. Apart from it, another country where the institution of constitutional complaint was established was Spain, where the Constitution of 1931 provided for in Article 131 the power of the Constitutional Court to hear appeals in

¹ For more details see Schumann (1983, p. 162).

² For more details see Czeszejko-Sochacki (1998, p. 12).

the scope of protection of citizens' rights if complaints before other authorities remained ineffective.³ The proper development of constitutional judiciary, and the institution of constitutional complaint occurred only after the Second World War. Shortly after the war, the institution of constitutional complaint first appeared in individual West German countries. At first the constitutional complaint was introduced in the Bavarian constitution of 1946, later similar institutions were established in 1947 in Hesse and only in 1958 in Saarland, to be finally included in the Act of 12 March 1951 on the Federal Constitutional Court. As a constitutional institution it has existed since 1969 (ZWIERZCHOWSKI, 1994; SCHLAICH, 1994, p. 127). In the case of Austria, the restoration of the Constitutional Tribunal was provided for by the amendment of the Constitution of October 1945. The next European country which introduced this institution in 1978 was Spain. In Belgium the adoption of the institution of constitutional complaint was inextricably linked with the slow process of transforming the state into a unitary regionalised state (federation) (ZWIERZCHOWSKI, 1994, p. 73). The further development and dissemination of the constitutional complaint came with a political breakthrough in Central and Eastern Europe, when in the former socialist countries the systemic transformation associated with a profound democratization of political systems was launched. The complaint appeared simultaneously with the establishment of new constitutional tribunals in the countries such as: Hungary (1989), Russia (1990), Slovenia (1991), Albania (1992), Czech Republic (1992), Slovakia (1992) and Poland after the adoption of the new Constitution and the Constitutional Tribunal Act in 1997.

1 THE PERSONAL SCOPE OF THE CONSTITUTIONAL COMPLAINT

Personal scope of constitutional complaint has been stipulated in Article 79 paragraph 1 of the Constitution, which reads: "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal [...]" The above Article is essential in the process of identifying the entity entitled to lodge a constitutional complaint, or in other words, it gives us a clear answer to the question of who can effectively file such a complaint to initiate a proper procedure (although – as discussed below – only upon fulfilment of certain conditions) (CZESZEJKO-SOCHACKI, 1998, p. 39; SZMULIK, 2006; BAGIŃSKA, 2010). According to Czeszejko-Sochacki (1998), the term "everyone" should be understood broadly. As he observes, the scope of the term encompasses both natural persons who are citizens of Poland, as well as other persons who are under the authority of the Republic of Poland (with certain exceptions for foreigners), stateless persons and legal persons. The rationale behind such interpretation of the term "everyone" is the fact that the Constitution uses it both when referring to the constitutional complaint as well as in Article 45 paragraph 1. Given that the both institutions have the character of procedural constitutional guarantees, and that the right to lodge a constitutional complaint to the Constitutional Tribunal can be considered a qualified variant of the right to trial, so in the light of the foregoing nothing stands in the way to state that the legislator

³ For more details see Szmulik Żmigrodzki (2000, p. 27).

gave the term “everyone” the same meaning in the both above cases. The broad understanding of the term “everyone” is also possible based on slightly different premises. Trzeciński (2002) suggests that a reference point for determining the scope of the term should be the objectives which the institution of constitutional complaint is supposed to serve as well as the types of violated constitutional rights and freedoms (TRZCIŃSKI, 2002, p. 207; ŁABNO, 2002, p. 773). The fact of including Article 79 paragraph 1 of the Constitution in the Chapter on freedoms and rights may suggest that the legislator primarily construes the term “everyone” as a natural person.

Closer analysis of the provisions of Chapter II of the Constitution allows even a broader interpretation of the term. First of all, in the light of the last assumption, the term “everyone” may be used in the sense of a natural person, for instance, in Articles: 41, 42 and 47 of the Constitution. Secondly, the interpreted term also covers other entities entitled to use the rights conferred on them by the legislature. It is proved by provisions contained e.g. in Articles 45, 63, 77, 78 and 80 of the Constitution. These may be, therefore: social organizations, associations, political parties or legal persons (GARLICKI, 1996, p. 13). Such understanding of the term “everyone” is dictated by the objectives the constitutional complaint serves, i.e. the elimination of unconstitutional acts from the legal system, as well as the protection of constitutionally guaranteed rights, some of which may be also enjoyed by legal persons (e.g. the right to trial, the right to compensate for the injury, the right to apply to the Ombudsman). The broad understanding of the term “everyone” is also supported by the will of the legislator expressed in votes of the members of the Constitutional Committee of the National Assembly. During its sessions, it was decided to grant the right to file a constitutional complaint to “everyone” within the meaning of a “subject” of law, in such a way to distinguish between the concept of “everyone” and the concept of “citizen”, “every citizen.” During the discussion, the term “person” was also used (TRZCIŃSKI, 2002). Thus, in the light of the foregoing, the term “everyone” means a natural person, a citizen or a legal person. In some cases the possibility must be taken into account that the institution of constitutional complaint may refer to the public authorities. This applies to situations in which their constitutionally protected rights put such entities in a situation identical to that of natural persons or other legal persons (CZESZEJKO-SOCHACKI, 1998; BANASZAK, 1997, p. 178; WITKOWSKI, 2011, p. 54-64). Pursuant to Article 79 paragraph 2 in conjunction with Article 56 of the Constitution foreigners are subject to a significant limitation of the use of the institution of constitutional complaint.

2 THE SUBJECT MATTER OF THE CONSTITUTIONAL COMPLAINT

Article 79 paragraph 1 of the Constitution of the Republic of Poland indicates the scope of the constitutional complaint – namely: “a statute or another normative act.” These must be acts upon which basis a court or an organ of public administration has passed a final decision on freedoms or rights of the complainant, or in other words, only a normative basis for a final decision and not the question of constitutionality of such a decision itself may be a subject matter of a com-

plaint⁴. According to Dudek (1998, p. 155), the Constitutional Tribunal does not assess judicial or administrative proceedings concluded with a substantive ruling, even if it stated a real infringement of constitutional rights of the individual, but norms that enable this infringement, i.e., paradoxically, “entitle” the authority to issue such a ruling.

The term “statute”, although it is not defined in the Constitution, does not cause serious problems with the interpretation of its nature or the procedure of adoption, as well as to its scope. Naturally, one may attempt to explain the term even more accurately, in particular with regard to its scope. It is not entirely clear whether the legislator using the term understands a statute within the meaning of the act called in this manner and adopted by the legislative authority, or perhaps, every act which has the force of statute. As we should think, the problem is explained in Article 91 of the Constitutional Tribunal Act, saying that “[...] whenever in the provisions of the Act the term ‘statute’ is used, it shall denote statutes and other legislative acts issued on the basis of provisions that were binding prior to the entry into force of the Constitution of the Republic of Poland, enacted on 2 April 1997.” Therefore Repel (2000, p. 86) rightly observes that this regulation is different from that contained in the previous Constitutional Tribunal Act. The inclusion of legislative acts passed under the previous constitutional provisions in the scope of the constitutional notion of statute certainly reinforces the point that no act having the force of statute expressly provided for in the provisions of the Constitution in force may be left outside this scope. Also legal acts of the force of statute, i.e. regulations having the force of statute by the President of the Republic of Poland issued pursuant to Article 234 of the Constitution, all previous legal acts of the force of statute (if they are still in force), namely:

- a) regulations of the President of the Republic of Poland having the force of statute from the interwar period;
- b) decrees by the Polish Committee of National Liberation;
- c) decrees having the force of statute passed by the government between 1945-1952;
- d) decrees of the Council of State from 1952-1989 are subject to control by the Constitutional Tribunal.

Apart from statute, Article 79 paragraph 1 indicates “other normative act” as a subject matter of a constitutional complaint. In this case the extent of interpretation may be large. The term “other normative act” may denote any other – excluding, of course, statute - normative act setting legal norms (in a broad sense), but it can be also interpreted on the basis of Article 188 points 1-3 of the Constitution, and therefore it would cover only international agreements and normative acts of central state bodies (in a narrower sense) (LABNO, 2002, p. 775). The current Constitution, compared to the previous practice of establishing local law and the attendant views, adopted new understanding of local law (for more, see Article 87 paragraph 2 in conjunction with

⁴ For more details see Bichta and Szmulik (2003, p. 38-410).

Articles 184 and 241, paragraph 7 of the Constitution). Firstly, it relates it to the activity of some local stakeholders, local public administration (local government and local organs of government), and secondly, grounds of merit, and especially the personal scope of application of the act and not the kind or form of the act play a decisive part in declaring it universally applicable.⁵ Therefore, one should opt for a broader understanding of the term “other normative act”. The view expressed by Rymarz, Kręcis and Zakrzewski should be adopted, who, referring to *ratio legis* of the constitutional complaint, and mainly to the guarantee function in the protection of constitutional rights and freedoms, believe that in essence there are no reasons to eliminate local law acts from the scope of the complaint (REPEL, 2000, p. 96; NIEZGÓDKA-MEDKOWA, 1997, p. 19). Rymarz (1999, p. 7) rightly emphasizes that

[...] it is difficult to reasonably assume that the legislator establishing the institution for the protection of citizens' fundamental rights would, at the same time, restrict this protection only to the control of constitutionality of the law enacted by central state bodies and assume the exclusion of examination of the constitutionality of an important segment of universally binding law in a given area, i.e. local law.

In interpreting Article 188 Section 5 it is not difficult to notice that this provision refers to regulations contained in Article 79 paragraph 1, and therefore the term “other normative act” used therein has an autonomous meaning. The interpretation aiming at the exclusion of local law from the scope of constitutional complaint would lead to the serious limitation of the principle of supremacy of the Constitution in the system of sources of law, as it assumes that there may be sources of universally binding law which contain general and abstract norms that are not subject to control in terms of compliance with the Constitution (REPEL, 2000, p. 8). Finally, it should be assumed that acts of local law can be subject to control by means of constitutional complaint.

Also ratified international agreements will fall within the scope of constitutional complaint as in fact there are no grounds for excluding ratified international agreements from this scope (REPEL, 2000, p. 92). Furthermore, the exclusion of ratified international agreements from the scope of constitutional complaint that today often concern the sphere of rights and freedoms of the individual, from his legal position to no less extent than domestic law. Hence, the exclusion of the possibility of submitting a constitutional complaint against them would considerably reduce the effectiveness of the national system of human rights. Similarly, the scope of constitutional complaint includes, issued on the basis of an international agreement, legal acts of an international organisation of which the Republic of Poland is a member. This applies in particular to universally binding law in the form of secondary law enacted by an international organization.

An important issue that must be addressed here is a matter of acts that cannot be subject to control under a constitutional complaint procedure. The exclusion of the possibility of challenging provisions of the Constitution itself through a constitutional complaint does not raise any doubts. Here the case of provisions of the Act to amend the Constitution will be different. The pos-

⁵ For more details see Ochędowski (1991) and Rot (1996, p. 53).

sibility of challenging its provisions through the constitutional complaint should be allowed, however only in relation to an improper procedure of its adoption. Besides, according to the doctrine, the admissibility of constitutional complaint is excluded, insofar as it is directed against (DUDEK, 1998, p. 157): 1) the failure of the legislative authority to issue an act implementing constitutional rights and freedoms, 2) inaction of a court or public administration authority in considering an individual case concerning constitutional rights and freedoms, 3) the use of an unconstitutional or illegal act in the decision, not having the form of a judgement, or in the decision resulting in a real violation of the status of the individual, but actionable, 4) the use of an act or a provision in compliance with the Constitution but with its incorrect interpretation in a judgement or decision. It is not permissible to challenge the absence of a provision,⁶ nor file a constitutional complaint against acts devoid of the characteristics of normative acts (LABNO, 2002, p. 777)⁷ as well as entire acts whose provisions would constitute a basis for determining a specific case (POLAND, 2002a).

The subject matter of a complaint may be the infringement of rights and freedoms guaranteed in the Constitution.⁸ At the root of the introduction of constitutional complaint laid the desire to ensure the observance of constitutional rights and freedoms of individuals, while its form of a specific legal measure, not used before common courts, was, first of all, a result of the historical development of sources of law, binding courts by statutes and the lack of tradition in the direct application of the Constitution by courts. Undoubtedly, also the concepts of constitutional fundamental rights, their protection as well as the model of constitutional judiciary played an important part here (TULEJA, 1997). In the case of the current Constitution analysis of regulations demonstrates that the provisions formulating rights and freedoms as a basis for a constitutional complaint should be primarily searched for in Chapter II (the freedoms and rights of citizens) and Chapter I titled "The Republic", which sets out the rules of the political system. For this purpose reading the preamble and ratified acts of international law regulating the norms of rights and freedoms of persons and citizens would not be without significance here (TRZCIŃSKI, 2000, p. 57). Of course, not all principles contained in Chapter I can form an independent basis for a constitutional complaint. Naturally, strictly constitutional principles, such as the principle of sovereignty of the nation or the principle of separation of powers, cannot be the basis for the constitutional complaint. On the other hand, it seems that the principle of freedom of economic activity, as well as the principle of the protection of property or the rule of law can be used for that purpose. Of course, the same reference to the pure wording of the aforementioned principle, without indicating which and how constitutional freedoms or rights have been infringed, will not automatically launch the proper course of proceedings with the application. In such a case it is necessary to delve into the content of this principle built by the body of rulings of the Constitutional Tribunal and the doctrine of constitutional law. In other words, the principles of a political system can serve as a basis for a constitutional complaint, provided that it is possible to translate them into a legal norm defining rights or free-

⁶ For more details see *Postanowienie* (1998) and *OTK ZU* (1998).

⁷ For more details see *Poland* (1998).

⁸ For more details see *Woch* (2011), *Wróblewska* (2007, p. 38-40) and *Czoik* (2007, p. 12-16).

doms of the citizen (TRZCIŃSKI, 2000, p. 58-60). Also certain provisions of the introduction to the Constitution may provide the grounds for a constitutional complaint. For instance, the principle of subsidiarity or the principle of social solidarity expressed in the preamble which could give the basis for a constitutional complaint may be indicated here (CZESZEJKO-SOCHACKI; GARLICKI; TRZCIŃSKI, 1999, p. 164). The judge of the Constitutional Tribunal, Lewaszkiewicz-Petrykowska, took a similar position on this issue, writing that: “the reference to the ideas expressed in the preamble is extremely helpful in solving apparent or real conflicts and contradictions faced by the constitutional court. The preamble, in fact, sets the direction for interpreting the substantive provisions of the Constitution. The Constitutional Tribunal often voiced such a position. Thus, for example, in the case K. 34/97 it inferred the prohibition on arbitrary law-making from the preamble, proclaiming:

Freedom, justice, cooperation and dialogue - these are some of the values distinctly worded in the preamble of the Constitution of 1997 that must provide the criteria for the assessment of any action of public authorities, including the legislation to implement the principles of the democratic and socially just state. (LEWASZKIEWICZ-PETRYKOWSKA, 2002, p. 65).

Łabno (2002, p. 767-768) can be quoted here who reasonably claims that: “[...] the admissibility of the constitutional complaint is determined by [...] the fact of infringing rights or freedoms stipulated in the Constitution, rather than drafting it in its particular passage.”

An essential basis, however, is provided by provisions contained in Chapter II of the Constitution entitled: *Freedoms, rights and obligations of persons and citizens*. There is a consensus in the doctrine that the provisions contained in the part: personal freedoms and rights (these are: the right of every human being to have his life protected, the prohibition of torture, the right to personal inviolability and guarantees of personal security, the right to defense and counsel of his own choosing or counsel appointed by the court, the right to a fair public hearing of one’s case, the right to privacy, including secrecy of correspondence, inviolability of the home [the violation may take place only for reasons and under conditions specified in the Act], the right of every human being to keep information concerning his person secret, freedom of the choice of place of residence and sojourn as well as leaving and returning to the country, freedom of conscience and religion, freedom of communication, freedom of artistic creation and scientific research, freedom of teaching, the prohibition of extradition of Polish citizens and persons suspected of committing a crime without the use of force) as well as in the next part stipulating political freedoms and rights (these are: freedom of assembly, freedom of association [Articles 58 and 59 governing this freedom should be considered together with Articles 11 and 12 which regulate freedom to found political parties and trade unions], the right to participate in public life [the right to vote, the right of access to the public service based on the principle of equality, the right to obtain information on the activities of organs of public authority, the right of legislative initiative, and the right to participate in a referendum], the right to submit petitions, proposals as well as collective and individual complaints to organs of public authority) may give rise to a constitutional complaint. The case of economic (social) freedoms and rights is different. Most of them are not addressed to citizens but to organs

of public authority. Some of them,⁹ naturally exhaust the requirements to become the basis of a constitutional complaint. Others may be claimed only within the limits specified by statute (see Article 81 of the Constitution), while the remaining can be only classified as programmatic norms¹⁰ or those that define objectives of public authority bodies. Disputes regarding the admissibility of a constitutional complaint are raised by basing it on the last two types, i.e. the rights the assertion of which is limited by the Constitution to the scope specified by statute, and programmatic norms. As far as the provisions referred to in Article 81 of the Constitution are concerned, some assume that it is not acceptable to use a constitutional complaint to protect these rights. Such a position was also expressed by the Constitutional Tribunal in its judgement.¹¹ These rights belong to the category of rights that can be claimed only within limits specified by statute, therefore, it is the task of the ordinary legislator to determine the content and substance of the rights referred to in Article 81. Such a view, however, is not compatible with the principle expressed in Article 2 of the Constitution, according to which the Republic of Poland is also the country “implementing the principles of social justice.” This description, in turn, corresponds to the meaning in conjunction with the principle of a social market economy expressed in Article 21 of the Constitution. This means that the Republic of Poland is obliged to implement the principle of the social state. Therefore the views denying the protection, stemming from a constitutional complaint, of a large part of social and economic rights should be considered unjustified as these rights are not inferior to civil and political rights and freedoms. Furthermore, without these rights it is not possible to use these rights. Thus, they may become the basis for a constitutional complaint.

The same applies to programmatic norms. Trzeciński’s (2000, p. 62-63) view must be shared who wrote: “In my opinion it can be justified that also programmatic norms, in which some economic and social right are comprised, can be infringed and may give a basis for a constitutional complaint.” It is because programmatic norms determine the directions and principles of pursuing policy by the Republic of Poland. It should be conducive to the implementation of programmatic norms and may not lead to their elimination, or non-compliance. Furthermore, it can be assumed that within each programmatic norm its “core” can be found, a violation of which can become a basis for a constitutional complaint. In its judgement, the Constitutional Tribunal pointed out that the State has the duty to take steps to ensure adequate financial resources necessary for the implementation of the constitutional social rights, but at the same time it must take into account the economic situation and the need to ensure the conditions for economic development (SCHLAICH, 1994), and even adjust the scope of implementation of social rights to the economic conditions (POLAND, 2001). According to the Constitutional Tribunal the limits of possibility of satisfying the needs are determined by other protected constitutional values, such as a budgetary balance

⁹ For instance, Article 64 paragraph 1: “Everyone shall have the right to ownership, other property rights and the right of succession”, or Article 65 paragraph 1: “Everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work.”

¹⁰ For instance, Article 68 paragraph 1: “Everyone shall have the right to have his health protected” and paragraph 5 of this Article: “Public authorities shall support the development of physical culture, particularly amongst children and young persons.”

¹¹ For more details see Poland (2000, p. 513).

(POLAND, 2002a). Hence, one has to agree with the Trzciński who does not reject the possibility of fully founding a constitutional complaint on these provisions¹² indicating three situations “where, as long as programmatic norms are violated, the constitutional complaint would be admissible” (LABNO, 2002, p. 769). It would be the case if: 1) the legislator adopted a faulty interpretation of a provision of the Constitution, where a specific purpose or task of a public authority has been defined, or applied incorrect measures for implementing a statute causing the violation of rights or freedoms; 2) the legislator enacted restrictions on rights or freedoms that violate the essence of these rights or freedoms; 3) the legislator regulated rights or freedoms below the “minimum” resulting from the essence of these rights or freedoms. This position is justified because otherwise the citizens could be deprived of one of the mechanisms of influencing the implementation of such a policy by public authorities that leads to the implementation of programmatic norms contained in the Constitution. The same conditions of the admissibility of a constitutional complaint can be adopted for the rights contained in Article 81 whose scope of implementation is defined by statutes. However, in our opinion, there is another reason for a constitutional complaint, because in the case of the rights listed in Article 81, the reduction of the existing level of the assertion of the rights listed there by the legislator, thus the deterioration of their compliance level, should also give a basis for the complaint.

The legislator explicitly excluded in Article 79 paragraph 2 of the Constitution the rights set forth in Article 56 of the Constitution (the right of refuge and granting a status of a refugee) from the scope of a constitutional complaint. Such an explicit exemption is justified, because it is difficult to consider that someone might be entitled to the right to refuge or a claim for granting a refugee status as to the subjective right. In addition, a person seeking refuge or a refugee status is not a citizen of the Republic of Poland, or (if located on its territory) it is not lawful. It is therefore difficult to assume that in the case of the denial of the right to the person who illegally entered the territory of the Republic of Poland, or his residence permit has expired or it has been withdrawn, such a person could claim his rights through a constitutional complaint, the result of which would be his stay on the territory of the Republic of Poland.

2 GROUNDS FOR LODGING A CONSTITUTIONAL COMPLAINT

The commented provision also indicates grounds for lodging a constitutional complaint. The first such prerequisite is an infringement of constitutional freedoms or rights. In Polish the term “infringement” (*naruszenie*) in the colloquial sense means: “take something from the whole; broach [...] damage, spoil, disrupt [...] violate, break (e.g. the laws, regulations).” (MALY, 1995, p. 479). Generally speaking, the term is used to describe any adverse change. In our case, however, we refer it in accordance with Article 79 paragraph 1 of the Constitution to the infringements of constitutional rights and freedoms, “in a situation where a final judgement (decision) of a court or an organ of

¹² Form more detalis see Trzciński (1999), Warszawa (1999, p. 44-45) and Trzciński ((1999, p. 10).

public authority is based on an unconstitutional normative act.” (CZESZEJKO-SOCHACKI, 2000, p. 68; JAROSZYŃSKI, 2007, p. 26-38). As noted by Czeszejko-Sochacki (2000), the Polish doctrine basically has not developed the definition (for the institution of constitutional complaint!) of the term “infringement.” However according to Jakimowicz (2008, p. 12, 14):

[...] infringement of constitutional rights and freedoms must be based on a court or public administration decision, and cannot be a consequence of any other fact than the implementation of legal norms that are contrary to the Constitution. The prerequisite for the admissibility of a constitutional complaint is also the direct nature of the infringement of public rights actually felt by the subject of those rights. There is no possibility of lodging a complaint against statutory rulings having the nature of general clauses. The protection of public rights through a constitutional complaint is admissible in a situation where the limitation of constitutional rights and freedoms arises directly from a statute or any other normative act (inconsistent with the Constitution), and not as a result of passing an individual act of a constitutive nature. The criterion of directness, however, will be preserved when for the implementation of a statute passing an individual act is necessary, but this will be an act of merely declaratory nature.

However, it is not in every case that the inconsistency of an act of a lower rank with the Constitution gives rise to a constitutional complaint. This requirement is fulfilled when the infringement of rights results in the deterioration of the citizen’s legal situation in relation to that guaranteed to him by the Constitution. Thus, filing a constitutional complaint would be unacceptable if it appears that a statute or other normative act, although it is inconsistent with the Basic Law, does not adversely affect the legal situation of the person concerned. This regulation basically distinguishes the constitutional complaint from *actio popularis*, emphasizing at the same time the individual character of the protection guaranteed by it (CZESZEJKO-SOCHACKI, 2000; JAROSZYŃSKI, 2007, p. 14).

The second constitutional prerequisite that allows the use of the institution of constitutional complaint to which the commented provision refers is the use of other procedural legal measures that enable a review of a final decision passed in an individual case. This means that one of the most important conditions for a constitutional complaint is the principle of subsidiarity (PREISNER, 2000, p. 106).¹³ This is the substantive premise. This principle is founded on the assumption that a complaint procedure may be launched only when the complainant had tried all procedural legal means which would have allowed the review of a final decision in a particular case (see Article 79 paragraph 1 of the Constitution) (LABNO, 2002, p. 779).¹⁴ In other words, the principle of subsidiarity refers to the fact that proceedings before the constitutional court are not a continuation of other proceedings. Therefore it is required that first all available remedies to which the entity is entitled are used and the ordinary course of the proceedings is exhausted. The legislator, in turn, does not require that the complainant exhausts political or economic measures at his disposal. On the other hand, the principle of subsidiarity cannot be employed everywhere where the entitled entity cannot

¹³ For more details see Sarnecki (1998, p. 22-23), Sokolewicz (1997, p. 53) and Sokolewicz (1998, p. 53).

¹⁴ For more details see Warmke (1993).

take advantage of others, except for the constitutional complaint, remedies or where the concept of the ordinary course of the proceedings does not apply. Such a situation may be exemplified by inaction of the legislator or a complaint against a statute (BANASZAK 1997, p. 268). Thus, also the Constitutional Tribunal treats the complaint as an exceptional, subsidiary and extraordinary protection measure. [...] The essence of the constitutional complaint is its extraordinary and subsidiary character. The complaint may be launched only when the complainant does not have any procedural possibility of further proceedings before a court or organ of public administration in his case. Courts and organs of public administration are primarily established to adjudicate on individual cases, and the Constitutional Tribunal should intervene only after the exhaustion of all procedures to settle the case that may be initiated by the complainant himself. This is the essence of the condition for a “final judgement,” formulated in Article 79 paragraph 1 of the Constitution. Against such a judgement no further means of appeal or any other legal remedies are available to the complainant [...] (POLAND, 1998c). As regards the term “final decision” it should be stated that it encompasses an obligation to apply all possible remedies in a particular case, and thus also a cassation appeal or a complaint to the Supreme Administrative Court. Only after exhausting these possibilities, in the case of an unsatisfactory “final decision,” a constitutional complaint may be filed.

The constitutional legislator did not specify in the Constitution the deadline for filing a constitutional complaint. The issue is defined in the Constitutional Tribunal Act. According to the Article 46 of the Constitutional Tribunal Act,¹⁵ a constitutional complaint can be submitted after trying all legal means, if such means is allowed, within 3 months from delivering the legally valid decision to the complainant, the final decision or other final judgement. The prerequisite for the admissibility of a constitutional complaint is its submission within the time limit. This term is of fixed and peremptory character. However, it does not run in the event when the complainant requests the appointment of an advocate or legal counsel *ex officio* until the court considers the application.

The Constitutional Court Act provides that a complaint must:

- a) define the subject matter of control - a provision of a statute or other normative act on the basis of which a court or organ of public administration has made a final decision in respect of freedoms or rights or obligations of the complainant specified in the Constitution, and in respect of which the complainant seeks the confirmation of non-conformity to the Constitution;
- b) indicate which constitutional freedoms and rights and in what manner have, according to the complainant, been infringed;

¹⁵ In this article, we refer to the Constitutional Tribunal Act of 25 June 2015, as amended, without taking into account the so-called “judgement” of 9 March 2016, as it was not issued by the bench and in manner provided by law. For more on this subject, see Szmulik (2016).

- c) justify the alleged non-conformity of the subject matter of control with the indicated constitutional freedom or right, with the presentation of arguments or evidence to support it;
- d) present the facts and;
- e) prove the date of service of the judgement, decision or other resolution;
- f) indicate whether against the judgement, decision or other final resolution an extraordinary remedy has been lodged.¹⁶

The complaint must also be accompanied by:

- a) judgement, decision or other resolution passed on the basis of a provision which is the subject to control by the Constitutional Tribunal;
- b) judgements, decisions or other resolutions confirming the exhaustion of all legal means;
- c) special power of attorney.¹⁷

The legislator also provided for in Article 66 of the Constitutional Tribunal Act the requirement that the complaint must be drawn up by an advocate or a legal advisor. In this respect it may raise some objections from the perspective of conformity to the Constitution. It seems that in such a situation, if a person intending to file a complaint requests the appointment of an advocate or a legal advisor *ex officio*, a lawyer should be appointed in each case. Otherwise, it may restrict the citizen's access to the institution.

There are also three conditions which must be fulfilled in order to allow a constitutional complaint to be considered. According to the legal doctrine, the infringement of rights or freedoms by an act of public authority must be: personal,¹⁸ current and direct (CZESZEJKO-SOCHACKI, 2000, p. 78; CZESZEJKO-SOCHACKI, 1998, p. 42).¹⁹ in relation to the complainant. There is an exception to the "personal" requirement in a judicial decision of the Constitutional Tribunal. Namely, in the judgement of 24 January 2001, file reference: Sk 30/99, the Constitutional Tribunal deemed lodging a constitutional complaint by the couple acceptable and reasonable in a situation where the challenged provision was applied in relation to one of them as a taxpayer, and in relation to the other as spouse of the taxpayer (POLAND, 2002b). The personal infringement occurs if there is a joint fulfilment of the two conditions. First, the complainant is the addressee of a legal norm, secondly, due to the existence of circumstances provided for in this norm rights or obligations relating to him personally are created. The current infringement shall "refer to [...] situations where the challenged act or action applies in a binding manner to a legal situation of the complainant at the time of lodg-

¹⁶ In this case, the Constitutional Court may stay the proceedings until the case of the measure (Art. 68 ustawy o TK).

¹⁷ Art. 65 ustawy o Trybunale Konstytucyjnym

¹⁸ Jurisprudence TK knows, however, derogation from this rule.

¹⁹ For more details see Benda (1991).

ing a complaint.” (CZESZEJKO-SOCHACKI, 2000). The purpose of this criterion is to prevent the extension of a constitutional complaint in order to differentiate it from the popular complaint (*actio popularis*), for most of statutes are created with the thought that everyone sooner or later will become its addressee. Thus, it has to be proved that the infringement of fundamental rights is current – as far as normative acts are concerned – that their adverse impact on the complainant’s legal situation is actual rather than potential. The last of the three requirements, i.e. the direct one generally relates to normative acts on the basis of which judicial or administrative decisions has been made. In other words, the direct impact (resulting in the admissibility of a constitutional complaint) takes place when obligations or other burdens on a legal situation of the entity are created by a normative act and no other individual acts must be passed.

The Constitutional Tribunal may issue a temporary decision on suspending or withholding a judgement in a case to which the complaint refers, if the execution of the sentence, decision or other resolution could bring irreversible effects for the complainant or if an important public interest or important interest of the complainant justifies it. The decision must be immediately delivered to the complainant and a competent authority. The Tribunal repeals a temporary decision if the reasons for which it was issued expire but no later than on the date of issuing the final judgement in the complainant’s case. If the Tribunal states that a normative act or a part thereof is in non-conformity to the Constitution, a temporary decision expires after 3 months from the date of its entry into force.²⁰

Conclusion

The institution of constitutional complaint as a legal protection measure that allows citizens to defend their rights and freedoms guaranteed by the Constitution appeared in Poland for the first time with the adoption of the current constitution. The legislator adopted, however, a narrow, compared with other countries of Central Europe, model of constitutional complaint. In Poland, the constitutional complaint is the right serving only those whose constitutional freedoms or rights have been violated. Thus it cannot have the nature of *actio popularis*. To file a constitutional complaint, the citizens have to exhaust all administrative and/or judicial means provided by law. It causes that the path leading to the use of this instrument for the protection of citizens’ rights is longer. A reason for adopting the narrow model of constitutional complaint in Poland was the fear of flooding the Constitutional Tribunal with citizens’ complaints. Currently, constitutional complaints are basically considered by seven judges of the Tribunal, but in some cases they can be transferred for consideration by the Constitutional Tribunal sitting in full bench. The hearing is held no sooner than three months from the date of the delivery of the notice on the date of the hearing to participants in the proceedings, and if the complaint is transferred to be examined in full bench, no sooner than six months from this date. These terms may, however, be halved by the President of the

²⁰ Art. 68 ustawy o Trybunale Konstytucyjnym.

Constitutional Tribunal in the case of complaints which concern direct infringement of freedoms, rights and obligations of persons and citizens laid down in Chapter II of the Constitution. In the case of the Tribunal sitting in a bench of seven judges, a judgement is rendered by a majority of votes. If the case is transferred for consideration by full bench, two-thirds majority vote is required, with the quorum of at least thirteen judges of the Constitutional Tribunal. The solutions contained in the Act allow for prompt consideration of constitutional complaints. Unfortunately, practice shows a relatively long time of examination of these cases by the Constitutional Tribunal.

Unfortunately, more extensive use of this measure of human rights protection is impeded by the strictness of the existing legal regulations concerning the formal requirements to be met by the person lodging a constitutional complaint to the Constitutional Tribunal. This is compounded by the practice of the Tribunal itself which very rigorously approaches the complaints lodged, as a result of which most of them are rejected in the preliminary examination procedure. As a consequence a constitutional complaint in its present form cannot be regarded as an effective instrument for the protection of human rights. Its effectiveness is also reduced by the limitation of the scope of some social rights guaranteed by statute. Proceedings in the cases of constitutional complaint are regulated in detail in the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws of 201 No. 1064, as amended) and the resolution of the General Assembly of the Judges of the Constitutional Tribunal of 15 September 2015 on the Rules of the Constitutional Tribunal (M. P., n. 823, 2015).

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