

M.A. Hanna Wiczanowska\*

# **THE ADEQUACY OF THE CONSTITUTIONAL COMPLAINT AS EXTRAORDINARY MEANS OF HUMAN RIGHTS PROTECTION – A COMPARISON OF POLISH AND GERMAN SOLUTIONS**

## **ABSTRACT**

The primary purpose of this article is to conduct a comparative analysis of the institution of constitutional complaint within the legal systems of Poland and Germany. The aim of this analysis is to establish an adequate relationship between two main goals of the constitutional complaint: (1) the elimination of unconstitutional provisions, and (2) a guarantee of human rights protection within the two aforementioned legal systems. The secondary purpose of the article is to attempt to resolve the issue concerning which of the presented purposes ought to gain primacy while constituting an adequate model of the constitutional complaint. For the reliability of the conducted analysis, the author will take into consideration such determinants as: the adopted model of the constitutional complaint (narrow, limited only to legal provisions, or wide), the conditions of admissibility of the constitutional complaint, as well as the competences of the Constitutional Court at the time of hearing a particular constitutional complaint case. These factors will subsequently be juxtaposed with an objective set of data, including: the number of complaints submitted annually, the number of complaints accepted annually to the substantive recognition, the percentage of complaints among all cases heard by the Constitutional Court, and the average period of recognition of such a complaint. The author will also refer to the level of satisfaction with the efficiency of the constitutional complaints in particular societies. Moreover, the paper will rely on a dogmatic analysis of the appropriate regulations regarding constitutional complaints within the two abovementioned legal systems. The choice of the present subject is justified by the need to revise current Polish solutions concerning the constitutional complaint, in order to ensure increases in the efficien-

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\* Adam Mickiewicz University, e-mail: [hanna.wiczanowska92@gmail.com](mailto:hanna.wiczanowska92@gmail.com)

cy of human rights protection. Additionally, the paper will refer to the judicial practice of the European Court of Human Rights.

**Keywords:** constitutional complaint; human rights; constitutionality; constitutional court; Poland; Germany; right of access to a court

## 1. INTRODUCTION

The constitutional complaint is an extraordinary measure designed to ensure the protection of human rights within the constitutional orders of Poland and Germany. The primary purpose of the present article is to conduct an analysis of its efficiency. The topic derives from a wider discussion regarding a particular feature of European constitutionalism of the second half of the 20th century, which is an emerging necessity of situating individuals within the State system, and the expression of their identity and dignity within existing legal regulations. As a result, the very essence of contemporary constitutionalism has been associated not only with a growing importance of human rights and freedoms, but, above all, with constituting the legal measures to seek remedy when such rights and freedoms are violated by public authorities. The experience of World War II had proven beyond doubt that the feasibility of human rights protection had been determined by the means with which it was equipped. Undeniably, the institution of the constitutional complaint is perceived as one such measure. Despite that, the analysis of two selected examples will prove that its theoretical construction, as well as practical implementation, vary among the European States.

Despite existing differences, it is essential to initially define the institution of constitutional complaint. The most general definition describes it as a claim, granted to individuals with regard to the States' authorities, for the protection of those individuals' fundamental rights through special proceedings before the constitutional court (Czeczajko-Sochacki, 1998, p. 31). This definition is complemented by the observations of B. Banaszak, who stipulated that the constitutional complaint has been perceived as an institution that, through special proceedings before the constitutional court, protects the rights and freedoms conferred on individuals as well as legal persons (both of civil and public law) in case they are violated through the actions or omissions by the public authorities (Banaszak, 1997, p. 175). Nevertheless, the present author considers such a definition too narrow, since in most legal systems the protection is not limited to the rights of citizens. Moreover, foreigners are also entitled to seek protection through the constitutional complaint. It is also worth referring to the definition offered by Bojanczyk, who stated that the constitutional complaint is a particular legal measure that enables individuals and other subjects with constitutional rights and freedoms to launch proceedings before the constitutional court, with the aim of verifying the ultimate decisions by public authorities, especially whether those do not infringe the constitutionally protected rights and freedoms of the applicant (Bojanczyk, 1999, p. 76). This definition adequately underlines the existence of a direct relation between the mechanism of constitutional complaint and constitutional rights and freedoms. In this context, some authors use the term "fundamental rights" (Tuleja & Grzybowski, 2005, p. 106). However, this definition is also too narrow, because it refers only to a model that adopts the acts of application of the law, concrete and individual judgments and decisions (the law as applied). In other words, it does

not refer to a situation in which the object of the constitutional complaints are legal regulations, hence general and abstract norms.

Differences between the abovementioned definitions appropriately reflect the differences in how the institution of the constitutional complaint is modeled in modern democratic societies. In general, there are two such models, a broad and a narrow one, and this distinction refers to both subjective as well as objective aspects. Consequently, it shall be underlined that the broadest model of a constitutional complaint is defined by:

- a broad scope of entities possessing legitimacy to lodge a constitutional complaint,
- a broad objective scope,
- a broad catalogue of the constitutional model (for instance, where protection covers all constitutional rights and freedoms).

Such criteria will be used in the latter part of this article to characterize models adopted in Poland and Germany as regards their subjective and objective broadness, as well as the scope of protected rights and freedoms. At the same time, it must be noted that, according to some representatives of the doctrine, the most important aspect from the perspective of the quality of the standards of human and civil rights protection is the objective scope of the constitutional complaint. Regardless, both the subjective scope of the complaint, as well as the scope of control models, are quite similar (although not identical) in the solutions adopted in the particular States. Consequently, the fundamental classification criterion for constitutional complaints is the broadness of their objective scope. Although the present author generally agrees with this thesis, it shall be emphasized that important divisions can be seen also within the area of the catalogues of constitutional models. This fragmentation will be confirmed in the latter part of the article. However, while considering the specific features characterizing constitutional complaints, two other elements shall be considered as decisive factors in its significance as an instrument of human rights protection. Both the opinion of the vast majority of the doctrine, as well as the current judicial practice of the application of this construction, justify the view that the main role has been played by two aspects. These are: the establishment of its basis (in other words, the adoption of either a narrow or a broad concept of constitutional complaint), as well as any legal consequences that result from the recognition of the validity of such a complaint in the proceedings before the constitutional court (Łabno, 2012, p. 42).

On this perspective, it is essential to focus on the purpose of the institution of constitutional complaint. In accordance with the statement of the vast majority of the doctrine, one shall take into account two main functions of the mechanisms under analysis: the objective function, which consists in the elimination of unconstitutional norms from specific legal systems, as well as the subjective function, which is associated with the protection of fundamental rights and freedoms. Therefore, one of the main focuses of this article will be the mutual relationship between two of the presented purposes, which has crucial repercussions for the effects of considering a constitutional complaint in the factual circumstances of a specific case (Łabno 2012, p. 45). One of the primary research questions in this regard is whether both aforementioned functions of the constitutional complaint shall be perceived as equivocal, or whether any of them (and if so, which one) should be granted primacy over the other. Such problematics will be developed in the latter parts of the article. However, at this stage of analysis it is vital to point out that the hierarchy of the purposes of a constitutional complaint will significantly affect not only the outcome of a positive judgment by the constitutional court

in the matter of said complaint, but also its other important aspects, such as its admissibility conditions, initial verification of the complaint and competences of the constitutional court.

As confirmed with the above remarks, there is no uniform European model of the constitutional complaint. Moreover, each of the models adopted in specific domestic legal systems has been associated with a varying scope of protections granted to individuals. The present analysis has been motivated by an increasing criticism of the form of the constitutional complaint in Poland, in both its theoretical and practical dimensions. Furthermore, the very essence of this criticism has been directed toward the objective scope of the constitutional complaint (since it allows only for complaints against the general and abstract legal norms and not against the application of the law), as well as the disturbed proportions between the objective and subjective purpose of the constitutional complaint (Łabno, 2012, p. 45). However, the author is of the opinion that, despite the particular importance of both adopted criteria for differentiation, such as:

- broadness (narrowness) of the objective scope, and
- the mutual relationship between the objective and subjective functions and their primacy,

greater importance shall be assigned to the second of abovementioned criteria. Justifying this thesis is the fact that this criterion has been constituted by several other specific factors, such as the range of competences granted to the constitutional court, the results of the recognition of the validity of complaint, the individuals' position within the proceeding, and the adopted admissibility conditions. By the same token, the analysis conducted herein has revealed a tendency for States with a narrow objective scope of the constitutional complaint (such as Poland) to focus solely on its objective function, which is strictly related to the mechanism of eliminating unconstitutional legal regulations. This observation implies that in countries with a broader objective scope there is a stronger focus on the individual position. This thesis will be reviewed separately for the German model, including a brief reference to the Slovak standards, as appraised by the European Court of Human Rights. However, the secondary purpose of the article is to verify the claim that the sole construction of the objective scope of the complaint does not predetermine the scope of protection.

## 2. METHODOLOGY

It is essential at the beginning of this section to first establish a uniform set of clear and precise criteria which will be applicable to both constitutional orders, and which will allow for a clear comparison of the degree of protection granted toward individuals. This thesis will be discussed later in this article. At the same time, these criteria shall concern a wide range of elements which both directly and indirectly impact the proceedings on the matter of a constitutional complaint. In accordance with the remarks expressed above, it has already been stated that in this context particular attention shall be paid to the objective scope of a constitutional complaint, as well as the maintenance of the right balance between its objective and subjective functions. However, this stipulation does not exhaust all of the criteria that need to be taken into consideration in order to genuinely analyze the presented topic. Therefore, the abovementioned set of criteria shall be supplemented by the following factors:

- The broadness of the subjective scope of the constitutional complaint. This criterion stresses two particular groups: foreigners (people who are not citizens of the specific

State), as well as legal persons of both civil and public law. Moreover, within the constitutional orders of some European States, certain “qualified” subjects are also entitled to lodge a constitutional complaint, which will be evident in the analysis of the German case.

- The broadness of the objective scope of the constitutional complaint, understood here according to the meaning stated in the present article’s introduction.
- A broad catalogue of the constitutional model, in particular whether the protection covers all constitutional rights and freedoms. In this context, it is essential to consider not only the subject of control (solely general and abstract legal norms, or individual or concrete acts - law as applied, or both of these forms), but also the model of such control. From the perspective of the model of control, it is necessary to consider whether the protected rights and freedoms can be safeguarded only by the constitution of the specific State, or whether they can be guaranteed by other sources of law, in particular international agreements. Moreover, while analyzing this criterion it is especially vital to ask whether subjects entitled to initiate a constitutional complaint other than the citizens of the specific State (especially foreigners) can seek protection regarding all their rights and freedoms, or whether some of such rights and freedoms are *ex lege* excluded from the protection granted through the mechanism of the constitutional complaint.
- The mutual relationship between the objective and subjective function and their hierarchy, *inter alia*:
  - a). The conditions of admissibility of the constitutional complaint, such as the lapse of time and the compulsory representation by a lawyer.
  - b). The direct effects of the recognition of the validity of the complaint from the perspective of the applicant.
  - c). The competences of the constitutional court while hearing the case arising from the constitutional complaint.
  - d). The position of an applicant (mainly individuals) within the proceedings.
- The efficiency of the adopted mechanism confirmation through the judgment of a competent judicial body in human rights protection, such as the European Court of Human Rights (if applicable). This criterion will be particularly important in the analysis of the Slovak model.

Results of the analysis based on the established set of criteria will subsequently be correlated with measurable and objective statistical data, which will serve to show the efficiency of the two analyzed model. The analyzed statistical data will be identical for both analyzed models, and will refer to:

- the yearly aggregated number of constitutional complaints initiated before a competent constitutional court;
- the yearly number of constitutional complaints accepted for substantive examination (the rate of the complaints accepted for examination based on merits from their aggregated number);
- the yearly number of constitutional complaints recognized as valid;
- the yearly rate of constitutional complaints with respect to all the cases examined by the constitutional complaints;
- the percentage of satisfaction from the currently functioning mechanism of the constitutional complaint (if applicable).

All of the analyzed data will refer to the period of 2014–2017; however, where necessary the author will also make brief references to an earlier period in order to illustrate the form of the constitutional complaint mechanism and its position within the history of constitutionalism of the analyzed State. The character of the selected data will make it possible to grasp the vague notion of “efficiency” as a measurable and easily comparable set of criteria. Subsequently, this will create an appropriate framework for presenting the pros and cons of both forms of the constitutional complaint analyzed herein. Consequently, it will also help fulfill the secondary purpose the article, which is to propose some measures for improvement of the theoretical and practical aspects of the presented mechanism in the Polish constitutional order.

The article will primarily employ a legal dogmatic method, as well as a comparative analysis. The first method will come down to an analysis of the literal resonance of the provisions of the Constitutions, and the appropriate statutory and selected judgments of constitutional court regulations in both legal systems under consideration. In turn, the comparative analysis will be used to juxtapose the solutions prescribed in the constitutional orders of both selected States on the basis of an identical set of criteria. In addition, the author will implement certain elements of statistical and historical methods.

## 2.1. THE EFFICIENCY OF THE POLISH MODEL OF CONSTITUTIONAL COMPLAINT

Before moving forward, it is essential to refer to Article 79(1) of the Polish Constitution from 1997, which states that *everyone whose constitutional freedoms or rights have been violated is entitled, in accordance with the appropriate provisions stated in the statutory regulation, to launch a complaint to the Constitutional Tribunal in the matter of the bill's conformity with the Constitution, as well as other normative act, on the basis of which the court or the body of public administration had ultimately ruled about the Constitutionally guaranteed freedoms and rights.* This provision, in conjunction with the appropriate terms of the statutory regulations, will constitute the legal basis for the analysis of the Polish model of the constitutional complaint.

These observations must subsequently give rise to a genuine analysis of the Polish model through the perspective of the adopted criteria supported with empirical data. In order to objectively evaluate the efficiency of the Polish model of the constitutional complaint it is essential to compare the number of complaints subjected to initial control, as well the number of these examined on merits. The data are presented in the table below.

Year	Constitutional Complaints launched since the beginning of the year/subjected to initial control	Constitutional Complaints subjected to examination on merits
2014	375	44
2015	408	-
2016	54	15 (ended with a judgment)
2017	188	30

Source: Adopted from the website of the Polish Constitutional Court <http://trybunal.gov.pl/sprawy-w-trybunale/statystyka/>

It is important to emphasize at the outset that, according to the data, a large percentage of complaints was rejected already at the stage of initial control. Despite that, a general tendency within the Polish law seems to confirm that a large percentage was rejected without a substantive analysis whether the constitutional freedoms and rights of the applicant had been genuinely violated. Therefore, the main objective of the article will be to identify the factors within the Polish regulations which significantly affect the efficiency of the protection granted to individuals.

To commence such considerations, it is crucial to reconstruct the group of subjects who, according to Polish law, are entitled to launch a constitutional complaint. The *prima facie* analysis of Article 79(1) indicates that such entitlement has been granted to *everyone*, without a precise definition of the term. However, certain hint may be found in Article 79(2), which states that *the provision of Article 79(1) is not applicable to the rights stated in Article 56 of the Constitution*. At the same time, it ought to be stipulated that, due to their nature, the rights prescribed by Article 56 of the Constitution (mainly the right to seek asylum) are granted solely to foreigners. This implies that, in general, the mechanism of the constitutional complaint guarantees foreigners the same scope of entitlements as Polish citizens, and the only exception has been constituted by the rights arising from Art. 56 of the Constitution (the right to seek asylum). In contrast, the provision remains silent on the protection granted to legal persons; however, its existence has been confirmed through the judicial practice of the Constitutional Tribunal, as well as statements of the doctrine (Trzciński, 2000, p. 213; Chmaj, 2008, p. 208). This approach can be found in the jurisprudence of the Polish Constitution, and is justified by the pursuance to the intensification of the protection of individuals who are the personal substrate of the corporative subject of law (judgment of Constitutional Tribunal from 8.06.1998, Sk 12/98).

In this context, the objective scope of a complaint reveals a greater impact on the large number of rejected complaints. As arising from the previously cited Article 79 of the Polish Constitution, a constitutional complaint may be launched against the concrete provision(s) of a bill or some other normative act which had been a basis for the ultimate judgment or decision regarding the constitutional freedoms and rights of the applicant. As a result, this provision establishes a narrow objective scope of the constitutional complaint, which means that the subject who initiated the complaint is limited to general and abstract legal norms, excluding law as applied – hence the individual and concrete acts of the application of the law, as well as the omissions of the legislator. Additionally, the subject of the constitutional complaint is limited to a bill or some other normative act which had constituted the basis of enacting the act of the law application – such as a judgment or a decision. As a result, the subject is limited to only those provisions that had been implemented under the circumstances of a concrete and individual case. A certain counterbalance for such a construction has resulted from an autonomous definition of the concept of a “normative act”. According to the Polish Constitutional Tribunal: “the rejection of such a construction will lead to an unsubstantiated refining of the subject to control within the proceedings regarding the constitutional complaint, and, as a consequence, to a groundless limitation of the possibility of human rights protection.” The Constitutional Tribunal had moreover deemed that this statement is clearly justified by constitutional values (judgment of the Constitutional Tribunal from 16.11.2011, SK 45/09). As a result, the Constitutional Tribunal held that a normative act within the meaning of Article 79 of the Constitution is not limited to the normative act

enacted by some of the Polish bodies, but – after fulfilling additional conditions – also includes acts enacted by the body of the international organization of which Poland is a member, such as the European Union (judgment of the Constitutional Tribunal from 16.11.2011, SK 45/09; Łabno 2012, p. 46). Despite the broad definition of the term “normative act”, the narrow objective scope of the constitutional complaint has limited the possibility of implementing this institution solely to cases in which legislative error, based on an inconformity with the Constitution, has been subsequently translated into an individual and concrete act of the application of the law.

Moreover, some representatives of the doctrine have advocated for a relatively narrow basis of the constitutional complaint within the Polish legal system as it is identified with the rights and freedoms stated in the Constitution (Łabno, 2012, p. 53). Although an important advantage of the Polish solutions, according to which admissibility of the constitutional complaint is decided solely based on the fact of violation of rights and freedoms regulated in the Constitution and not their placement within the Constitution itself (Łabno, 2009, p. 765), this protection is not always sufficient. For instance, it must be underlined that the Constitutional Tribunal has refused to recognize the principle of equality as a pattern of control, based on the assumption that it constitutes a general principle and not a concrete right or freedom, and therefore does not create the sole basis of a constitutional complaint (judgment of the Constitutional Tribunal from 24.10.2001, SK 10/01). The independent basis of a constitutional complaint is also not created by the software standards (Chmaj, 2008, p. 208).

Another reason for the large number of complaints rejected at the initial stage of the examination can be deduced from the admissibility criteria. First, it ought to be reiterated that the constitutional complaint can be launched only after an existing legal way prescribed for a certain type of proceedings has expired. Another important admissibility criterion concerns compulsory legal representation. An applicant must be represented by a solicitor or a barrister, unless the applicant is a judge, a prosecutor, a barrister, a solicitor, a notary public, a professor or a person with a post-doctoral degree in legal studies. The legal representative is able to draft and submit the constitutional complaint, to file a grievance regarding the refusal to set such a complaint in motion, and to represent the applicant throughout the proceedings before the Constitutional Tribunal. (Art. 44, Point 1 of the Polish bill regarding the organization and the mode of proceedings before the Constitutional Tribunal from 30.11.2016). At the same time, Article 44(2) stipulates that in case of the applicant’s inability to bear the costs of legal aid, the applicant can petition the district court on the basis of his or her place of residence to establish the applicant as attorney *ex officio*. From the applicant’s perspective, this solution undoubtedly affects the growing scope of limitations. One possible reason for this regulation has been offered by Aneta Łazarska, who sees it as an instrument of rationalization of the liability for damages of the State Treasury arising from juridical errors (Łazarska, 2012, p. 613). Moreover, Lech Jamróz emphasizes the fact that compulsory legal representation establishes a guarantee that all essential requirements of the constitutional complaint will be fulfilled (Jamroz, 2011, p. 74). The present author fully shares this view, since, according to Article 54 of the Polish statute regarding the organization and the mode of proceedings before the Constitutional Tribunal from 30.11.2016, the constitutional complaint must consist *inter alia* of an indication of which Constitutional rights and freedoms have been violated in the opinion of the applicant, as well as the mode of this violation. From this perspective, L. Jamroz stresses that, due to the existence of the compulsory legal representation, the fulfillment of



this demand does not remain beyond the possibility for the applicant without sufficient legal knowledge. Although this position is conceivably defensible, the author shares the view that less formalized requirements could result in waiving compulsory legal representation, while at the same time ensuring stronger protection for the applicant.

Finally, one of the main reasons had been traced back from a disturbed relationship between the objective and the subjective function of the constitutional complaint through granting primacy to the former. The analysis of these problematics shall be included with the effects in the macroscale, which refer to the legal provisions which had been judged as unconstitutional. According to Article 190(1) of the Polish Constitutions, judgments of the Constitutional Tribunal are commonly binding and final. Moreover, they are subjected to the procedure of promulgation analogous to the promulgation of normative acts, and where a certain act had not been promulgated, judgments are published in the Official Journal of the Republic of Poland, "The Polish Monitor". Consequently, the objective function of the constitutional complaint is rather free from controversies, which is not so obvious in case of its subjective function associated with the legal protection of individuals. The departure point can be found in Article 190 (4), which prescribes that *judgments of the Constitutional Tribunal regarding in compliance with the Constitution, international agreement or bill of the normative act which had constituted the basis for the final judicial judgment, ultimate administrative decision or resolution in other matters, establishes grounds for the resumption of the proceedings, repealing of the decision or resolution in the other matters in accordance with the principles and in the mode specified in the provisions applicable for certain proceedings*. As *expressis verbis* arising from the analyzed provision, the Constitutional Tribunal itself is not competent to give a binding judgment in individual and concrete cases, and its competences are limited solely to judgments regarding the conformity of certain general and abstractive norms with the provisions of the Constitution. This stipulation, however, does not itself determine the efficiency of the legal protection granted to individuals. In this context, it is essential to recall the provision of Article 190 (3) of the Polish Constitution, which states that *judgments of Constitutional Tribunal enter into force with the day of their promulgation; however, the Tribunal can indicate a different date of expiration of the legal power of such act. This period cannot exceed 18 months in the case of a bill, and 12 months in the case of other normative acts. In the case of judgments connected with financial expenditures not foreseen in the Budget Act, the Constitutional Tribunal indicates the term of expiration of the legal power, having taken note of the opinion of the Council of Ministers*. A direct consequence of indicating a different moment of expiration of the legal power of these acts than the moment of promulgation is the impossibility of resuming certain proceedings, since the judgment eliminating a certain act or provision has not entered into force. Nevertheless, in this context it is essential to ask whether such limitations shall be equally applicable to the applicant, or whether his legal situation shall be solved differently in comparison to other subjects of law in a similar situation. The instrument of the potential solution of such matters is the so-called privilege of benefits. This mechanism essentially relies on entitling the applicant to challenge the act of the application the law in the matter of which the constitutional complaint had been launched. This entitlement may be executed before the lapse of the term of expiration of the legal power of the unconstitutional or illegal provision, starting from the day of promulgation of the judgment of the Constitutional Tribunal. This construction has two basic advantages: it expedites the realization of the rights of the applicant, and it acts as a guarantee that prevents the loss of the applicant's right to

launch a complaint in case the legislator were to execute the judgment within the period of the adjournment (Krok, 2015, p. 49). Moreover, some authors claim that, due to the fact that the applicant has made an effort to challenge unconstitutional legal provisions within the procedure of the constitutional claim, he or she shall be subsequently granted certain benefits to enjoy the victory (Królikowski & Sułkowski, 2009, p. 209–210). Furthermore, some of the representatives of the doctrine postulate its excess toward other people who had launched a constitutional complaint upon the same legal basis but which has not yet been examined by the Constitutional Tribunal (Łabno, 2012, p. 55). In some states, for instance in Austria, the privilege of benefits is regulated within the norms of the Constitution. However, in the Polish constitutional order, the presented institution does not vividly conflict with any regulations of the Constitution or statutory acts, and has not been expressly permitted within the Polish Constitution. In this context, A. Łabno specifies that the providence of the privilege of benefits within the concrete provision of the Constitution does not constitute the condition *sine qua non*; however, due to the principle of legal certainty, it is highly advisable (Łabno, 2012, p. 54–55).

## 2.1. THE EFFICIENCY OF THE GERMAN MODEL OF CONSTITUTIONAL COMPLAINT

The legal basis for a constitutional complaint in the German legal system has been constituted by Article 93 (1) (4a) of the Basic Law of the Federal Republic of Germany, which prescribes the right to launch a constitutional complaint. In particular, the complaint may be filed by any person alleging that one of his or her basic rights, or one of the rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104, has been infringed by public authority. Additionally, it shall be noted that a similar entitlement has been granted to municipalities, or associations of municipalities, on the ground that their right to self-government under Article 28 has been legally infringed; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land. However, this latter case will be not considered in this article. An evaluation of the German mechanism will be undertaken analogously to the Polish case. First, it is important to indicate the statistical data regarding the number of constitutional complaints launched and subjected to initial control, and to compare them with complaints examined on the basis of their merits within the period of 2013–2016. The relevant data are shown below:

Year	Constitutional Complaints initiated	Constitutional Complaints examined: by Chamber or Senate
2013	6477	5987 in total (among which 12 examined by Senate)
2014	6606	6086 in total (among which 10 examined by Senate)
2015	5739	5665 in total (among which 12 examined by Senate)
2016	5610	5667 in total (among which 13 examined by Senate)

Source: Adopted from the website of the German Federal Constitutional Court [http://www.bundesverfassungsgericht.de/EN/Verfahren/Jahresstatistiken/jahresstatistiken\\_node.html](http://www.bundesverfassungsgericht.de/EN/Verfahren/Jahresstatistiken/jahresstatistiken_node.html)

This tendency can also be seen in the history of German constitutionalism where, according to the statistics, within the period of 1951–2002 there had been 135,968 initiated complaints, from which 109,246 were decided by the Chambers and 3,879 by the Senate of the Federal Constitutional Court (Vanberg, 2005, p. 88). To understand the data it is essential to know the structure and composition of the German Federal Constitutional Court. In conformity with the panel system adopted in 1956, when a constitutional complaint reaches the court, it is initially reviewed by a three-judge panel called a chamber. If the complaint is judged unanimously as either inadmissible or having no hope of success, it may be dismissed. If at least one judge concludes that the complaint has a chance of succeeding, it is forwarded to the relevant Senate for a decision. Moreover, in 1986 chambers were granted a limited power to decide cases. Provided that all of the judges in a chamber agree that a complaint clearly falls under an established precedent and raises no new constitutional issues, the chamber may rule in favour of the complainant without forwarding the case to the full court, with a reservation that only the full Senate may declare a statute unconstitutional. As evidenced by the data, the vast majority of constitutional complaints has been handled by the chambers, and only a small number of them has been examined by the Senate. According to the opinion of Georg Vanberg, most of such decisions involve highly individualized cases that do not touch on a broader statutory question, and have few implications beyond the immediate ruling. For instance, many of them challenge the constitutionality of a specific ruling by a trial judge in a particular case. However, it is important to note that the chambers are bound to accept cases that are properly filed and not clearly without merits, hence they are not equipped with full discretionary control (Vanberg, 2005, p. 88–89). This thesis has been developed by various representatives of the doctrine who claim that, although the success rate of complaints in Germany is approximately 2.5%, court access itself seems to be significantly broad (Rogowski & Gawron, 2016, p. 257). This hypothesis will be subjected to analysis in the latter parts of this article.

One crucial question to ask at this point is whether the German mechanism of the constitutional complaint has really provided a broad scope of the right to a fair trial. As emphasized in the doctrine, the German Constitutional Court was awash in such complaints by the mid-1960s, when the Germans began to regard them as an important prerogative and a means of protecting their basic rights. In response, and with the backing of the Court, federal legislators anchored the right to file constitutional complaints in the Basic Law itself, introduced in 1969. The popularity of the constitutional complaint was underscored by the fact that the amendment received no opposition from public officials. Years later, a president of the Federal Constitutional Court insisted that “the administration of justice in the Federal Republic of Germany would be unthinkable without a complaint of unconstitutionality” (Kommers & Miller, 2012, p. 12).

Having established the importance of the constitutional complaint mechanism for the German legal system, it is necessary to focus firstly on the subjective scope of the analyzed constitution. According to the previously cited Article 93 (1) (4a) of the Basic Law of the Federal Republic of Germany, “any person” has the right to file a constitutional complaint. In conformity with the judicial practice of the Federal Constitutional Court, as well as statements by the various representatives of the doctrine, the term “any person” can refer to natural persons with the legal capacity to sue, to corporate bodies, as well as to other “legal persons” possessing rights under the Basic Law. Moreover, as a general rule, only domestic legal

persons are permitted to launch constitutional complaints, although the Federal Constitutional Court has ruled that foreign corporations are entitled to file complaints alleging violations of the procedural right secured by Articles 101 (1) [2] and 103. Consequently, it ought to be emphasized that the whole construct of the subjective scope of protections seemingly contains many similarities to the Polish solution, especially through the implementation of the wide notion of “any person”. However, the jurisprudence allowing foreign legal persons to file a constitutional complaint only in cases of a procedural violation may contribute to a significant weakening of the standard of human rights protection. Therefore, in this sense the subjective scope of the German constitutional complaint shall still be deemed as rather broad, yet at the same time narrower than its Polish equivalent.

Another vital feature of the constitutional complaint mechanism is the broadness of its objective scope. First of all, the term of infringement by public authority used in Article 93 (1) [4a] of the Basic Law includes the possibility of launching a constitutional complaint against any governmental action, including judicial decisions, administrative decrees and legislative acts. As seen in the *prima facie* analysis, the objective scope of the German constitutional complaint has been defined much more broadly in comparison with Polish solutions. In this context it is worth focusing on particularly interesting examples regarding the measures questioned within the procedure of the constitutional complaint. For instance, the Federal Constitutional Court has allowed citizens to challenge measures taken during the EU financial crisis based on the right to vote, arguing that such a right implies the specific right to vote in the parliament that still has something important to say and is not unduly constrained by financial obligations into which it has entered. Another crucial example concerns the interpretation of the Article 2, Paragraph 2 of the Basic Law as a general right to individual liberty to do or not to do whatever one pleases, as opposed to a more specialized right protecting only certain core expressions of personality. In this context, one will undoubtedly agree with Michaela Hallibroner’s observation that, through such an approach, the Federal Constitutional Court has significantly expanded the scope of its own jurisdiction (Hallibroner, 2015, p. 86). A similarly generous approach has been taken toward defining the terms of infringement: according to the standard formula, any State action which wholly or partially makes it impossible for an individual to make use of his/her fundamental rights constitutes an infringement of that right, whether or not it is intentional, direct or indirect, has legal or factual effects, or is accompanied by State sanctions. This approach is perfectly illustrated by the classic German example in which the plaintiff challenged a sign prohibiting horseback riding on certain hiking paths in the forest. On this perspective, it must be emphasized that under Article 2 of Basic Law horseback riding is an example of a constitutionally protected activity, and, as a consequence, traffic signs prohibiting its enjoyment on certain paths constitute an infringement. It is essential to underline here that this approach vividly conflicts with the Polish solution, in which the principle of equality has been denied the status of a constitutional right or freedom on the sole basis and, as a result, the applicant would not be able to invoke it as an exclusive pattern of control. This points to an interesting phenomenon: the Polish Constitution does not contain an exhaustive catalogue of rights that can become an independent model of constitutional control. Most importantly, these rights are not limited to the freedoms and rights prescribed in Chapter II of the Constitution. The only *expressis verbis* exclusionary effect has been directed to the right to asylum (Art. 56 of the Constitution). In contrast, Article 93 (1) (4a) of the Basic Law consists of a catalogue

of rights which can be protected through the mechanism of the constitutional complaint. The existence of this catalogue could have *prima facie* suggested that the scope of protection has been significantly limited; however, as the presented analysis shows, the tendency has been reversed. One can therefore agree with Hallibroner, who emphasized that although some infringements may still be justifiable, such a broad definition of both the rights and what constitutes the infringement by State authorities not only enables individuals to launch a constitutional complaint, but also increases the chances of its acceptance for substantive examination. This jurisprudence has undoubtedly constituted one of the grounds for the large number of complaints submitted yearly to Federal Constitutional Court.

At the same time, it is important to bear in mind that this is not the only reason for the tremendous popularity of the constitutional complaint in German society. One must also consider certain conditions of the admissibility of the constitutional complaint. To begin, it is essential to focus on the subsidiarity of the constitutional complaint, which requires the exhaustion of all accessible legal remedies prior to the initiation of a constitutional complaint. Analogously to the Polish legal system, the German constitutional order formulates the principle of the necessity of exhaustion of the legal remedies available to the applicant within the circumstances of the specific case. However, this requirement has not been applicable when the constitutional complaint has been directed against a legislative measure. In this context, Donald P. Kommers appropriately emphasizes the fact that no ordinary judicial remedy is available against legislative acts. In consequence, if such an act is likely to cause a person serious and irreversible harm, he or she may file a complaint against it without necessarily exhausting other remedies (Kommers & Miller, 2002, p. 12). It is important to add that this principle is applicable whether or not a certain statute requires an independent act of execution (Kommers, 1997, p. 530). In the opinion of the present author, this solution is worth considering in the context of the Polish constitutional order – while the exhaustion of domestic remedies shall be perceived as the general principle, an exception shall be made in cases where the applicant has suffered substantial and irreversible (or difficult to remedy) harm. It is especially crucial in the case of a narrow objective scope of the constitutional complaint, which is limited to normative acts (norms of a general and abstract character), and only those that constitute a legal basis for a resolution or a judgment in the specific matter. Another exception that refers not only to legislative measures applies to circumstances in which “recourse to other courts would entail a serious and unavoidable disadvantage to the complainant”.

According to German law, a constitutional complaint must be filed within one month of being notified of the decision. In comparison to the Polish standards, the German period is significantly shorter, which may threaten the applicant’s opportunity to take advantage of this instrument. At the same time, it shall be stipulated that an important exception concerns situations in which the statute has been under attack. In such cases, the complaint must be filed within one year of its enactment. The rationale for such a relatively short period has been explained by Helmut Steinberger, according to whom it can be assumed that, as a rule, the longer the complainant tolerates a violation, the less acknowledged interest he or she has in asserting his or her constitutional rights. Therefore, with the passage of time, important facts of the case are less likely to be genuinely proven. As a result, the constitutional complaint in its German shape is oriented toward the requirements of legal certainty, which sometimes may remain in conflict with the protection granted to constitutional freedoms

and rights (Steinberger 1998, p. 28). However, a great advantage of the German model of the constitutional complaint has been safeguarded by Article 93 (2) of the Law of the Federal Constitutional Court. In conformity with this act, if complainants were unable to comply with the time limit through no fault of their own, they shall, upon application, be granted reinstatement into their former procedural position. This shape of the regulations is in compliance with the resolutions of the Venice Commission, which stated that, with regard to individual acts, the court should be able to extend the deadlines in cases where an applicant is unable to comply with a time limit due to reasons unrelated to either their or their lawyer's fault, or where there are other compelling reasons. Such a practice has been denied within the Polish constitutional system (Venice Commission, 2010, p. 32). Another key condition has been associated with legal representation while launching the complaint, as well as during the proceedings before the constitutional court. The vast majority of the doctrine emphasizes the fact that the procedure of filing a complaint is easy and inexpensive (Vanberg, 2004, p. 87). Suffice it to say that German constitutional law does not prescribe mandatory legal representation; nevertheless, the applicant may use a professional legal service. Legal representation is only mandatory when an oral hearing takes place. The constitutional complaint must be submitted in writing, which includes also the possibility of filing it by telefax, but not by e-mail. As emphasized by the vast majority of the doctrine, a large number of constitutional complaints were handwritten (Kommens, 1997, p. 15). Finally, above all of the aforesaid conditions, is essential to stipulate that the complaint must have general constitutional significance. On the whole, a complaint does not fulfil this requirement if it touches on an issue that has been previously decided by the Federal Constitutional Court; however, certain exceptions have been foreseen.

According to the opinion of the majority of the doctrine, as well as the Federal Constitutional Court itself, the constitutional complaint serves a dual function: first, as a means of extraordinary judicial relief giving an individual the possibility of defending their basic rights, and secondly, of preserving the objective constitutional order and of aiding in the interpretation and development of constitutional law (Tatham 2013, p. 70). On this perspective, it is quite astonishing that the declared sole and independent purpose of the constitutional complaint has been the development of constitutional law, while the insurance of the protection of individual rights and freedoms has been simultaneously omitted. This dilemma does not have a uniform solution. Within the German constitutional order there is some ongoing debate as to whether in each case the analysed instrument serves exclusively the individual interests of the citizens (Schlaich, 1997, p. 180–182). The present author agrees with the opinion that this purpose shall not remain the sole function of the constitutional complaint; instead, one of its primary objectives shall be the protection of individuals rights and freedoms. Its prominence shall moreover be visible through the adopted shape of the constitutional complaint, with its elements subjected to the abovementioned analysis. A direct link between the Polish and German solutions, and the fulfilment of the function of the protection of individuals' rights, will be explained below.

### 3. RESULTS AND DISCUSSION

The primary objective of the following section of the article is to explore the impact of the technical and legislative construction of the Polish and the German constitutional complaint, as well as its influence on the efficiency of protecting individual rights and freedoms. Separate consideration will be given to the right of access to the court, and to substantial rights and freedoms that constitute the model of constitutional control. The following section will also discuss proposals for certain measures of optimizing the adopted construction of the constitutional complaint in relation to its primary objective of protecting individual rights, taking into account the hierarchy of such objectives in the Polish and German constitutional orders. As a result, the analysis will be divided into two separate parts relating to the right of access to the court and to other substantial rights and freedoms.

#### 3.1. THE EFFICIENCY OF THE PROTECTION OF THE RIGHT OF ACCESS TO THE COURT

It was clear from the database analyzed in the previous section of the article that the yearly number of constitutional complaints submitted to the Constitutional Court in Germany was significantly higher than in Poland, having reached its all-time peak in 2013 with 6,477 proceedings. The rationale for this substantial difference had been already indicated, and may be associated with the long tradition of the constitutional complaint mechanism in the history of German constitutionalism, the mechanism's broad subjective and objective scope, as well as the structure of admissibility criteria, such as the lack of compulsory legal representation when filing the complaint, the lack of a specific legal form, and the possible exception from the requirement of exhausting all available domestic remedies. Undoubtedly, the discussed features of the German structure of the constitutional complaint further the realization of the right of access to the court. As previously stated, many representatives of the doctrine claim that the German solution can be characterized as having a broad scope of the right of access to the court. In accordance with the opinion of the vast majority of doctrine, the Federal Constitutional Court has been perceived as the "citizens' court" (Haberle 1997, p. 112). In compliance with the presented concept, the specialized constitutional mechanism has been understood as if it were a *right* in the strictest sense of the term, that is, as if its correct filing by an individual were sufficient to bind the constitutional court to admit the complaint, and thus to solve the case on its merits (Corriz-Diaz, 2011, p. 181–182). Therefore, the present author shares Alfredo Narvaez Madecigo's view that "this somewhat romantic notion of the constitutional complaint has certainly contributed to strengthen the idea that the constitutional jurisdiction in Germany works as a super jurisdiction of appeals" (Madecigo, 2015, p. 156). Undeniably, this notion has been additionally strengthened by the broad interpretation of the terms of infringement on constitutional rights and freedoms, as well as the public authority, which was specifically shown in the previous section of the article. The presented concept can be characterized by two basic features: the particularly intensive control of the ordinary judicial procedures carried out by the German Constitutional Court through the procedural basic rights, and a high number of constitutional complaints that argue such procedural violations. Meanwhile, it shall also be noted that the analyzed concept usually leaves out the overwhelming number of constitutional complaints which do not make it through the process of admissions. In this regard, many authors emphasize that, according to the statistics of the Federal Constitutional Court, the critique that the court is becoming

a super jurisdiction of appeals cannot be sustained (Hoffmann-Riem, 2003, p. 177). On this perspective, it is necessary to point out that substantial controversies surround both the composition and the structure of the German Federal Constitutional Court. To confirm this thesis, it is worth stipulating that it had been a subject of several constitutional challenges by complainants who argued that a chamber's dismissal of their complaints constituted a denial of the right to "the jurisdiction of his lawful judge" under Article 101 (1) [2] of the Basic Law; however, it is hard to imagine the Court undermining its own protective ramparts. (Kommers & Miller, 1994, p. 21).

In light of this, it ought to be noted that, due to several independent factors, Poland has not faced similar problems in its constitutional order. First of all, the role of the courts and the tribunals (such as the Constitutional Tribunal) is clearly separated in the Polish constitution, which precludes the perception of the Constitutional Tribunal as a super jurisdiction of appeal. Secondly, as has already been underlined, the admissibility criteria of the Polish constitutional complaint are much more restrictive in terms of form, legal representation and the impartial requirement of exhausting all available legal remedies. Finally, the third and most crucial reason concerns the narrow objective scope of the Polish constitutional complaint, limited only to normative acts that had constituted a basis for a resolution of an individual case.

To recapitulate, it is worth recalling that, in accordance with the jurisprudence of the European Court of Human Rights, the right of access to the court must be substantial, not just formal. This conclusion is a derivative that this right is not exclusively the right of sole character, but, what is equally important, a means of safeguarding other substantial rights and freedoms. Therefore, although the German form of the constitutional complaint puts stress on the facilitation of the access to the court, it may be doubted whether it constitutes a genuine measure of protecting the rights and freedoms of individuals.

### **3.2. THE EFFICIENCY OF THE PROTECTION OF OTHER SUBSTANTIAL RIGHTS AND FREEDOMS**

Taking into account all of the previous remarks, it is essential to compare the scope of protections granted by the constitutional complaints within the two analyzed legal systems. Therefore, in what follows the author considers whether the protection of individual rights and freedoms has been included among the main purposes of the constitutional complaint, and, if so, where does it exist in the hierarchy of such purposes. Settling the issue requires prior reference to the efforts of a resolution that has been successful for the complainant. As it has been previously stated regarding the Polish case, the current form of the legislature, as well as contemporary jurisprudence of the Constitutional Tribunal, have stressed the effect of granting a constitutional complaint that relies on declaring certain legal norms incompatible with the Constitution. As to individual legal situations, a judgment of the Polish Constitutional Tribunal which is advantageous to the complainant gives rise to the resumption of exhaustive proceedings within a specified period of time. This construction has justified a view, presented by various representatives of the doctrine, that the elimination of unconstitutional legal norms has illegitimately dominated the function of ensuring the efficient protection on human rights. For instance, A. Łabno has stipulated in this context the necessity of reversing the functions of the constitutional complaint mechanism (Łabno, 2012, p. 45).



At the same time, since the German constitutional order prescribes a broad objective scope of the constitutional complaint, the efforts of the judgment of the Federal Constitutional Court granting the complaint are much more complex. According to the § 95 (1) of the Act on Federal Constitutional Court, if the Court grants a constitutional complaint, it shall declare in its decision which provision of the Basic Law was violated, and by which act or omission. The Federal Constitutional Court may at the same time declare that any repetition of the contested act or omission would also violate the Basic Law. The undoubted advantage of the German legal order within this scope attaches the possibility of declaring that such a repetition of the contested act will also violate the provisions of the Basic Law. Meanwhile, if the Court grants a constitutional complaint which challenges some law, that law shall be voided analogously to the Polish solutions. Another entitlement has been granted to the Federal Constitutional Court when the complaint refers to an individual and a concrete act of the application of law, such as a judgment or a decision. In conformity with § 95 (2) of the Act on Federal Constitutional Court, if the Court grants a constitutional complaint which challenges a decision, the Federal Constitutional Court shall reverse the decision; in the cases referred to in the first sentence of § 90(2), it shall remand the matter to a competent court. This construction confirms the thesis that the Federal Constitutional Court has been granted distinct but limited competences regarding the direct protection of individuals' rights.

A key similarity between the Polish and German solutions concerns the constitutional complaint as a measure of insuring the efficiency of the protection of individuals' rights. In particular, it shall be emphasized that in neither of the two analyzed legal systems has the Constitutional Court been granted competence to award financial satisfaction, or any other form of damages to the complainant, which could cause the strengthening of the adopted standards of constitutional rights protection. On this perspective, it is interesting to recall the solutions adopted within the Slovak constitutional order, in which the Court may ultimately award adequate financial satisfaction to the complainant whose fundamental rights and freedoms have been violated. However, the paradox of this mechanism rests in the fact that the applicant has not been entitled to claim any such adequate financial satisfaction. Nevertheless, it must be stipulated that the efficiency of this measure has been confirmed by the European Court on Human Rights in the factual circumstances of the case of *Andrasik and others v. Slovakia*. The decision referred to the efficiency of the Slovak constitutional complaint as a remedy with regard to an unreasonable length of proceedings, which is capable both of preventing the continuation of the alleged violation of rights—in that the concerned authority could be compelled to take the necessary action without undue delay—and of providing adequate redress for any violation that has already occurred (Council of Europe, 2009, p. 119). In conclusion, it must be stated that the mechanism discussed above shall be considered by both Poland and Germany as a means of increasing the quality of individual rights protection, which shall be perceived as one of the primary (if not the main) purposes of the constitutional complaint construction.

#### 4. CONCLUSIONS

To recapitulate the above analysis, it must be stipulated that, for various reasons, both legal systems do not grant individuals sufficient protection through the constitutional complaint mechanism. Nevertheless, the scope of protections granted in the German constitutional

order seems wider in comparison with the Polish solutions. The model adopted in the Polish Constitution from 1997, as well as the current statute concerning the organization and the mode of proceedings before the Constitutional Tribunal from 30.11.2016 (which was also evident in the previous acts), can be characterized as having a narrow objective scope that does not encompass acts of the application of law (individual and concrete), as well as containing restrictive admissibility criteria. These legal requirements limit the possibility of the right of access to the court; however, it ought to be stated that in the Polish legal system the courts are strictly separated from the tribunals. Moreover, due to the formal admissibility criteria, a large percentage of launched complaints is rejected during their initial control. The advantage of the Polish model is its explicit mention of the objective of protecting individuals rights as *explicite* related to its construction. However, as confirmed by the analysis above, this purpose is sometimes obscured by its objective function.

In contrast, the German approach to the constitutional complaint can be characterized as having a significantly broader objective scope and mild admissibility criteria, which fosters the realization of the right of access to the court, as emphasized by the vast majority of the doctrine. However, as proven through aforesaid remarks, this right of access to the court has been of a rather abstract character, and, since only small number of complaints has been examined on merits by the Senate, does not contribute to ensuring the protection of human rights. What is more, in both of the analyzed legal systems, the Constitutional Court is not entitled to award a financial settlement to the applicant, which would constitute good practice according to the current jurisprudence of the European Court of Human Rights.

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