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SELECTED ASPECTS OF POLISH CONSTITUTIONAL COMPLAINT

1. Introduction

A broad catalogue of rights and liberties of an individual in constitutions of particular states of Central and Eastern Europe was undoubtedly one of the main trends of the evolution of constitutionalism in these states. Also, introducing and consolidating legal mechanisms, whose purpose is to guarantee the rights and liberties assisted the comprehensive presentation of an individual's status. One of such guarantees is the institution of constitutional complaint. This institution, taking the area of the Visegrad Group States into consideration, was earliest introduced to the legal system of Hungary (1989), then the Czech Republic and Slovakia (1992) and latest – in Poland, under the provisions of the current Constitution of The Republic of Poland of 1997.

A multitude of studies concerning the issue of constitutional complaint in Poland may suggest that this is currently an area, which has already been exhausted to a significant extent. However, current activity of the Constitutional Tribunal within the scope of complaint practice reveals further doubt mainly due to considerable level of generality of constitutional regulations – the provisions of article 79, defining the premises of complaint. All this induces some reflection on the assessment of this institution's functioning, as well as on its essence. The question whether this institution is useful as a manner of protecting constitutional rights and liberties or not is an important and valid issue.

There are many interesting topics related to the complaint, as, for instance, issuing so–called provisional resolutions, catalogue of control models, examining so–called legislative omission, or (potential) possibility to make local law acts subject to control. However, in this study, two other significant matters will be presented, namely: the question who possesses so–called capacity to lodge complains and the question whether acts of international law may be the subject of a complaint.

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2. The issue of "complaint legitimisation"

Investigation of the subjective scope of a complaint shall begin with constitutional regulations. The expression "everyone" used by the legislator in the regulation provided by article 79 paragraph 1 of the Constitution suggests a broad range of subjects entitled to lodge complaint. In the doctrine of constitutional law it is pointed out that, under constitutional provisions relating to liberties and rights, the term "everyone" may assume two meanings – narrow and broad scope. The narrow scope means possibility to be used only by natural persons, whereas the broad encompasses other subjects of law, not only natural persons.[2]

One should concur with the statement that the constitutional expression "everyone" shall be understood broadly. Z. Czeszejko–Sochacki defends this approach by means of comparing the text of article 79 paragraph 45 of the Constitution (which regulates the right to judgment). He claims that since both institutions possess the capacity of a procedural constitutional guarantee, and the entitlement to lodge a complaint may be considered a certain kind of the right to judgment, than this means that the legislator assigns the same content to this regulation in both provisions[3].

The view described above is quite commonly approved in the doctrine. Similarly, the fact that generally each natural person, that is – citizens as well as other persons – is entitled to a constitutional complaint also remains unquestioned[4]. This results from the interpretation of article 37 paragraph 1 of the Constitution, which states that: "anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution". Exemptions from this principle with respect to foreigners shall be specified by statute (paragraph 2 of the same Article).

However, the doubt related to the question whether also different subjects, apart from natural persons, fall within the scope of the expression "everyone" and therefore, whether they are also entitled to lodge a complaint and if yes, then which of them in particular?

In the light of views presented by representatives of the doctrine, the power to use constitutional complaint is also vested in other subjects of law, as: legal per-

2 Some representatives of the world of Polish constitutional law sometimes use different terminology claiming that the term "everyone" may be understood in three distinct manners. First – as each natural person, second – a citizen and third – both a natural person and a legal person. See: Z. Czeszejko–Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy z dnia 1 sierpnia 1997 roku*, Warszawa 1999, p. 156; S.J. Jaworski, *Skarga konstytucyjna jako środek ochrony konstytucyjnych praw i wolności*, Zamość 2003, p. 10.

3 Z. Czeszejko–Sochacki, *Skarga konstytucyjna w prawie polskim*, „Przegląd Sejmowy" 1998, no. 1, p. 40.

4 Z. Czeszejko–Sochacki, L. Garlicki, J. Trzciński, *Komentarz…, op. cit.,* p. 158; J. Trzciński, *Zakres podmiotowy…, op. cit.,* p. 50.

sons subject to civil law (commercial law – especially companies), social organizations, trade unions, political parties and associations[5]. Constitutional complaint serves the purpose of protecting rights and freedoms of an individual in constitutional terms, however some of the guaranteed rights and liberties shall be vested also in subjects other than natural persons or citizens due to the nature of their essence. These rights are, for instance, the mentioned right of judgment (article 45 of the Constitution), right of compensation (article 77 of the Constitution) and right of property (article 64 of the Constitution).

One should assume the view that in order to define correct scope of the expression "everyone", "also the purposes, which constitutional claim is supposed to serve should be taken into consideration, together with the sorts of infringed constitutional liberties or rights"[6]. The fundamental purpose of constitutional complaint is to protect the constitutional right of a particular subject who initiates the complaint. Such a definition of the complaint's purpose differentiates this complaint from general claim, that is from the so–called *actio popularis*. The result of the construction of complaint adopted in Polish law system is the fact that in order to show legal authorization for lodging a complaint "*it is necessary to fulfil two conditions together. First, a specific and individual infringement of constitutional rights or liberties vested in the plaintiff must take place. Secondly, source of this infringement should be a judgment , issued under the provisions of a regulation, whose constitutionality is the matter under examination. These are sine qua non conditions of factual examination of a constitutional complaint, which result directly from the provisions of the Constitution and the act on the Constitutional Tribunal*" – claimed the Constitutional Tribunal in one of its judgments[7].

First of all, it should be emphasized that the subjective scope of a constitutional complaint is defined mainly by the subjective scope of particular constitutional liberties or rights. In other words, "if someone (in the broad interpretation of this word – L.J.) may be a subject of constitutional law, he is also entitled to lodge a constitutional complaint and may, with the help of the Constitution, demand the protection of this entitlement"[8].

The Tribunal has indicated many times that decision whether a legal person in the given case possesses capacity to lodge a complaint should be verified in

5 See, for instance, J. Trzciński, *Zakres podmiotowy…, op. cit.,* p. 49; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2006, p. 375; Z. Czeszejko–Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warszawa 2003, p. 248; B. Szmulik, *Skarga konstytucyjna. Polski model na tle porównawczym*, Warszawa 2006, p. 114.

6 J. Trzciński, *Zakres podmiotowy…, op. cit.,* pp. 46–47.

7 Compare with, for instance, resolution of the Constitutional Tribunal of 19th April 2004, sign. Ts 8/04 (OTK ZU 2004, No. 3B, item 202, p. 591).

8 P. Tuleja, M. Grzybowski, *Skarga konstytucyjna jako…, op. cit.,* pp. 107–108.

connection with the basis for complaint defined by the legislator. However, since the basis for a complaint is constituted by rights, liberties or responsibilities of the plaintiff provided by the Constitution, then this results in the fact that only a subject who is the "carrier" of subjective rights, which are based on constitutional regulations, for which the complaint is one of the fundamental means of protection, is authorised to lodge a complaint. As a consequence, in accordance with the Tribunal's assessment, "whenever there is compliance between the nature of a subject (who lodges a complaint) and the nature of law, which the subject refers to" the subject may lodge a complaint[9].

The Constitutional Tribunal, similarly to the majority of representatives of constitutional law doctrine, recognizes capacity of legal persons to lodge a complaint[10]. However, although in vast majority of cases the complaint is a reaction to an infringement of liberties and rights, which the legislator precisely related to a person or a citizen, simultaneously it also states some rights and freedoms relating to collective subjects, as: political parties or religious associations. What is more, some rights or liberties guaranteed by the Constitution, for instance, the right of property, or freedom of business activity, must include not only natural persons, but also economic subjects who are not natural persons[11], which results from the essence of economic system.

In relation to the above, and in the scope defined here, the power to lodge a constitutional complaint is vested, among others, in: social organisations (including associations), political parties, companies, trade unions, and cooperatives. An authorisation from particular statutory organ for a legal person expressed in the form of legally binding statute, for the subject representing the legal person, is a condition to use the power to formally lodge a constitutional complaint by a legal person[12].

Summarising this fragment of the discussion one may claim, that if legal persons are subjects (beneficiaries) of constitutional liberties or rights, then in the case of their infringement, these persons may demand their protection by means of constitutional complaint. However, if a legal person cannot be an addressee of a particular law or liberty due to the essence (character) of a particular right, then the Constitutional Tribunal shall refuse to examine the complaint lodged by this le-

9 Compare, for instance with: resolution of the Constitutional Tribunal of 10th May 2005, sign. Ts 204/04 (OTK ZU 2005, No. 6B, item. 238, p. 688).

10 See, for example: J. Trzciński, *Zakres podmiotowy…*, *op. cit.*, p. 49; Z. Czeszejko–Sochacki, *Sądownictwo konstytucyjne w Polsce…*, *op. cit.*, pp. 249–250; J. Sobczak, *Sądy i trybunały*, (in:) *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2005, p. 406–407; S.J. Jaworski, *Skarga konstytucyjna jako środek…*, *op. cit.*, p. 11.

11 Compare with, for instance: resolution of the Constitutional Tribunal of 8th June 1999, SK 12/98 (OTK ZU 1999, No. 5, item 96, p. 496).

12 Compare with resolution of 12th December 2001, sign. Ts 113/01 (OTK ZU 2002, No. 1B, item 89).

gal person[13]. In order for the legitimisation to lodge a complaint by the given legal person to be recognized, a plausibility statement is required, which states that through passing a judgment by public authority based on the regulation, whose constitutionality is questioned, particular and individual infringement of constitutional rights or liberties vested in the plaintiff took place[14]. Thus, the infringement of constitutional rights or liberties must be personal, direct and valid[15].

It is also impossible to lodge a complaint for a plaintiff on behalf of another subject. This issue may be characterised on the example of complaints lodged by shareholders on behalf of companies. If the complaint is submitted by shareholders, and the content of the complaint results in a claim that the company was an addressee of final decisions as a separate subject of law, then in such a case, the shareholders are not subjects authorised to lodge a complaint. They are in fact demanding the protection of rights and liberties, which do not concern them directly. The Tribunal stated that despite the "judgment on rights, liberties or responsibilities of a company determines indirectly legal and actual status of the shareholders", "when the shareholders were not the addressees of undertaken administrative and judicial decisions, their authorisation to lodge a constitutional complaint in the given case is excluded"[16]. In such a situation the complaint cannot be set into motion.

An analogical settlement should be undertaken in a situation when the complaint is submitted by a shareholder of a limited liability company, if he acts on his behalf, not on behalf of a subject (organ) representing a legal person. Only a person who represents a company may lodge a complaint on behalf of this company and also effectively demand the protection of constitutional rights or liberties, which the company as such is subject to[17].

13 An example of such a decision is the resolution of the Constitutional Tribunal of 21st March 2000, sign. SK 6/99 (OTK ZU 2000, No. 2, item 66, p. 298): "Not all rights and liberties which are vested in a natural person, are also vested in a legal person. The "R–P" association did not point to a right provided by the Constitution, which was the subject of the complaint, which would be vested in a legal person. The right to be elected for self–government councils is not vested in legal persons, but natural persons".

14 Resolution of the Constitutional Tribunal of 30th March 2004, sign. Ts 127/03 (OTK ZU 2004, No. 1B, item. 66, p. 190).

15 For example, resolution of the Constitutional Tribunal of 16th January 2001, sign, Ts 84/00 (OTK ZU 2001, No. 5, item 130, pp. 752–753): "*Infringement of constitutional rights or liberties must be personal, direct and valid. It takes place when the plaintiff is an addressee of a legal regulation, and as a result of circumstances provided by this regulation, rights and responsibilities arise which concern him personally, and final judgment issued on the basis of the questioned normative act violates the sphere of rights and liberties of the plaintiff, protected by the Constitution. Directness of infringement means that we are dealing with a normative act, which was the basis for making a decision in the case of the plaintiff, even if it was not directly indicated in the text of the judgment itself. Finally, validity of infringement means that it may not be potential in character, but must be real. Moreover, in accordance with article 47 para.1 of the act on the Constitutional Tribunal, indicating infringed constitutional rights or liberties and determining the manner of this infringement are formal requirements of a constitutional complaint*".

16 Resolution of the constitutional Tribunal of 14th March 2001, sign. Ts 7/01 (OTK ZU 2001, No. 5, item 147, p. 799).

17 Resolution of the constitutional Tribunal of 14th March 2001, sign. Ts 113/01 (OTK ZU 2002, No. 1B, item 89).

In the assessment of the Tribunal, lodging a complaint on behalf of a third party would be admissible "exceptionally in a situation, when exercising their rights by these people would be tightly connected with activities of a legal person, and these people would not possess the possibility to submit a constitutional complaint, and the legal person himself would not be able to initiate a procedure in the Constitutional Tribunal in the course provided by article 191 paragraph 1 points 3–5 of the Constitution"[18].

The Tribunal also decided that lodging a complaint by spouses is admissible in a situation when the questioned regulation was applied to one of them as a taxpayer, and to the other – as a taxpayer's spouse. In the above situation the Tribunal ruled that taking the content of regulations provided in the questioned law as well as the content of accusations expressed within the complaint into account, lodging one constitutional complaint instead of two individual complaints may be considered as justified[19].

Considering the issue of constitutional complaint of legal persons in broader aspects it is worth settling whether the institution of constitutional complaint can be used by legal persons operating – as a principle – within the public sector, and especially the units of territorial self–government, state legal persons or companies with State Treasury's share as well as independent public health care institutions.

Judging cases of constitutional complaints, which came from territorial self–government units, the Tribunal recognized lodging a constitutional complaint by a commune as a territorial self–government unit as inadmissible. This results in the fact that, organs of public authority and subjects enforcing public objectives are in the very nature of things not the addressees (subjects) of entitlements provided by particular constitutional liberties and rights vested in private subjects. Therefore, they cannot implement the institution of constitutional complaint. What is more, the Tribunal stated that decisive organs of territorial self–government units possess a constitutional entitlement to initiate the procedure of controlling if a regulation is constitutional by means of another mode (by submitting an application in the course provided by article 191, paragraph 1 point 3 of the Constitution)[20].

The Tribunal pointed out that units of territorial self–government are in fact legal persons, however as such they have entirely different character than legal persons constituted by natural persons, who exercise the freedom of association guaranteed by the Constitution. Moreover, legal personality of self–government units possess-

18 Resolution of the constitutional Tribunal of 17th March 2003, sign. Ts 116/02 (OTK ZU 2003, No. 2B, item 105, p. 267).

19 Compare with the judgment of 24th January 2001, SK 30/99 (OTK ZU 2001, No. 1, item 3, p. 27).

20 Resolution of the Constitutional Tribunal of 12th October 2004, sign. Ts 35/04 (OTK ZU 2005, No 1B, item 25, p. 73). Compare also with resolutions, which have the following signatures: Ts, 72/01; Ts 74/04; Ts 9/05.

es secondary meaning (intermediate) within the scope of the Constitution, in the sense that it is not the unit who decides directly about the subjective scope of particular rights and liberties. On the contrary: lack of legal personality does not interrupt being the subject of constitutional rights. An example of such subject, which does not possess legal personality but is entitled to lodge a complaint is an ordinary association[21].

What is more, the Tribunal emphasized that since the means of protecting constitutional liberties and rights, including the right to appeal against judgments and the power of constitutional complaint are vested in an individual, in a sense "against" public authority, then assuming that these means may be vested in organs of public authority is contrary to the essence and character of these means as well as to the function of protecting constitutional human rights[22].

The Constitutional Tribunal also provided one more argument against recognising the capacity to lodge complaints by communes. Namely, "*it should be noted that the right to initiate control with the use of general principles, meaning the fullest control (article 191 paragraph 1 point 3 in relation to paragraph 2 of the Constitution), is vested in the decisive organ, that is a council, and not the organ representing a commune on the outside, that is the mayor. A commune's constitutional complaint, which is proved by this case, would always be lodged by a village–mayor, mayor or a president and in certain situations, especially after introducing direct elections of the decisive organ in 2002, it may lead to dualism of competence of the commune's organs within the same scope of operation, which would be unfavourable for the commune as a whole*"[23]. However, the moment of discontinuance of the given case is worth noticing. Decision of discontinuation with respect to inadmissibility of issuing a substantive judgment was caused by declaring the lack of complaint capacity of a commune, yet was issued after the complaint was set into motion, that is during the preparatory procedure. Actually, this case was examined by the Tribunal in its full composition, and discontinuation was subject to criticism in individual opinion of E. Łętowska.

The argumentation quoted here also refers to capacity to issue complaints of districts, as self–government units[24]. The Tribunal rules that territorial self–government units, as legal persons of public law, may effectively lodge a complaint after

21 Compare with resolution of the Constitutional Tribunal of 23rd February 2005, sign. Ts 35/04 (OTK ZU 2005, No. 1B, item 26, p. 76).

22 Compare with resolution of the Constitutional Tribunal of 23rd February 2005, sign. Ts 35/04 (OTK ZU 2005, No. 1B, item 26, p. 77).

23 Resolution of the Constitutional Tribunal of 22nd May 2007, sign. SK 70/05 (OTK ZU 2007, No. 6A, item 60, p. 14).

24 By means of resolution of 27th September 2005 in the case Ts 83/05 (OTK ZU 2005, No. 6B, item 258) the Tribunal refused to set a complaint submitted by Lidzbark district – the District Employment office in Lidzbark Warmiński into motion. The Tribunal also did not consider an appeal to the resolution presented here.

fulfilling two criteria. Namely first of all, they would have to show that they are addressees of constitutional regulations, which express subjective laws falling within admissible basis for complaint and secondly, they would have to refer to protection of rights vested in them, which constitute emanation of subjective rights and liberties protected by the Constitution[25].

In one of the cases, referring to the issue of complaint authorisation of a public health care institution the Tribunal decided that subjects implementing the functions of public power cannot lodge constitutional complaints because they are not the addressees of entitlements provided by particular constitutional regulations, but the addresses of responsibilities related to implementation of other subjects' rights. Because of this the Tribunal did not set the wheels into further motion for this complaint[26].

However, the Tribunal allowed for a possibility to lodge a complaint in a situation when limiting the rights of a legal person related to implementation of public assignments would at the same time restrict the rights of individuals[27].

In a different case the Tribunal recognized admissibility of constitutional complaint of such an institution, which was based on the charge of infringing the constitutional right of property and other material rights (article 64 paragraph 2 of the Constitution)[28], equal for everyone by the sued regulation. The Tribunal emphasized that this does not contradict the remarks formulated in the previously described case since different actual and legal context caused the fact that decisions settled in the previous case are not fully adequate to decide about the examined complaint[29].

While discussing the issue of capacity to lodge complaints by legal persons or companies with the share of the State Treasury, it is worth to refer once more to the Tribunal's decisions, although they do not yet settle – or at least it seems so – a definite and unambiguous decision pattern. The Tribunal recognized that these subjects possess authorisation to lodge a constitutional complaint, but only within the scope of protecting their property rights[30]. Similarly, in two other cases, the Tribunal admitted complaints lodged by companies with the share of State

25 Resolution of the Constitutional Tribunal of 7th December 2005, sign Ts 83/05 (OTK ZU 2005, No. 6B, item 259, pp. 737–738).

26 Resolution of The Constitutional Tribunal of 6th February 2001, sign. Ts 148/00 (OTK ZU 2001, No. 3, item 72, p. 414).

27 *Ibidem*, resolution of the Constitutional Tribunal of 6th February 2001, as above, p. 414

28 Judgment of the Constitutional Tribunal of 4th April 2005, sign. SK 7/03 (OTK ZU 2005, No. 4A, item 34, pp. 445–446).

29 *Ibidem*, judgment of 4th April 2005, as above.

30 In the case SK 24/04 The Tribunal recognizes as a *meritum* the constitutional complaint lodged by Agrarian Fixed Property Agency. Compare with the Constitutional Tribunal's judgment of 21st March 2005 (OTK ZU 2005, No. 3A, item 25).

Treasury. An argument for admitting these complaints to substantive examination was the operation of the plaintiff companies within the sphere of private law[31].

The remarks presented above, concerning the circle of subjects who are entitled to lodge a complaint prove that the use of a general expression "everyone" in the Constitution led to creation of doubt, which was related to the question of detailed and exhaustive definition of the range of these subjects. Undoubtedly, this expression shall be assigned a broad scope of interpretation. Such an opinion is expressed in the doctrine, as well as in the judicial decisions of the Tribunal[32]. This broad scope of authorisation "corresponds to international standards, especially the views expressed in the doctrine of states, whose legal tradition is assumed to be the origin of constitutional complaint"[33].

3. Acts of international law as subjects of constitutional complaint

The regulations of the Constitution of the Republic of Poland grant the Constitutional Tribunal the competence to examine acts of international law with the Constitution. This is provided by article 188 paragraph 1 of the Constitution: "The Constitutional Tribunal shall adjudicate the conformity of statutes and international agreements with the Constitution (…)". This regulation does not differentiate between ratified and unratified international agreements. Therefore, it should be claimed that this regulation spreads the area of controlling conformity with the Constitution over all international agreements, which means both those ratified and those unratified.

It is pointed out in the theory of constitutional law that the so–called secondary (consequent) control of international agreements' conformity with the Constitution has the most extensive range (including all agreements). Abstract control fulfils significantly bigger role within the scope of controlling these legal acts[34]. However, this does not mean that international agreements cannot be the subject of constitutionality control by means of constitutional complaint at all. Yet basically the

31 Resolutions of the Constitutional Tribunal of 8th November 2005, sign. Ts 203/04 (OTK ZU 2005, No. 6B, item 237, p. 685) and sign. Ts 204/04 (OTK ZU 2005, No. 6B, item 239, p. 691). The Tribunal, by means of these resolutions, considered the appeals of the company KGHM Polska Miedź S.A. against the former refusals to set the wheels into further motion for these cases.

32 See: J. Trzciński, *Uwagi do art. 79 Konstytucji*, (in:) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Tom I, ed. L. Garlicki, Warszawa 1999, pp. 4–5; Z. Czeszejko–Sochacki, L. Garlicki, J. Trzciński, *Komentarz…, op. cit.,* p. 158 and referring to the point of view of L. Garlicki – J. Sobczak, *Sądy…*, *op. cit.*, p. 406.

33 Z. Czeszejko–Sochacki, *Sądownictwo…*, *op. cit.*, p. 250.

34 See: M. Grzybowski, *Prawo międzynarodowe i wspólnotowe jako wzorzec i przedmiot kontroli norm*, (in:) *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, ed. M. Zubik, Warszawa 2006, p. 340.

model of Polish constitutional complaint regulated by article 79 paragraph1 of the Constitution does not provide basis to question the legally international norms[35].

Analysis of statements expressed by representatives of the doctrine of constitutional law allows to draw a conclusion that some arguments have arisen about the possibility to include acts (regulations) of international law to the catalogue of normative acts subject to assessment in the course of constitutional complaint.

J. Repel adopts the standpoint that interpretation of constitutional regulation of complaint (that is, article 79 paragraph 1) does not exclude appealing against a ratified international agreement in the course of complaint. In such a situation the accusation of infringing constitutional liberties or rights or responsibilities must relate to this agreement directly, and not to the statute authorising its ratification[36]. In the opinion of J. Repel excluding international agreements from the subjective scope of constitutional complaint "creates an explicit gap in the protection of constitutional rights and liberties from their infringement on behalf of organs of public authority". The author argues that for the direct implementation of ratified international agreements, it is possible to base judicature of courts or organs of public administration on the provisions of these agreements, and at the same time, contractual regulations not always have to remain in full coherence with Polish constitutional provisions[37].

J. Repel also thinks that assuming the interpretation, which restricts the subject of complaint only to acts established by organs of public authority of the Republic of Poland, leads only to the exclusion of so–called secondary law, which is established by international organisations, from that scope. However, in his opinion this is understandable in the context of obligation of the European Union (EU) member States to recognize exclusive right of the European Tribunal of Justice to interpret EU laws[38].

Other commentators, including: Z. Czeszejko–Sochacki and S. Jaworski adopt the standpoint that acts of international law cannot be the subjects of constitutional complaint[39]. They are against treating acts of international law as the subject of controlling conformity with constitution by means of the complaint procedure. It is characteristic that they simultaneously do not exclude the theoretical possibility of supporting "the final adjudication" described in article 79 paragraph 1 of the

35 *Ibidem*, p. 340.

36 See: J. Repel, *Przedmiotowy zakres skargi…, op. cit.,* p. 87.

37 *Ibidem*, p. 94.

38 *Ibidem*, p. 95.

39 For example: Z. Czeszejko–Sochacki, *Skarga konstytucyjna w prawie polskim*…, *op. cit.*, p. 48; S.J. Jaworski, *Skarga konstytucyjna jako środek ochrony…, op. cit.,* p. 16;

Constitution on the basis of norms included directly in acts of international law[40]. This means that in the case if infringement of rights or liberties guaranteed by the Constitution was a result of implementing rules of international law by a court or organ of public administration while they give the final adjudication (a normative act of international law would be the basis of these organs' final adjudication), these norms shall be included in the subjective scope of constitutional complaint.

The problem of potential recognition of legally international regulations as subject of control of their conformity with the Constitution in the course of constitutional complaint shall be also examined from another perspective. Correct analysis of the presented matter should account for legal consequences of the potential ruling on non–conformity of international agreements' regulations with the Constitution by the Constitutional Tribunal. In this context, also complications related to implementation of the Constitutional Tribunal's resolution stating such a non–conformity should be pointed out.

Refusal to recognize the binding force of a particular normative act regulations as well as their deletion from the legal system is a basic consequence of the Tribunal's ruling stating their non–conformity with the Constitution (the Tribunal's adjudication – what is worth remembering – is final and operates *erga omnes*). This refers to regulations, which lose the binding force in internal legal system. However, the results of a similar Tribunal's ruling in external relations (e.g. state – state) are different since such a judicial decision does not lead to termination of binding force within the scope of these relations[41]. Implementing the Tribunal's ruling, which stated non–conformity of an international agreement with the Constitution may also be hindered by *pacta sunt servanda* principle[42].

With reference to the sole interpretation of an international agreement or regulation provided by the agreement, in a situation of giving multiple interpretations to an agreement or its regulations, "the Tribunal shall recognize as correct this interpretation, which is the most coherent with the provisions of the Constitution (…)"[43].

Answering the question whether community law regulations (which means primal and secondary law) may be subjects of control in the course of constitutional complaint constitutes another problem.

40 See: Z. Czeszejko–Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy…, op. cit.,* p. 168; see also the remarks of J. Trzciński concerning article 79 of the Constitution, (in:) *Konstytucja…, op. cit.,* p. 15.

41 See: M. Grzybowski, *Prawo międzynarodowe i wspólnotowe…, op. cit.,* p. 342.

42 *Ibidem*, p. 340.

43 *Ibidem*, p. 343.

It should be taken into account, while considering this question that the norms of this law are subject to the general regime of constitutionality control of international agreements. However, it is emphasized in the literature that there are no foundations for the control of constitutionality to relate also to acts of law established within the scope of international organisations. Because acts of secondary community law (derivative law) do not possess the status of an international agreement, they cannot be subject to constitutionality control, whose scope is defined by article 188 paragraph 1 of the Constitution. This means, that secondary community law should be interpreted by the European Tribunal of Justice[44].

Also another aspect related to the problem of possibility to spread the subject of control over acts of secondary (derivative) law of the European Union should be noted. Namely, some doctrine representatives point out that an indispensable condition of recognizing the Constitutional Tribunal as an organ entitled to control acts of this law would have to be the consideration of acts of secondary law as "normative acts" in the view of the Constitution of the Republic of Poland. However, they cast doubt on such a construction due to the fact that the notion of a "normative act", which appears in the Constitution (for instance, in article 88 paragraph 2, article 79, article 190 paragraph 3, article 191 paragraph 2, article 193) refers consistently to the law established by organs of the Republic of Poland[45].

Also a different view may be found in the literature. This view relies on the assumption that for the need of article 188 of the Constitution a ratified agreement cannot be recognised as a normative act, whereas for the need of article 79 of the Constitution – it is not recognized as a normative act. Similarly, by assigning to acts regulated by article 91 paragraph 3 of the Constitution (secondary law) the nature of universally binding law, it cannot be at the same time assumed that they are not normative acts[46].

In the academic literature, one may still come cross a standpoint, according to which the notion of a "normative act" included in article 79 and 193 of the

44 See *ibidem*, pp. 345–346, Also: K. Działocha, *Uwagi do art. 91 Konstytucji*, (in:) *Konstytucja…*, *op. cit.*, p. 9.

45 See *ibidem*, pp 8–9. Also: J. Barcz, see the same, *Konstytucyjnoprawne problemy stosowania prawa Unii Europejskiej w Polsce w świetle dotychczasowych doświadczeń państw członkowskich*, (in:) *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym*, ed. M. Kruk, Warszawa 1997, pp. 220–221. K. Działocha claims that secondary law does not fall within the Constitutional Tribunal's scope of competence, which is regulated by article 188 of the Constitution (the Tribunal's Power to examine international agreements with the Constitution). He also thinks that it would be difficult to find a constitutional provision, which would give competence to control constitutionality of secondary law. He allows for possibility to make international agreements provided by article 91 para. 1 and 2 of the Constitution–so–called primal law of European Communities as subject of control. See K. Działocha, *Uwagi do art. 91 Konstytucji…*, *op. cit.*, p. 8.

46 See: A. Wyrozumska, *Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa*, (in:) *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, ed. K. Wójtowicz, Warszawa 2006, p. 90. In this dissertation, the author performed an extensive presentation of standpoints adopted by many doctrine representatives in the area of making acts of international law as well as acts of legal organs of the European Union subject to control.

Constitution could be interpreted by the Constitutional Tribunal in an extent broader than it has been interpreted until now. As a result, the Tribunal could recognise its jurisdiction since questioning conformity of e.g. community resolution with the Constitution of the Republic of Poland by means of question of law or constitutional complaint cannot be excluded[47].

Adjudication of the Constitutional Tribunal up to now has not resolved this matter, due to the fact that examining acts of so–called derivative law is not explicitly provided by the provisions of the Constitution (article 188)[48]. Arguments for recognising entitlement to examine community resolutions are, i.a.: the fact that on the basis of their regulations a citizen may be granted particular subjective rights, and as a result decisions of law implementing organs may be made on the basis of these regulations. Apart from this, excluding from the Tribunal's scope of competence may mean so–called "constitutionality deficiency", that is a situation, in which acts of law exist in a democratic country, which can be the basis of judicial decisions, and which at the same time cannot be subjects of controlling conformity with the Constitution. An argument against recognizing the Constitutional Tribunal's entitlement to examine community resolutions is mainly the fact that secondary community law does not belong to the category of international agreements, it constitutes legal system other than the State's legal system[49]. Some people think that currently a simplified statement that community resolutions are excluded from the subjective scope of constitutional complaint, especially after considering their normative character is not sufficient[50]. The Tribunal's practice will definitely be an instruction of how to resolve this question.

4. Conclusions

The Polish model of constitutional complaint is included in so–called narrow models of complaint. This means the complaint can be lodged against a regulation of law, and not against individual decisions of law implementing organs (courts, organs of administration). It is also required to point out personal, legal and valid interest, and the complaint proceeding is based on the rule of subsidiary. As a result, broad scope of the notion of complaint as well as restrictive selection of com-

47 See: K. Wójtowicz, *Konstytucja Rzeczypospolitej Polskiej a członkostwo w UE*, (in:) *Konstytucja dla rozszerzającej się Europy*, ed. E. Popławska, Warszawa 2000, p. 171 and the following. The regulation of article 193 of the Constitution is: "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court".

48 Currently in the Constitutional Tribunal there is an unresolved complaint, in which the plaintiff appealed against the regulation of community resolution (sign. SK 45/09)

49 See: T. Jaroszyński, *Rozporządzenie wspólnotowe jako przedmiot skargi konstytucyjnej*, „Europejski Przegląd Sądowy" 2007, no. 4, p. 27 and the following.

50 *Ibidem*, pp. 37–38.

plaints (in general, letters addressed to the Tribunal) decide about effectiveness of this mean of protection of rights and liberties. It is not easy to exercise the right to lodge a constitutional complaint, only these complaints, which present particular, significant constitutional problem, approach the substantive stage.

In the course of many–year practice, The Constitutional Tribunal adopted possibly broad understanding of the premises for lodging a complaint, including "complaint legitimisation" (also: subjects of complaint and models of control). This broadened interpretation can be justified on the basis of the binding legal regulation. One may assume, that the regulation provided by article 79 of the Constitution was "surrounded" by the Tribunal's interpretation. Actually, in case any doubt appears, admissibility of complaints for substantive examination is decided by the Tribunal through using the principle of caution and the Tribunal prefers to start the proceedings for examining a complaint and later discontinue the process (e.g. due to inadmissibility).

Employing constitutional complaint discloses a range of interesting problems. The legislator was unable to foresee part of there problems[51]. Over 12–year period of using the institution of article 79 of the Constitution allows for drawing certain conclusions, as well as formulating postulates *de lege ferenda*.

In my opinion constitutional complaint, considering also particular disadvantages of its model, turned out to be an institution useful for protecting rights and liberties of an individual (usually a citizen). It also caused the rise of citizens' awareness within the scope of their rights and abilities to protect their interests (legal). As a consequence of using constitutional complaint, a normative advantage of the Constitution and the matter of possibility to use its regulations directly were revealed. Introducing the institution of constitutional complaint to the Polish legal system also caused the increase of the Constitutional Tribunal's importance as an organ operating both in order to protect the Constitution and to protect rights of an individual.

Currently a debate on the need of changing some constitutional regulations and the scope of their possible change is in progress. The regulations which are fragments (laws) of the Constitution most often pointed as those, which should be subject to changes, are: article 227 of the Constitution considering the position of the National Bank of Poland as a central bank, within the perspective of Poland's accession to the Euro currency zone; regulations concerning relations between in-

51 For example, In 2000 amendment was introduced to the act on the Constitutional Tribunal, adding paragraph 3 to article 39 (in the case when a normative act lost its binding force in the questioned scope before a decision was issued by the Tribunal, then the proceeding is not discontinued, if pronouncing a decision on such a normative act is necessary for protection of constitutional rights and liberties). At the same time it is characteristic that the Tribunal itself makes the decision in this scope.

ternal and international law (modifications to Chapter III of the Constitution are postulated); change of the mode of electing president together with additional alternations as far as the political position of the head of state is concerned. However, in my opinion it is difficult to notice an explicitly articulated necessity to alter article 79 of the Constitution[52]. The environment of constitutionalists directs partially defined postulates in this scope, and sometimes these are also applications concerning the change of the act on the Constitutional Tribunal[53]. I think that the area of constitutional regulation of an individual's status is also not so attractive for politicians, as for example the issues I have already mentioned, since it does not translate into strengthening (the structures of) authority.

However, some people think that there is an explicit need to modify the construction of Polish constitutional complaint. It is even proposed to perform a radical change, which would consist in reshaping the current complaint into actio popularis[54]. However, this is connected with a range of problems. First of all, the division of entitlements of the Constitutional Tribunal from the entitlements of the Supreme Court is vividly expressed and the change could disturb it. Secondly, it was the legislator's assumption that the Constitutional Tribunal should deal with significant constitutional problems. And finally, there is a purely technical problem: in what manner would the Constitutional Tribunal be supposed to adjudicate in the situation of expected increase of the number of complaints, since already now it is considerably loaded with the amount of submitted applications?

On the other hand, the constitutional complaint should be a real guarantee serving the purpose of protecting constitutional status of an individual in a state. If, through changing the constitutional regulations, it would be possible to achieve a greater effectiveness of the complaint and simultaneously retain its cohesion with other legal solutions and other organs' scopes of competence (e.g. the Supreme Court) then I can see no obstacles to rationalise the current model of constitutional complaint.

52 For example: it was not even mentioned in the speeches given during a conference in Sejm organized in November 2009 by the Marshal discussing the need and the scope of changing the Constitution of the Republic of Poland. The speakers concentrated on mutual relations between particular central State organs.

53 See: P. Tuleja, *Postępowanie przed Trybunałem Konstytucyjnym w sprawie hierarchicznej kontroli norm*, „Przegląd Sejmowy" 2009, no. 5, p. 49. See also: W Sadurski, *Prawo przed sądem*, Warszawa 2009.

54 See, for instance: W. Sadurski, *Prawo przed sądem*, Warszawa 2009.