ORDINES
Per un sapere interdisciplinare sulle istituzioni europee

ISSN 2421-0730
NUMERO 1 – GIUGNO 2017

VIKTORIYA SERZHANOVA

Constitutional Justice in Poland. Selected Issues in a Comparative Perspective

ABSTRACT- The hereby paper aims at presenting some reflections over the selected issues connected with the Constitutional justice in Poland. In particular, it focuses on the activity of the Polish Constitutional Tribunal in the field of protecting the Constitution and controlling the constitutionality of law. These issues are analyzed in the context of the essence of the abovementioned concepts as the most important guarantees of observing the Constitution, as well as in the lights of the models commonly implemented in this area in order to exercise this task. The subject of the paper covers the analysis of the notion of protecting the constitution, deriving its origin, discussing the existing models of its realization and reviewing the outline of one of them which has been implemented on the Polish ground. Moreover, it also analyzes the concept, essence and origin of the institution of a constitutional complaint which aim is protecting the constitutionally guaranteed fundamental human rights and freedoms. The work discusses its model and scope applied in Poland and the basic principles of the proceedings of its examining anticipated by law on the basis of the Constitution of the Republic of Poland and conducted by the Polish Constitutional Tribunal.

KEYWORDS- constitutional justice, constitutional court, control of the constitutionality of law.

VIKTORIYA SERZHANOVA*

Constitutional Justice in Poland. Selected Issues in a Comparative Perspective**

SOMMARIO: *1. Introduction – 2. The Essence and Genesis of the Idea of Protecting the Constitution – 3. Models of the Law Constitutionality Control – 4. A Model of the Constitutionality Control Implemented in Poland – 5. The Concept and Scope of a Constitutional Complaint – 6. Proceedings in the Matter of a Constitutional Complaint – 7. Conclusions.*

1. Introduction

The problem of protecting the constitution is a considerably essential area of a modern democratic legal state's functioning, for guaranteeing conformity of the binding laws with the constitutional provisions is one of the most important objectives which contemporary states endeavour to reach. Among the mechanisms provided to ensure the effective realization of this goal are the constitutional guarantees, with the guarantees of the conformity of laws with the constitution and the guarantees of the fundamental rights and freedoms of men and citizens in them[1].

The problem of constitutional guarantees has an essential practical relevance. It is connected with the question of what social, political and legal instruments and remedies are to be used in order to guarantee the

* Head of the Chair of Government and Politics of the European States Faculty of Law and Administration, University of Rzeszow

** Contributo sottoposto a valutazione anonima.

[1] In the Polish constitutional law doctrine the guarantees of the conformity of laws with the constitution are divided into direct, indirect, substantial, procedural, etc. This substance is competently analysed by B. BANASZAK, *Prawo konstytucyjne* (*Constitutional Law*), Warszawa 2008, 104-105.

implementation of the content of the basic law text. Among the constitutional guarantees, comprehended as the entirety of factors and legal institutes serving to materialize its provisions, the first place is occupied by the institutional and legal guarantees, in other words, state authorities created especially for this purpose. This factor mainly consists in creating organizational frames, appointing relative state authorities and constructing institutions and procedures which are supposed to prevent 'melting' of the constitutional provisions in the ocean of norms contained in ordinary laws. In contemporary democratic states of fundamental significance in this field are constitutional courts, being quasi-court judicial authorities created particularly for the purpose of preserving the supremacy of the constitutional provisions by way of examining the compatibility of the norms contained in laws and under-law legal acts with them. An essential part is also played here by other state authorities: e.g. Ombudsmen, as well as different institutions and procedures, like for instance a constitutional complaint and the proceedings of its considering[2].

One cannot also underestimate the significance of the guarantees of rights and freedoms of men and citizens, comprehended as the entirety of legal institutions aiming at materializing constitutional rights and freedoms, first and foremost legal guarantees among them, of course. A characteristic feature of a contemporary democratic state is that, besides the institutional legal guarantees of the national law, an essential part is also played by the ones of the international and supranational nature. These guarantees consist of the substantial legal norms, containing both principles and legal institutions which are to ensure rights and freedoms of men and citizens. There are also certain principles and procedures, among others: openness of the proceedings, public pronouncing of a sentence, the right to a fair trial, the right of defence, etc. In the national law they are:

[2] See A. REDELBACH, *Skarga konstytucyjna w systemie ochrony praw człowieka w Polsce (A Constitutional Complaint in the System of Human Rights Protection in Poland)*, in *Palestra*, 11/1997, 40 ss.

independency and autonomy of courts, the Ombudsman's activity, electoral protest, as well as control of the constitutionality of law and a constitutional complaint. Supplemental to the national guarantees are foreign institutions and procedures. Among them there are supranational and international courts: the Court of Justice of the European Union, the European Court of Human Rights, the International Criminal Court, etc.

The activity of constitutional courts, with the Polish Constitutional Tribunal among them, is connected with the protection of the constitution, strictly comprehended as the control of the constitutionality of law[3], which consists in adjudicating on the conformity of laws and other legal acts with the constitution. Besides the abovementioned, the competences of the discussed authorities are usually determined much wider. Therefore, traditional tasks of the constitutional courts in the scope of preserving the constitution are also as follows: supervision of the activities of political parties, with judging on the admissibility of their dissolution (e.g. in Germany); settling the competency disputes between the supreme state authorities, the central state authorities, as well as between the central and local state and self-government bodies; examining constitutional complaints, being an extremely essential instrument of preserving the fundamental rights and freedoms of men and citizens guaranteed in the constitution. The constitutional courts or similar authorities can also be empowered to exercise a function of referenda supervision and announcing their results, to guard the correct running of the presidential elections (e.g. the Constitutional Council in France), to consider the charges put by the parliament towards the head of state and members of the government (e.g. in Italy).

The hereby paper aims at analyzing the main issues of the activity of

[3] Extendedly on the control of the constitutionality of law see L. BOSEK, M. WILD, *Kontrola konstytucyjności prawa (Control of the Constitutionality of Law)*, Warszawa 2014, *passim*; A. KUSTRA, *Kontrola konstytucyjności całej ustawy (Control of the Constitutionality of the Whole Law)*, in *Przegląd Sejmowy,* 2/2012.

the Constitutional Tribunal in Poland in the field of protecting the Constitution through controlling the constitutionality of legal acts, as well in the area of the human rights protection, which is directly connected with the protection of the Constitution, too. In particular, its objective is related to the detailed analysis of the centralized model of protecting the Constitution implemented in Poland, as well as the institute of a constitutional complaint or, in other words, an individual review as it is also sometimes called in the doctrine, and the procedure of its examining on the ground of the Polish legal order, which seems to be one of the most important guarantees of observing the Constitution. The subject of the lecture will cover: the analysis of the concept and essence of protecting the constitution and controlling the constitutionality of law, their models commonly known and applied in the world, confronting them with the one introduced in Poland, as well as the institute of a constitutional complaint, which aim is protecting the constitutionally guaranteed fundamental human rights and freedoms. Moreover, the subject of the lecture will concentrate on deriving the institute's origin, discussing the model and its range applied in Poland, as well as the basic principles of the proceedings of its examining stipulated by law on the basis of the Constitution of the Republic of Poland and conducted by the Polish Constitutional Tribunal. The conclusion also contains a not less significant element of the hereby deliberations, which is an effort to estimate the effectiveness of such a model of protecting the basic law, with the model of a constitutional complaint in particular – in the whole human rights protection area, especially in the lights of the experience gained during the three decades' activity of the Tribunal and the two decades' practice of the constitutional complaint's functioning in the Polish legal order.

2. The Essence and Genesis of the Idea of Protecting the Constitution

The problem of protecting the constitution exists there and then, where and when the primacy of the constitutional norms in the system of legal sources is recognized. Historically, it is connected with the appearance of written constitutions, because it is easier to confront such a basic law with other legal norms, it gives a larger sense of its dominance over the law created in a usual procedure, as well as the stability of the whole legal system. Generally saying, protection of the constitution consists in creating legal mechanisms removing the incompatibility of laws with the constitution and of lower legal acts with laws. Strictly understood protection of the constitution can be considered only when there exists a non-parliamentarian authority created specially in order to realize this objective[4].

Among the objectives most frequently put in front of the institutions appointed to protect the constitution there are: strengthening the role of the basic law in the process of law enactment and application, endeavouring to the effective preservation of the constitutionally guaranteed rights and

[4] Protection of the constitution and constitutional courts are acutely discussed by B. BANASZAK, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych (Comparative Constitutional Law of the Contemporary Democratic States)*, ed. 3, Warszawa 2012, 444 ss. See also W. MOJSKI, *Kilka uwag o przedmiocie i funkcjach kontroli konstytucyjności prawa w Polsce (Several Reflections about the Subject and Functions of the Control of the Constitutionality of Law in Poland)*, in *Przegląd Prawa Konstytucyjnego*, 2-3/2010, 281 ss.

Among the newest works it is worth reaching for: W. PŁOWIEC, *Przepis prawny i norma prawna jako przedmiot kontroli Trybunału Konstytucyjnego (A Legal Provision and a Legal Norm as the Subject of the Control of the Constitutional Tribunal*), in *Państwo i Prawo, 1*/2017, 36-53; R.M. MAŁAJNY, *Trybunał Konstytucyjny jako strażnik Konstytucji (The Constitutional Tribunal as a Guard of the Constitution)*, in *Państwo i Prawo,* 10/2016, 5-22; ID, *Legitymacja sądownictwa konstytucyjnego* (*Legitimation of the Constitutional Judiciary*), in *Państwo i Prawo,* 10/2015, 5-21; L. GARLICKI, *Niekonstytucyjność: formy, skutki, procedury (Unconstitutionality: Forms, Effects, Procedures)*, in *Państwo i Prawo*, 9/2016, 3-20.

freedoms and their organization, as well as ensuring a desired balance between the legislative and executive powers[5].

The principle of parliamentary legal acts being bound and restricted by the constitution appeared in 17th century in the English Agreement of the People of 1647[6]. However, the control over the conformity of laws with the constitution is commonly considered to have been introduced for the first time in the United States in 1803. It was applied in the decision of the Supreme Court with John Marshall as the Chief Justice in the case of *Marbury v. Madison*[7]. At the same time it is necessary to notice that the Constitution of the USA of 1787 did not provide the right of the Supreme Court to examine the conformity of laws with the Constitution. In other words, the Supreme Court 'granted this right to itself' in this precedent decision and by this way legally institutionalized it. In the discussed case the Supreme Court adjudged Section 13 of the Judiciary Act of 24 September 1789 to have violated Article III of the Constitution, regarding it unconstitutional and thus invalid.

An institution of the constitutional court, being a judicial authority specially created in order to protect the constitution (German: *Staatsgerichtshof*) comes from 19th century. The idea of constitutional judiciary was formulated for the first time by Georg Jellinek in his work *Ein Verfassungsgerichtshof für Österreich* (*The Constitutional Court of*

5 E. ZWIERZCHOWSKI, *Europejskie Trybunały Konstytucyjne. Zarys rozważań konstytucyjnych (European Constitutional Courts. An Outline of Constitutional Deliberations)*, Katowice 1989, 19; more extendedly also see: ID, *Sądownictwo konstytucyjne (Constitutional Judiciary)*, Bialystok 1994; B. BANASZAK, *Porównawcze prawo konstytucyjne,* cit., 444-445.

6 About the Agreement of the People act see S. R. GARDINER, *History of the Great Civil War,* III - IV, London 1889-94; C. HILL, *The World Turned Upside Down*, London 1972; A. SHARP, *John Lilburne*, Oxford 2004; E. VERNON, P. BAKER, *The History & Historiography of the Agreements of the People*, Palgrave 2012.

7 *Marbury v. Madison*, 24 February 1803, 5 U.S. 137.

Austria) published in 1885[8]. Jellinek's idea was innovative because it consisted in appointing a special court to adjudge on the constitutionality of laws. Later the idea was developed by Hans Kelsen in his work *Vom Wesen und Wert der Demokratie* (*The Essence and Value of Democracy*) of 1920[9].

Hans Kelsen stated, that the lot of modern democracy to a large extent depended on the systematic development of all the control institutions. He considered, that being the legislator, the parliament itself was not able to be the guarantee of its constitutionality. In its practical functioning, a legislative authority felt itself a free creator of law, not an authority applying it, bound by the constitution, although it was indeed, following the idea lying in its basis. Therefore, the parliament itself ought not to have been regarded the guarantee of that idea. Only a separate from the legislator authority, independent from it and any other holder of the state power, could be appointed to annul legal acts incompatible with the constitution. That was what the institution of the constitutional court consisted in. Moreover, he promoted a thesis, that it could be exercised only by a non-parliamentary authority, for the only form allowing to regard such a solution to be an effective to a certain extent guarantee of legality would have been adjudicating unconformity of a defective act with the law by another authority, along with simultaneous obliging the one which had enacted it to repeal it. On account of the parliament's nature it was not able to be effectively obliged, therefore in practice such a solution could not be implemented. Expecting that it would repeal an adopted by it statute because of its unconstitutionality stated by another authority would be politically naive. Common courts would also not be able to materialize that because of their judicature divergence. Therefore, control of the

[8] G. JELLINEK, *Ein Verfassungsgerichtshof für Österreich*, Wien, Hölder 1885, *passim*.

[9] H. KELSEN, *Vom Wesen und Wert der Demokratie*, Tübingen, Mohr 1920, second, revised and enlarged edition 1929; reprinted Aalen, Scientia 1981. In English: *The Essence and Value of Democracy*, ed. N. Urbinati, C. I. Accetti, transl. B. Graf, Rowman & Littlefield Publishers 2013, *passim*.

constitutionality of law ought to have been entrusted to one central authority – the constitutional court.

Kelsen's theory led to establishing first two constitutional courts in 1920: in Czechoslovakia and Austria. Being the author of the Austrian Constitution of 1 October 1920, Kelsen introduced the Constitutional Court to be an authority empowered to control the constitutionality of law into Section D of chapter VII of its text. It was the second in Europe Constitutional Court, after the Czechoslovak one, established by the Constitution of 29 February 1920. The third one was the Tribunal of the Constitutional Guarantees (Spanish: *Tribunal de Garantías Constitucionales*) established by the Constitution of Spain of 9 December 1931 (started its functioning in 1932). Dynamic development of this institution came after World War II. Nowadays, the existence of constitutional courts in the political systems of most of the European countries, and not only, is regarded to be a standard of a democratic legal state. They have been functioning in: Italy (since 1947), Germany (since 1949), Turkey (since 1961), Spain (since 1978), Portugal (since 1982) and many others. Another, diverse form is bestowed to the Constitutional Council in France (French: *Conseil constitutionnel*), which has become a model for some states (especially of Francophonic Africa)[10].

In Poland, the tradition of the Constitutional Tribunal is rather young, for during the resurgent of the Polish state in the inter-wars period (the II Republic of Poland) this form of protecting the constitution was not provided by the then binding basic laws: either by the Constitution of 17 March 1921, according to which the political system was based on the French Third Republic model (French: *La Troisième République*), or by the authoritarian Constitutional Law of 23 April 1935. Therefore, formally established by the law of 26 March 1982 on the Amendments of the

[10] For more see L. GARLICKI, *Sądownictwo konstytucyjne w Europie Zachodniej (Constitutional Judiciary in Western Europe)*, Warszawa 1987, *passim*.

Constitution of the Polish People's Republic[11] and by the later law of 29 April 1985 on the Constitutional Tribunal, starting its functioning on 1 January 1986, it was the first such type of institution in the history of Poland[12].

3. Models of the Law Constitutionality Control

There are two basic models of the control of the constitutionality of law known in the constitutional law doctrine:

- intra-parliamentary;
- non-parliamentarian control exercised by the bodies situated outside the parliaments, being independent from them, or directly by the common courts[13].

---

[11] Official Law Gazette *Dziennik Ustaw of* 1982, no 11, item 83.

[12] On the origin and the process of establishing the Constitutional Tribunal in Poland see R. ALBERSKI, *Trybunał Konstytucyjny w polskich systemach politycznych (The Constitutional Tribunal in the Polish Political Systems)*, Wrocław 2010, *passim*; also B. SZMULIK, *Sądownictwo konstytucyjne – ochrona konstytucyjności prawa w Polsce (Constitutional Judiciary – Protection of the Law Constitutionality in Poland)*, Lublin 2001, *passim*; Z. CZESZEJKO-SOCHACKI, *Przebieg prac nad utworzeniem polskiego Trybunału Konstytucyjnego (1981–1985) (The Process of Works over the Establishment of the Polish Constitutional Tribunal (1981–1985)*, in *Przegląd Sejmowy,* 3/1994, 22 ss; ID. *Sądownictwo konstytucyjne. (Tradycja a współczesność) (Constitutional Judiciary (Tradition and Contemporaneity)*, in *Państwo i Prawo*, 6/2001, *passim*; *Trybunał Konstytucyjny (The Constitutional Tribunal)*, ed. J. Trzciński, Wrocław 1987, *passim*; *Zagadnienia sądownictwa konstytucyjnego. O istocie państwa w 90 rocznicę ustanowienia Konstytucji marcowej (Issues of the Constitutional Judiciary. On the Essence of the State in 90th Anniversary of Adopting the March Constitution)*, Warszawa 2014, *passim*.

[13] Boguslaw Banaszak, besides these two, also determines abstract and concrete control. More deeply all these types are characterized by him in *Porównawcze prawo konstytucyjne*, cit., 448-449.

The intra-parliamentary control of the constitutionality of laws exists in every state, independently from the fact if the non-parliamentarian control is established or not. The obligation to watch the conformity of the statute norms with the constitution is performed not only by the parliament itself, but also by its internal bodies, especially by the parliamentarian committees which prepare the draft laws, as well as by the entities empowered to initiate them. Sometimes there are created special committees inside the parliaments, which task is to examine the draft laws lodged to them from the perspective of their compatibility with the constitution. The characteristic feature of this form of control is that the parliament is the only authority to finally decide upon the conformity of the law with the constitution. If it is adopted by the parliament it cannot be questioned by any other organ because of its incompatibility with the basic law.

In the present world the non-parliamentarian control is represented by two systems: American and European.

In the American system the control of the constitutionality of laws is performed by common courts. They adjudge on the conformity of a statute with the basic law while deciding on a particular case, in which the parties bar the unconstitutionality of the law on the basis of which the judgement is supposed to be made. This model is used not only in the USA, but also in Switzerland, Nordic states and Japan, where the function of the authorities controlling the ordinary laws' conformity with the constitution is exercised by common courts, i.e. those which examine criminal and civil cases, and the final decisions in the matters of constitutionality are taken by the Supreme Court. The questions of starting a case and barring unconstitutionality are presented differently here. In many states such a case may be initiated only in connection with a civil or criminal case already being processed before the court. While the case is being heard, each of the parties may bar unconstitutionality of the law, on the basis of which the litigation is intended to be solved (the USA, Australia).

The essence of the European system is establishing a special separate body, empowered to authoritatively adjudge on the constitutionality and validity of laws. Such control may be of a preventive character, i.e. averting announcing the law touched by the defect of unconstitutionality, or of a repressive nature, i.e. annulling the law already after its enforcement.

While performing the controlling function over the conformity of ordinary laws with the basic ones the empowered authorities frequently exercise prior control, because they make opinions on the draft laws which are not adopted by the parliament yet. Such a solution has been implemented for instance in France and Ireland. In other states there has been introduced a solution consisting in the consecutive control, i.e. the laws already adopted by the parliament are adjudged. Such a system exists for instance in Germany, Switzerland, India and occurs the most frequently. In Germany and Italy citizens have the right to bar unconstitutionality of a certain law with the constitution on the occasion when a concrete case is examined by the common court. In other states the procedure of lodging a claim with charge of inconformity of the law with the constitution is much more complicated and only the determined state authorities, not particular citizens, are empowered to bar such an accusation. For instance, in Ireland such a claim may be submitted by the President of the Republic, in Germany and Italy – by a certain group of the deputies to the parliament, it may also be a local self-government authority (e.g. the Regional Council in Italy), a federation subject (e.g. the land's government in Germany), the Supreme Court or Administrative Court (e.g. in Austria).

The laws which have been adjudicated unconstitutional or annulled by virtue of law, or which enforcement has been withheld until the parliament takes up relative actions in order to remove the defects, or which are still formally remained within the binding legal order, may usually not be applied by the administrative and judicial authorities.

4. A Model of the Constitutionality Control Implemented in Poland

In Poland the most commonly applied in this part of the world, European model of non-parliamentarian control of the constitutionality of law performed by the Constitutional Tribunal has been implemented. Its essence is based on the existence of a specially separated authority empowered to authoritatively adjudicate on the constitutionality and validity of laws. Such control may be of a preventive character, i.e. avert the announcement of the text of the law touched by the unconstitutionality defect, or it may also have a repressive nature, annulling the false laws already after their being adopted.

Presently, the legal grounds of the establishment, as well as the organization and functioning of the Constitutional Tribunal in Poland are constituted by the provisions of: art. 173, 174 and 188–197 of the Constitution of the Republic of Poland of 2 April 1997[14], the law of 30 November 2016 on the Organization and Proceedings before the Constitutional Tribunal[15], the law of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal[16]. These regulations are supplemented by the provisions of the Rules of Procedure of the Constitutional Tribunal adopted through the resolution of the General Assembly of the Judges of the Constitutional Tribunal on 15 September

[14] The Official Law Gazette *Dziennik Ustaw*, No 78, item 483 with amendments.

[15] The Official Law Gazette *Dziennik Ustaw,* of 19 December 2016, item 2072.

[16] The Official Law Gazette *Dziennik Ustaw,* of 19 December 2016, item 2073. During the last period of a little over a year there were adopted several laws on the Constitutional Tribunal. The ones presently in force derogated the law on the Constitutional Tribunal of 22 July 2016, which was in force half a year and which derogated the law on the Constitutional Tribunal adopted on 25 June 2015. Such activity of the legislator ought to be estimated very critically, because implementing new laws every several months does not contribute to the constitutional stability and effective protection of the Constitution, which is an utmost and supreme value, nor does it help to get over the constitutional crisis.

2015[17].

The Constitutional Tribunal is composed of fifteen judges appointed by the lower chamber of the parliament Sejm for the period of a nine-years term. The election is made individually. In order to become a Tribunal judge a candidate needs to meet the requirements and possess the qualifications demanded for the position of a judge of the Supreme Court or the Supreme Administrative Court. The candidates are submitted by a group of at least fifty deputies or the Sejm Presidium, which elects judges by the absolute majority of votes in the presence of at least half the general number of the deputies. A Tribunal judge takes an oath in front of the President of the Republic. Refusal to take the oath means resignation from the position.

The judges are independent and autonomous in performing their duties and are subject only to the Constitution of the Republic of Poland and the laws. They are protected by the immunity and prohibited to belong to political parties, trade unions or conduct any public activity which cannot be reconciled with the principles of the judges' independence and autonomy[18].

According to the provisions of the basic law the Constitutional Tribunal composes a part of the judicial power, for art. 173 (chapter VIII) of the Constitution of the Republic of Poland states that courts and tribunals are a separate power, independent from other ones. The Constitutional Tribunal is established, first and foremost, to exercise control over the

[17] The Official Law Gazette *Monitor Polski* of 21 September 2015, item 823 – adopted on the basis of one of the previously binding Laws on the Constitutional Tribunal – of 25 June 2015. Though in 2016 three other laws were adopted and came into force, the Rules of Procedure have not been changed.

[18] The legal status of the judges of the Constitutional Tribunal are extendedly discussed by M. ZUBIK, *Status prawny sędziego Trybunału Konstytucyjnego (The Legal Status of the Judges of the Constitutional Tribunal)*, Warszawa 2011, *passim*. Though the laws change very often, fortunately the legal status of the judges is guaranteed by the basic law, which is not so easy to modify because of its rigidness. This assures a certain degree of constitutional stability for them.

conformity of laws with the Constitution, in particular: the compatibility of laws and international agreements with the Constitution, the conformity of laws with the ratified international agreements, the ratification of which demands the prior consent expressed in a law, as well as the conformity of legal provisions enacted by the central state authorities with the Constitution, ratified international agreements and laws. Moreover, the Polish Constitutional Tribunal also performs other competences characteristic for the constitutional courts, directly connected with the protection of the Constitution, which are: hearing constitutional complaints, exercising supervision over political parties in the scope of conformity of their objectives and activities with the Constitution and settling the competency disputes between the central state authorities. The Polish doctrine also derives another function: a signalizing or, in other words, an informational and signalizing one[19]. It consists in the obligation of the Constitutional Tribunal to present Sejm and other authorities creating law the legal defects and gaps, the removal of which is necessary. This right, if properly used, may essentially influence the improvement of the legal system. Moreover, this function also obliges the Tribunal to issue the collection of its judicature, the diffusion of which also constitutes an important element in the process of preserving the Constitution and improvement of the legal system[20].

The subjects empowered to submit motions initiating a proceedings

[19] Interesting deliberations on the signalizing function are presented by P. KUCZMA, *Konstytucjonalizacja funkcji sygnalizacyjnej Trybunału Konstytucyjnego (Constitutionalizing of the Signalizing Function of the Constitutional Tribunal)*, in *Aktualne problemy reform konstytucyjnych (Current Problems of the Constitutional Reforms)*, ed. S. Bożyk, Bialystok 2013, 235 ss.; also J. REPEL, *Funkcja sygnalizacyjna Trybunału Konstytucyjnego (The Signalizing Function of the Constitutional Tribunal)*, in Nowe Prawo, 1/1989.

[20] See W. MOJSKI, *Kilka uwag o przedmiocie i funkcjach kontroli konstytucyjności prawa w Polsce (Several Reflections about the Subject and Functions of the Control of the Constitutionality of Law in Poland)*, *Przegląd Prawa Konstytucyjnego*, 2-3/2010, 281 ss.

before the Constitutional Tribunal are: the President of the Republic, the speakers of both the lower and the upper chambers – the Marshalls of the Sejm and Senate, the President of the Council of Ministers (the head of the government), at least fifty deputies or thirty senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the General Prosecutor, the President of the Supreme Chamber of Control, the Ombudsman, as well as – in the scope of their competences: the National Judicial Council, local self-government authorities, national trade union bodies, nation-wide authorities of the employers' and professional organizations, Churches and other religious communities.

5. The Concept and Scope of a Constitutional Complaint

The concept of a constitutional complaint is not easy to be defined explicitly. This institute is derived from the German legal culture circle[21], but despite a rather long tradition of its functioning the subject literature has not elaborated a homogeneous definition of this notion yet. The most accurate approach to comprehend the essence of this institute seems to be made through distinguishing a group of features characterizing it. Among those, which do not raise any considerable doubts, there are the following: it is an institute serving to protect the interests of individuals or legal persons, which have been violated by the activities of public authorities or their abandonment, before a constitutional court, in a special proceeding guaranteed by the laws on human rights[22].

[21] For the first time it was implemented by the order of the King of Bavaria in 1814.

[22] About the constitutional complaint in the Polish doctrine see B. BANASZAK, *Skarga konstytucyjna (A Constitutional Complaint)*,), in *Państwo i Prawo*, 1/1995; A. BISZTYGA, *Polska skarga konstytucyjna a skarga do Europejskiego Trybunału Praw Człowieka (A Polish Constitutional Complaint vs. a Complaint to the European Court of Human Rights)*, in *Acta Universitatis Vratislaviensis. Przegląd Prawa i Administracji*, 44/2000;

In the Polish legal order a constitutional complaint is provided by art. 79 of the Constitution of the Republic of Poland of 2 April 1997, which introduced this institute in Poland and since then it has existed for two decades already[23]. This constitutional provision stipulates that everyone, whose constitutional freedoms or rights have been violated, has a right to submit a complaint to the Constitutional Tribunal in the matter of conformity with the Constitution of the law or another legal act, on the basis of which a court of law or a public administration authority has ultimately decided on his freedoms, rights or duties anticipated in the Constitution, according to the detailed provisions determined by the law. The scope of the complaint does not cover the rights of foreigners to asylum or granting a status of a refugee[24].

L. JAMRÓZ, *Skarga konstytucyjna. Wstępne rozpoznanie (A Constitutional Complaint. Preliminary Examination)*, Białystok 2011. In the Polish literature the constitutional complaint was subjected to deep analysis in the monograph *Skarga konstytucyjna (A Constitutional Complaint)*, ed. J. Trzciński, Warszawa 2000, *passim*; see also A. STRZEMBOSZ, *Sądy a skarga konstytucyjna (Court vs. a Constitutional Complaint)*, in *Państwo i Prawo* 3/1997, 3 ss.; among the newer works also B. SZMULIK, *Skarga konstytucyjna. Polski model na tle porównawczym (A Constitutional Complaint. A Polish Model on the Comparative Background)*, Warszawa 2006, *passim*. The newest elaboration which thoroughly and competently discusses the concept, models and origin of the constitutional complaint, is written by L. JAMRÓZ, *Skarga konstytucyjna. Wstępne rozpoznanie (A Constitutional Complaint. Preliminary Examination)*, Białystok 2011, 13 ss.; see also B. BANASZAK, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych (Comparative Constitutional Law of the Contemporary Democratic States)*, 3 ed., Warszawa 2012, 165 ss.

[23] On the reception of the constitutional complaint institute into the Polish legal order see Z. CZESZEJKO-SOCHACKI, *Skarga konstytucyjna w prawie polskim (A Constitutional Complaint in the Polish Law)*, in *Przegląd Sejmowy, 1/* 1998, 31 ss.; also ID., *Skarga konstytucyjna – niektóre dylematy procesowe (A Constitutional Complaint – Some Procedural Dilemmas)* 6/1999, 27 ss. For more see also A. REDELBACH, *Skarga konstytucyjna*, cit., 40 ss.

[24] The scope of the constitutional complaint in the Polish legal order in a more detailed way is competently analyzed by J. REPEL, *Przedmiotowy zakres skargi konstytucyjnej (The*

Neither the Constitution, nor the law provides any more extended legal definition of a constitutional complaint. Therefore, the only legal source which can be used here to define this notion on the Polish ground is the Constitution itself and the mentioned above art. 79. More detailed provisions found in relevant laws concern only the rules of proceedings in the matter of considering a constitutional complaint. They are stipulated in the Law of 30 November 2016 on the Organization and Proceedings before the Constitutional Tribunal. Some more detailed regulations on the proceedings can be found in the Rules of Procedure of the Constitutional Tribunal of 15 September 2015.

The normativization degree and the particularity level of the regulations concerning the constitutional complaint in Poland are not very high and seem to be rather laconic. At the same time the provisions concerning its shape and range can evolve far too much insufficiency in comparison with the solutions implemented by other contemporary European states. The subject of the complaint can cover only a legal act (e.g. a law, order, rule, etc.), but cannot relate to a certain decision of a court or administrative authority. That is why the Constitutional Tribunal does not start cases on the basis of such complaints. Whereas in other European states, like for instance in Austria, Germany, Spain or the Czech Republic, one can submit a complaint against a court or administrative decision. The practice shows, however, that the majority of complaints do refer to such decisions. On the other hand, the Constitutional Courts in Spain or the Czech Republic, because of some procedural restrictions, control legal acts exceptionally.

Subject Scope of a Constitutional Complaint), in *Skarga konstytucyjna*, cit., *passim*. It is also interesting and worth reaching for A. KUSTRA, *Model skargi konstytucyjnej jako czynnik kształtujący orzecznictwo sądów konstytucyjnych w sprawach związanych z członkostwem państwa w Unii Europejskiej (The Model of a Constitutional Complaint as a Constituting Factor of the Constitutional Courts' Judicature in Matters Connected with the State's Membership in the European Union)*, in *Państwo i Prawo*, 3/2015, 34-56.

Besides those mentioned already, another restriction in the scope of the constitutional complaint in Poland is connected with the fact that not all the regulations of a general nature within the sphere of the fundamental rights can be its subject. They do not include local law and decisions of self-government authorities. It is also not clear why there is no possibility to submit a complaint against the violation of the legal rights guaranteed to an individual by the international agreements ratified by Poland by law (or any other legal act).

6. Proceedings in the Matter of a Constitutional Complaint

In Poland a constitutional complaint can be submitted after the whole instance course has been exhausted in the term of three months after the valid judgement or another ultimate decision has been delivered to the complainant. The complaint is heard according to the same procedure as any other motion related to adjudication on the conformity of a legal act with the Constitution or laws.

The constitutional complaints submitted to the Tribunal have to meet a series of specific formal and substantial requirements relevant for a pleading. In particular, they have to determine the provision of a law or another legal act in question, on the basis of which a court or a public administrative authority has validly decided on the freedoms, rights or duties of a complainant guaranteed in the Constitution, and in relation to which he demands adjudication of non-conformity with the Constitution. Besides, the complaint has to point which exactly freedom or right has been violated according to the complainant and in what way, justify the charge of unconstitutionality of the questioned provision of law or another legal act with the indicated complainant's constitutional freedom or right, as well as present arguments and proofs to support it. Moreover, it has to include the presentation of an actual state of affairs, document the date of delivery of

the judgement, decision or another settlement ultimately finishing the case, the information if it has been appealed by the way of an extraordinary remedy. The complaint has to attach the judgements, decisions and other ultimate settlements which certify exhausting of all the instances in the legal action, as well as a special power of attorney. In case of the complaint there obliges a mandatory representation by a lawyer, which consists in the necessity of the complaint to be prepared by a lawyer or a legal advisor, unless the complainant is a judge, prosecutor, notary, professor or associate professor (habilitated doctor) of legal sciences himself.

The submitted complaint is directed to the judge appointed by the President of the Constitutional Tribunal for the purpose of conducting its preliminary examination at the proceedings in camera[25]. It is a very important phase of the complaint proceedings. During this phase the complaint is examined both from the formal and substantive perspectives. If the complaint does not meet the formal requirements the judge calls to remove the defaults during the period of seven days. If they are not removed or if the complaint is obviously groundless[26] the judge may issue a decision on the rejection of its further run. Such a decision can be appealed to the Tribunal during the period of seven days. The grievance is considered during a proceeding in camera and if the judge allows it, he directs the case to be considered during a trial. His otherwise decision cannot be appealed.

The Tribunal may also decide on the suspension or leaving in abeyance carrying out the decision on the matter subject to the complaint, if it could cause irreversible effects. The Constitutional Tribunal informs the

[25] On the preliminary examination see more extendedly L. JAMRÓZ, *Skarga konstytucyjna*, cit., 35 ss.

[26] For more see J. KRÓLIKOWSKI, J. SUŁKOWSKI, *Znaczenie przesłanki oczywistej bezzasadności dla dostępności skargi konstytucyjnej jako środka ochrony konstytucyjnych wolności i praw (The Significance of the Premise of Obvious Groundlessness for the Availability of a Constitutional Complaint as a Means of Protection of the Constitutional Freedoms and Rights)*, in *Przegląd Sejmowy,* 5/2009, 91 ss. About substantive premises see L. JAMRÓZ, *Skarga konstytucyjna*, cit., 82 ss.

Ombudsman and the Ombudsman for the Children who are free to declare their participation in the proceedings within 60 days.

The participants of the proceedings on the matter of a constitutional complaint are: the complainant, the authority which has issued the act covered by it, the Office of the General Attorney of the Republic of Poland if it has been appointed by the Council of Ministers to represent it in the proceedings, the Ombudsman and the Ombudsman for the Children if they have declared their participation. The participants appear before the Tribunal personally or are represented by a plenipotentiary.

In order to thoroughly clarify the considered case the Tribunal ought to examine all the significant circumstances during the proceedings. The Tribunal is not bound by the evidence motions put by the participants and is allowed to admit every other evidence which it considers to be purposeful. The Tribunal can request assistance of courts and public authorities, as well as providing all the acts connected with the case. It can also address to the Supreme Court and the Supreme Administrative Court in order to receive information related to the interpretation of a certain provision in the judicature.

The Constitutional Tribunal considers the complaint during a trial. It also has a possibility to examine it during a proceedings in camera, if it unquestionably follows from the positions presented by the participants of the proceedings in the written form, that the normative act, on the basis of which a court or administrative authority has ultimately decided on the complainant's constitutional freedoms, rights or duties, is contrary to the Constitution. The judgement issued according to this procedure is subject to announcement.

The trials before the Tribunal are public, although the president of the adjudicating panel may exclude publicity on account of state security or official secret protection. The law gives the judges access to state secret connected with the considered case. A witness or an expert witness, however, may be heard by the Tribunal after they are exempted from its

preserving by the empowered authority. Rejection of giving consent to hearing may be justified only by a significant state interest. The expert or witness cannot refuse testifying if the Tribunal regards such a refusal as unjustified.

The Tribunal adjudicates on the matter of the constitutional complaint in a panel of three. Judges to compose the panel, as well as the president and a rapporteur are appointed by the President of the Constitutional Tribunal. A judge is subject to exemption from the adjudicating panel when he has issued or participated in issuing the questioned normative act, sentence, administrative decision or other settlement, or when he was a representative or plenipotentiary of one of the participants, or when other circumstances justifying it occur. He is excluded on his request or *ex officio*, if the circumstance justifying doubts regarding his impartiality has been substantiated.

The pleadings in the proceedings are regarded to be motions and statements of the participants which have to be prepared in the number allowing to deliver them to all the participants and keeping two more copies in the case files. The constitutional complaint, on the basis of which the proceedings before the Tribunal is launched, may be withdrawn before the trial starts.

The Tribunal extinguishes the proceedings in camera if: issuing the judgement is unnecessary and inadmissible, the complaint has been withdrawn or the questioned legal act has lost its validity before the adjudication is issued by the Tribunal.

In matters of constitutional complaints the Tribunal adjudicates in the form of sentences. In case of a sentence complying with the complaint the Tribunal adjudicates the reimbursement of the complainant's proceedings costs by the authority which has issued the claimed normative act. In justified cases the Tribunal may also adjudicate the costs reimbursement when it has not complied with the claim. The Tribunal is empowered to determine the costs of the complainant's representation by a

lawyer or legal advisor depending on their contribution into clearing the case.

The presence of the claimant and his representative at the trial is obligatory. Otherwise, the Tribunal extinguishes the case or adjourns it. Participation in the trial of the authority which has issued the questioned legal act or his representative is also obligatory. If any of the proceedings participants does not attend the trial, the case may be adjourned and its new date may be set. The trial takes place notwithstanding the attendance of other proceedings participants. In case of their absence the Tribunal presents their opinions.

While formulating its adjudications the Tribunal is bound by the substantial merit determined in the constitutional complaint. It issues adjudications after the judges consultations and voting over the proposed judgement and the basic motives of the settlement. The consultations are presided by the presidents of the adjudicating panels. In complicated matters the judgement pronouncement may be adjourned, but not more than for 14 days[27].

The judgement is passed by the majority of votes. The president collects the judges' votes according to their seniority and votes as the last one. The judges who do not agree with the adjudication or only with its

[27] The notion, classification and legal effects of the Constitutional Tribunal's judgements are competently discussed by Z. CZESZEJKO-SOCHACKI, *Orzeczenie Trybunału Konstytucyjnego: pojęcie, klasyfikacja i skutki prawne (Judgements of the Constitutional Tribunal: the Concept, Classification and Legal Effects)*, in *Państwo i Prawo*, 12/2000. More about the Tribunal judicature may be found, as well as the Constitutional Tribunal's judgements and their legal effects are deeply and competently discussed by M. FLORCZAK-WĄTOR, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne (The Adjudications of the Constitutional Tribunal and their Legal Effects)*, Poznań 2006, *passim*. About the executing of the Tribunal's judicature see *Wykonywanie orzeczeń Trybunału Konstytucyjnego w praktyce konstytucyjnej organów państwa (Application of the Judgements of the Constitutional Tribunal in the Constitutional Practice of the State Authorities)*, ed. K. Działocha, S. Jarosz-Żukowska, Warszawa 2013, *passim*.

substantiation are allowed to declare their dissenting opinions before the pronouncement. The judgement is signed by the whole adjudicating panel along with the 'over-voted' judges.

If the Tribunal has considered the complaint during a proceedings in camera the president of the adjudicating panel informs the claimant and other participants about it, at the same time setting the date and place of the judgement pronouncement.

Not later than within a month from the judgement pronouncement its written substantiation is prepared. The judgement in the written form is pronounced to the proceedings participants together with the oral substantiation and the information about the eventual dissenting opinions. The judgement is delivered to the participants immediately after the substantiation is written. The Tribunal's judgements are instantly announced in the Official Law Gazette 'Dziennik Ustaw'. If the judgement concerns an act not announced in the publishing organ it is published in the Polish Monitor. The Constitutional Tribunal also publishes its collection of judgements 'The Judicature of the Constitutional Tribunal' in the electronic form at its website[28].

[28] Helpful to estimate the scope of the Tribunal's activity and perhaps to some extend also the effectiveness of this remedy can be some statistical data concerning the constitutional complaint. Since its introducing into the Polish legal order in 1997, during the last two decades there have been issued 708 judgements and settlements finished on the substantial consideration in cases based on the constitutional complaints. Presently 56 cases on constitutional complaints out of 170 of all the cases hung before the Tribunal are under consideration. On average about several dozens of complaints are examined by the Tribunal a year. It makes more or less 1/3 to a half of all the cases decided by the Tribunal in certain years. A deeper analysis of the statistical data also leads to a conclusion that the number of complaints generally increases year by year. On this matter it is also worth reaching for K. DZIAŁOCHA, T*rzydzieści lat orzecznictwa Trybunału Konstytucyjnego (Thirty Years of the Constitutional Tribunal's Judicature*), in *Państwo i Prawo,* 1/2017, 98-105.

7. Conclusions

Nowadays the problem of protecting the constitution still seems to remain current, especially in those states which aspire for being perceived to be democratic and at the same time do not have any long and stable traditions of democracy. The basic idea of the control of the constitutionality of law appears in those legal systems in which the top place of the legal sources hierarchy is occupied by the constitution, comprehended as the written act of parliament of the supreme force, prevailing and dominating over all the other norms. The main element of such control is watching the conformity of the lower legal acts with the higher ones in the hierarchy and, in consequence, with the basic law.

In the contemporary world there have been developed two basic models of controlling the constitutionality of law: the one exercised by common courts with the Supreme Court as the head and the one performed by a special court, or a quasi-court authority, usually called a constitutional court (tribunal). The states in which the control of the constitutionality of law is exercised by common courts are usually characterized by a strong position of parliaments in this field, which are the main authorities performing this function, therefore the scope of their power and the part they play here is much more important and mature. The states which have implemented the other solution, following Kelsen's model, are frequently seen to have been less stable in their political history in the past, full of sudden and radical changes in introduced government and politics – which count the majority of them. Therefore, they have appeared to strongly need a separate, independent and autonomous supreme state authority acting within the judicial power to be the guard of their constitutions.

This is the model having been applied in Poland. The Constitutional Tribunal was established in the middle 1980-s, just before the cardinal changes of the Polish political system. Being patterned on the Kelsen's model, its main tasks are connected with the widely comprehended

protection of the Constitution. Among its competences there are: control of the constitutionality of legal acts, examining a constitutional complaint, supervising the activities of political parties and settling competency disputes between the central state authorities. The Polish Constitutional Tribunal is a part of the dually constructed judicial power exercised by courts and tribunals, though it is not considered to be a strictly understood justice authority.

It goes without saying, that the constitutional complaint is a particular legal remedy serving to protect the constitutional rights and freedoms of individuals. Moreover, it contributes to eliminating unconstitutional norms being the basis of the binding legal system. At the same time it is difficult to explicitly and ultimately estimate which function of the constitutional complaint is prior. Therefore, accurate seems to be an opinion, that from the perspective of the experience connected with the constitutional complaint's functioning, the institute surely fulfils its role relating to the protection of individuals' rights and freedoms, although its substantial scope is very narrow on the ground of the Constitution and the law on the Tribunal being in force[29]. It is hard to deny this point of view.

It is also important to underline that the new statute regulations, adopted at the end of the last year, do not change anything relating to the constitutional complaint, its scope or the procedure of its consideration, comparing to the solutions which had been in force on the ground of the previously binding statute legal norms. This induces to assume that the hitherto legal construction, though perhaps a little narrow, has still proved to be rather effective in performing its main functions. The proceedings of examination and consideration of the constitutional complaint also seem to be constructed correctly and properly, which allows its successful and

[29] See L. JAMRÓZ, *Skarga konstytucyjna*, cit., 228. The Author analyses the first decade of the complaint's existence in the Polish legal order. However, after the two decades' experience his opinion still seems to be true, which can prove at least a certain degree of stability in this field.

effective functioning.

The Constitutional Tribunal is still a rather young organ in the Polish tradition, therefore it is natural that it wrestles a large number of problems. Though its over thirty years' history has been full of outstanding activity which seemed to be on a very high level, it cannot be totally secured from political maelstroms. This means in fact, that not all the mechanisms have occurred to work properly to protect the Constitution and Tribunal itself against the dilemmas following from its autonomy, independence and political indifference.