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MODELS OF REGULATING CONSTITUTIONAL COMPLAINTS IN VIEW OF AMENDMENT PROCEDURES IN EUROPEAN COUNTRIES

ABSTRACT

Many European judicial systems provide the procedure of a constitutional complaint aiming to protect the fundamental rights and freedoms of citizens. The mechanism behind such complaints is intended to ensure an additional layer of security between the citizen and public institutions. The models established in European Union Member States show that the very concept of a constitutional complaint, as well as the formal requirements and its placement in the legal system are not uniform. Particular importance should be attributed to placement of this mechanism in the judicial system of an analysed country. In order to fully comprehend how effective the level of protection of rights truly is and what are the exact consequences of such regulations, it is imperative to determine whether the procedure is regulated in the constitution itself or through statutory law.

Objectives: The purpose of this study is to analyse various models and regulations of constitutional complaints among chosen European Union countries. Thorough research has been conducted as to what are the conditions impacting whether the regulations of constitutional complaints are included directly in the constitution or incorporated in acts of statutory law. The importance of the placement of such regulations has been evaluated with reference to dynamic changes in the protection of human and citizen rights and freedoms.

Methods: In order to create this article general scientific research methods were used, both empirical and theoretical (analysis, synthesis, abstraction, generalization and induction). Systemic, functional and comparative research methods were also included.

Results: The article presents various models of constitutional complaints with reference to their role in influencing the level of human and citizen rights and freedoms protection.

Overview: The article evaluates the role of the mechanism of constitutional complaints through diverse legal regulations and the legislative level of human rights protection in existing legal European models.

KEYWORDS: *Constitutional complaint, human rights, complaint models, democracy.*

One of the basic mechanisms protecting citizens from undesirable actions of governmental institutions as well as courts in the adjudication process, is the procedure of the constitutional complaint (Jamróz, 2011, p. 20 et seq.). Its main objective is to enable the protection of constitutionally guaranteed rights and freedoms of citizens. The objective and subjective scope of this institution differs depending on the model of complaint adopted in a particular country but is also a result of the cognitive areas entrusted to courts and constitutional tribunals.

As a preliminary remark, it should be pointed out that regulations concerning constitutional complaints can be found both in constitutions and statutory legislation. The analysis of the regulations established in Member States of the European Union leads to the conclusion that in most of these countries this mechanism is incorporated into statutory legal acts. It allows a certain flexibility and openness to changes in the existing legal standards, which is especially valuable in dynamically evolving geopolitical conditions. Nonetheless, citizens of those abovementioned states do not have a full constitutional guarantee of protection of their rights and freedoms (Chmaj, 2022, p. 117; Wierzbowski, 1996, pp. 213 et seq.). This incomplete guarantee implies that there is a possibility of certain risks and violations arising. The main one being that the legislative body could by statutory law take measures which would exclude or extend civil rights and freedoms. Undoubtedly, regulations concerning constitutional complaints that are included in statutory legal acts, do not fall within the framework of the standardisation of law in the countries of the European Union (Bidziński, 2021, p. 130 et seq.).

An analysis of the constitutions of European countries leads to the conclusion that this mechanism has been legally regulated in only 17 of the 28 Member States. For instance in the constitutions of Belgium, Bulgaria, Denmark, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania and Romania, there are no regulations concerning the constitutional complaint. Contrarily, the issue of such complaints is most extensively regulated in the Austrian constitution, where the legislative body has even specified matters concerning time limits and possible judgements. This act also defines the effects of court rulings in ongoing proceedings, which subject matter are still relevant at the time of the ruling, as well as those that have become groundless.

Surprisingly, introducing rigid constitutional provisions when establishing the mechanism of the constitutional complaint later results in a total lack of flexibility to implement any changes. The inability to adapt regulations to socially relevant changes does have a big impact on the public perception of such laws. Therefore, while the 'rigid' nature of the constitution is a desirable form of guaranteeing rights and freedoms, the rigidity of the procedures designed to protect them may lead to different results.

Moreover, based on the placement of the constitutional complaint regulations, the level of detail in which they are described and the enforced procedures for changing their scopes, the regulations found in European countries can be divided into three categories: 1) rigid regulations; 2) moderately rigid regulations and 3) no regulations at all.

The rigid version of regulations of the constitutional complaint are characterised by the fact that all changes in the complaint procedure, including those with regard to formal requirements, legitimate subjects or possible rulings of the constitutional court, require amending the constitution itself. In this model, priority is therefore given to the stability of the law, which is extremely important from a political, but also the social standpoint. This system guarantees that citizens will not be surprised by new legal practices that violate their status and rights.

Alternatively, there is the second indicated system, i.e. the moderately-rigid system. From a formal and legal point of view, it is similar to the rigid system, however, due to lesser formalism and more liberal procedures, the focus is on strictly systemic issues relevant to the realisation of human rights and freedoms. For instance, in the German constitution the regulations are limited to indicating who is entitled to file a complaint in case of a violation of rights by public authorities (Article 93(4a) and (4b)) (Jagoda, 2020, p. 177 et seq.). A similar provision can be found in Slovenia (Article 160 of the Constitution). It should be emphasised that the constitutions which refer to statutory laws provide a great amount of flexibility. However, given the specific regulatory spectrum even in flexible systems these referrals are not unlimited. Those models require enacting statutory laws that implement the issues directly regulated by the constitution. The fundamental principles alongside the material and personal scope (Bosek, Wild, 2015, p. 101 et seq.) of these acts shall be in accordance with the constitution which should be interpreted restrictively. In case of any divergence or doubt, priority should always be accorded to constitutional provisions.

Table 1. Models of regulations based on the possibility of implementing changes in selected countries of the European Union.

COUNTRY	RIGID	MODERATELY RIGID	NO REGULATIONS
Austria	<input checked="" type="checkbox"/>		
Belgium			<input checked="" type="checkbox"/>
Bulgaria			<input checked="" type="checkbox"/>
Croatia		<input checked="" type="checkbox"/>	
Czech Republic		<input checked="" type="checkbox"/>	
Denmark			<input checked="" type="checkbox"/>
Estonia			<input checked="" type="checkbox"/>
Finland			<input checked="" type="checkbox"/>
France			<input checked="" type="checkbox"/>
Greece			<input checked="" type="checkbox"/>
Lithuania			<input checked="" type="checkbox"/>
Luxembourg			<input checked="" type="checkbox"/>
Latvia			<input checked="" type="checkbox"/>
Germany		<input checked="" type="checkbox"/>	
Romania			<input checked="" type="checkbox"/>
Slovakia		<input checked="" type="checkbox"/>	
Italy			<input checked="" type="checkbox"/>

Source: own research based on the provisions of the constitution of individual countries.

In the third model, the constitution does not contain any regulations concerning the institution of the constitutional complaint. Those competences are transferred to other bodies, institutions or courts. This system can be found in Estonia, where the role of the constitutional court is performed by the Supreme Court. This regulation differs from the classical concept of a constitutional complaint. However, despite the lack of legal norms placed directly in the constitution, the Estonian system provides other guarantees for the protection of citizen rights. A similar concept can be found in Malta, where the protection of rights is regulated mainly in statutory law. The Constitutional Court functioning in Malta has the power to adjudicate cases regarding human rights violations.

More importantly, in countries where the mechanism of constitutional complaints is regulated by the constitution a substantial lack of uniformity in terms of the scope of this institution can be found. In most of the member states the scope of the complaint is reduced to the term *violation of rights*. Only in Croatia, the Czech Republic, Spain (Kłopotcka-Jasińska, 2010, p. 125 et seq.), Slovakia and Slovenia, the legislative body emphasised that the subject of the complaint may be violations of human rights as well as the violation of freedoms. Usually the constitutional complaint is viewed as a guarantee that in a judicial model there is a certain 'democratisation of the system of constitutional control' and a protection of 'the basic guarantee of the concept of the rule of law' (Ludwikowski, 2000, pp. 158 et seq.). Therefore, the inability to use the institution of the complaint or an extensive restriction, should be perceived as a threat to the rule of law, as well as a lack of consideration for rights and freedoms. Restrictions in the protection of rights and freedoms can lead to an instrumental treatment of constitutional and statutory laws (Woch, 2011, p. 14 et seq.). Additionally, some constitutions require for the complainant to exhaust all existing legal remedies, before having access to the constitutional complaint. The practice of including such rules in the constitution is not common, as this aspect of the protection of rights and freedoms is a strictly procedural element of the mechanism of the constitutional complaint. In most European countries, the relevant provision is only found in a statutory legal act that is specifying all formal requirements needed to file a complaint. There are however, certain exceptions such as the constitution of Slovenia and Hungary that explicitly indicate the basic formal requirements. In Slovenia, it is specified that 'the Constitutional Court shall adjudicate in matters of constitutional complaints only after other legal remedies have been exhausted'. Provisions of the kind should be considered incorrect or at least likely to imply a real threat to the mechanism itself. That is because, governmental authorities do not always function effectively and can create appeal procedures which will undermine the possibility of filing a constitutional complaint. Certainly, there are governments which could aim to create facade (fictitious) appeal guarantees that will not provide any actual protection of rights. However, some regulations do seem more adequate and rational such as the one established in Hungary. Hungarian regulations indicate that it is

necessary for the complainant to exhaust all existing appeal procedures before filing a complaint which should be the last step in a case. That is unless the complainant is able to prove that appeal procedures were not accessible nor available in his case. (Tuleja, 2022, p. 322 et seq.; Zubik, 2007, p. 163).

The exact same practice was enforced for the procedure of filing complaints to the European Court of Human Rights. According to Article 35(1) of the European Convention on Human Rights, the admissibility of a referred case requires the exhaustion of all remedies provided by domestic law, in accordance with universally recognised principles of international law, unless there was no such possibility (Garlicki, 2010, p. 172). The Court can dispense a complainant when *the use of a domestic remedy would be unjustified and would constitute a disproportionate obstacle to the exercise of the applicant's right to file an individual complaint* (Gronowska, Jasudowicz, Balcerzak, Lubiszewski, Mizerski, 2010, p. 172).

In the Polish legal system, the scope of the requirement to exhaust legal remedies has been repeatedly explained by the Constitutional Court (Wiącek, 2011, p. 28, Michalczyk-Wlizio, 2021, p. 227 et seq.). For instance, in the ruling issued on the 17th of December 2009 it was emphasised that a constitutional complaint is 'inadmissible if a ruling has become final as a result of a failure to lodge an ordinary appeal or if the appeal has not been accepted because of formal defects which were caused by the complainant'. Moreover, the right to lodge a constitutional complaint arises when the final judgment or decision has been delivered to the complainant, even if it was possible to appeal the judgement by using appeal measures deemed as *extraordinary* (Trzciński, 2023, p. 110): a cassation complaint or a complaint intended for the resumption of proceedings" (Czeszejko-Sochacki, 1998, p. 31).

The issue of the mechanism of constitutional complaints has not yet been uniformly regulated in the judicial systems of European countries. Divergences can be found not only in terms of statutory laws, but also – and perhaps mostly – at the very level of constitutional regulations (Skrzydło, 2007, p. 76 et seq.; Orłowski, 2021, p. 237 et seq.). Undoubtedly, different levels of protection of human rights and freedoms are provided by European countries depending on the model of regulations they chose (Łabno, 2002, p. 768 et seq.). From a legal and factual point of view, this lack of unison does raise legitimate

doubts. However, the majority of EU member states are also signatories to various conventions and treaties concerning human rights and freedoms. In view of the above, the question of internationally standardising the scopes of complaints and procedures used by constitutional courts or tribunals, should be considered so that member states (at least during their EU membership) cannot restrict or violate any rights.

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