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RESEARCH ARTICLE

Individual Application to the Constitutional Court of Poland

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Abstract

The Constitutional Court was established in Poland in 1985, a country that adopted the European model constitutional justice system. Individual application to the Constitutional Court (Constitutional complaint), which is an important mechanism in the protection of individual rights and freedoms and also ensures the development of the Constitutional Court jurisprudence, was made possible for the first time in Poland with the Constitution that came into force in 1997. The Constitutional Tribunal Act, which was adopted in the same year with the 1997 Polish Constitution, contains regulations regarding individual application. Because of the judicial reforms carried out in 2016, the Constitutional Tribunal Act Law was changed. The Act of Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, which is the most recent act put into force on January 3, 2017, includes up-to-date regulations regarding individual applications. The review authority of the Polish Constitutional Court regarding individual applications differs from that in Turkey. In the Republic of Poland, when an application is made to the Constitutional Court on the grounds that fundamental rights and freedoms guaranteed in the constitution have been violated, the legal regulation itself is subject to unconstitutionality review. The reasons for choosing Poland in this study include the fact that the Constitutional Court was established in Poland before the collapse of the Eastern Bloc; that it sets an example for other Eastern European countries; and that legal regulations can also be subject to individual application.

Keywords

Polish Constitutional Court, Individual Application, Constitutional Review, Constitutional Complaint, Fundamental Rights and Freedoms

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Introduction

For constitutions to function to limit power, it is not enough for them to contain regulations regarding the basic organs of the state; besides, individual rights and freedoms must be recognised and guaranteed. Abstract norm reviews and concrete norm reviews, which are types of constitutionality reviews, are not sufficient to secure individual rights and freedoms. In addition to these review mechanisms, the opportunity for individual application to the Constitutional Court should be provided.

This study discusses the system of individual application to the Constitutional Court in Poland, which has a special place in the democratisation waves after the end of Soviet rule in Eastern Europe. Poland was selected because the country established the Constitutional Court while still under Soviet rule and pioneered other post-communist countries regarding the establishment of the Constitutional Courts.

In this study, the focus is on the history and structure of the Polish Constitutional Court. Following this, the types of norm reviews carried out by the Polish Constitutional Court will be briefly discussed. Next, the study will explain how individual application works. Regarding the functioning of individual applications, the study will deal with who initiates individual applications in what circumstances and in what way. Finally, the review procedure of the Polish Constitutional Court, the decisions that can be made, and the effects of the decisions will be discussed.

I. Establishment and Historical Development of the Polish Constitutional Court

Judicial review is important for protecting the fundamental rights and freedoms included in the constitutions. In this regard, there is a need to examine the establishment of the Polish Constitutional Court and its judicial review mechanism.

Poland's[1] position[2] has always been different from that of other Eastern European countries. It not only has the oldest Constitutional Court in Eastern Europe but also has become a pioneering country in this regard[3] because the opposition in Poland emerged early and grew stronger rapidly. There are two reasons for this: The first is that there was a great struggle against Soviet domination in Poland, and they were

1 With its Constitution dated May 3, 1791, Poland had the world's second and Europe's first Constitution, after the 1787 US Constitution. However, the Constitution never came into force, and four years after its adoption, Poland lost its independence and was disintegrated by Austria, Prussia, and Russia. Herman Schwartz, *The Struggle for Constitutional Justice in Post- Communist Europe* (The University of Chicago Press, 2000) 49; Rett R. Ludwikowski, 'Two Firsts: A Comparative Study of the American and the Polish Constitutions' (1987) 8 Michigan Journal of International Law 117.

2 Poland, which came under Soviet rule, later took part in the Eastern Bloc as a member of the Warsaw Pact. However, the republic's experience and liberal policies in its history caused Poland to be in a different position from Hungary. Bülent Yücel, 'Yarı-Başkanlık Sisteminin Hükümet Modeli Üzerine Karşılaştırmalı Bir Çalışma: Fransa Modeli Ve Komünizm Sonrası Polonya', (2003) 52 Ankara Üniversitesi Hukuk Fakültesi Dergisi, vol. 52, pp. 352, 2003.

3 Piotr Czarny and Bogumił Nalezin´ski, 'Law-making Activity of the Polish Constitutional Tribunal' in Monica Florczak-Wator (ed), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020) 165.

always in a struggle with their neighbours for independence. In addition, they were a homogeneous nation state. The second reason is that the communist regime in Poland has always been authoritarian, not totalitarian[4].

Looking at the historical background of the Polish Constitutional Court, we see that there was no judicial review mechanism in the Polish Constitutions before World War II and that a judicial review mechanism could not be developed during Soviet rule. Neither the 1921 nor the 1935 Constitutions included a Constitutional Court, and although the necessity of constitutional jurisdiction was put forward by the doctrine in the early 1970s, there was no tradition of constitutional jurisdiction that could be referred to when the transformation process[5] began in Poland in the 1980s. After the formation of the 1st Solidarity Movement in 1981, the idea of urgently establishing a constitutional court emerged[6].

In the Autumn of 1981, lawyers began working on the establishment of the Constitutional Court. The constitutional amendment of 26 March 1982 introduced the Polish Constitutional Court[7] and the Impeachment Court into the Polish legal system. Although the law for the Impeachment Court, which ensures the functioning of the institution, was accepted on the same day, the Constitutional Tribunal Act was accepted on April 29, 1985, after three years of conflicts regarding the regulation. It has been stated by groups opposed to the idea of establishing the Constitutional Court that it is difficult to support it politically, considering the independence of the institution[8].

During this period, the assertiveness of the Supreme Administrative Court on constitutional issues caused the regime to be uneasy about the Constitutional Court and to want to limit it. In these circumstances, because of a hard-won compromise that included several limitations on the court's position and powers, the Constitutional Tribunal Act was adopted on April 29, 1985[9]. The most important limitation regarding

4 Levent Gönenç, *Prospects for Constitutionalism in Post-Communist Countries* (Kluwer Law International, 2002), 123, 124.

5 Poland has been the leading country in democratisation movements in Eastern Europe. The "Polish Solidarity Movement", dating back to the 1980s, sparked subsequent revolutionary events in Eastern Europe. Gönenç (n 4) 123; The Solidarity movement in Poland and its leader Lech Walesa gained legitimacy in 1989 and later. Stephen Gardbaum, 'Revolutionary Constitutionalism' (2017) 15 International Journal of Constitutional Law 190.

6 Leszek Lech Garlicki, 'The Experience of the Polish Constitutional Court' in Wojciech Sadurski (ed), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective* (Kluwer Law International 2002) 265. Although Constitutional Courts were established in many Western European countries after World War II, the constitutional judiciary was rejected as a manipulative tool of the bourgeois class in Central and Eastern Europe and in Poland, which was under the influence of Communist rule. Mark F. Brzezinski and Leszek Garlicki, 'Judicial Review in Post-Communist Poland: The 'Emergence of a Rechtsstaat' (1995) 31 (1) Stanford Journal of International Law 15.

7 The Polish Constitutional Court was established at an early stage of the transition to democracy. Although additional powers were introduced with the constitutional amendments in 1989 after its establishment, the court's powers are more limited than those of the constitutional courts of similar countries in Europe. Ergun Özbudun, Demokrasiye *Geçiş Sürecinde Anayasa Yapımı* (Bilgi Yayınevi,1993) 164.

8 Garlicki (no 6) 265.

9 Schwartz (n 1) 51, 52.

the proceedings of the Constitutional Court was that the decision of the court could be overturned by a decision taken by a two-thirds majority of the Sejm (Polish Parliament) on unconstitutional laws[10].

The first judges of the Constitutional Court panel were appointed in November 1985, and the first trial of the newly established Constitutional Court was held in May 1986[11]. Thus, the Constitutional Court was established before the collapse of the communist system. It differed from Western European models because the court's duties and authority were realised as a result of a compromise[12]. According to the establishment and historical information of the Constitutional Court, Poland preferred the European Model Constitutional Court, where a central judicial body conducts review[13].

Fundamental changes became possible after the systemic transformation that began in 1989[14]. The 1985 law was amended to remove some limitations on the Constitutional Court's duties and powers. Through incompatible legislative amendments, until 1997, the Sejm retained the power to override decisions of the Constitutional Court on the unconstitutionality of laws[15]. The fundamental change in the political situation led to a great increase in the importance of the Constitutional Court. Political pluralism allowed opponents to emerge from among the public. During this period, there was no new constitution in Poland. Despite the lack of a new constitution in Poland until 1997, the constitutional amendments adopted did not solve important problems[16].

Considering the structure of the Polish Constitutional Court, according to Article 194[17] of the Polish Constitution, the Constitutional Court consists of fifteen judges who are elected by the Sejm[18] for a term of nine years from among persons distinguished by their legal knowledge. According to Article 6 of the Act of November 30, 2016 on

10 Garlicki (n 6) 265.

11 Ibid.. 265; Daniel H. Cole, 'Poland's 1997 Constitution in Its Historical Context' (1998) 1 Saint Louis-Warsaw Transatlantic Law Journal 1.

12 Garlicki (n 6) 265.

13 For the Constitutional Court crisis in Poland and subsequent thoughts on the review conducted by ordinary courts (American Model), see Piotr Radziewicz, 'Judicial Change to the Law in-Action of Constitutional Review of Statutes in Poland' (2022) 18 (1) Utrecht Law Review 38; Marcin Szwed, 'The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights' ECtHR 7 May 2021, No. 4907/18, Xero Flor w Polsce sp. z o.o. v Poland (2022) 18 (1) European Constitutional Law Review 132-154.

14 Despite the significant changes in 1989, the decisions of the Constitutional Court were not binding until the New Polish Constitution came into force on October 17, 1997. Sven Höbel, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law: A Comparison of Constitutional Courts' Approaches' (2007) 3 Croatian Yearbook of European Law and Policy, 516.

15 Garlicki (n 6) 266.

16 Ibid. 266.

17 For the English text of the Constitution, see <The Constitution of the Republic of Poland (sejm.gov.pl)> accessed 25th December 2023.

18 The fact that all members of the Constitutional Court were elected by the Sejm created fears that they might be influenced by politicians, but efforts were made to reduce this possibility. In addition, not all members are elected at the same time, which reduces the possibility of judges being influenced by political will. Hüseyin Bilgin, 'Polonya Yargı Sistemi Üzerine Düşünceler' (2013) 107 Türkiye Barolar Birliği Dergisi 390.

the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, "The General Assembly shall comprise the incumbent judges of the Tribunal who have taken the oath of office before the President of the Republic of Poland"[19].

The President appoints the President and Vice-President of the Constitutional Court from among the candidates recommended by the General Assembly of the Constitutional Court. The issues on which the Constitutional Court has the authority to decide are listed in Article 188 of the Polish Constitution. These are;

- the conformity of statutes and international agreements to the Constitution;

- the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;

- the conformity of legal provisions issued by central State organs to the Constitution and ratified international agreements and statutes;

conformity to the Constitution of the purposes or activities of political parties;

- complaints concerning constitutional infringements, as specified in Article 79, paragraph 1.

In addition, Article 189 of the Constitution stipulates that the Constitutional Court will resolve jurisdictional disputes between the central constitutional organs of the State.

In relation to the decisions made by the Polish Constitutional Court, the majority required for decisions to be made varies in accordance with the type of case and the composition of the Constitutional Court hearing the case. For instance, decisions made by the General Assembly of the Constitutional Court require the presence of at least two-thirds of the Justices, including the President or the Vice President of the Tribunal, and they are adopted by a simple majority unless the law requires otherwise[20]. This is typically reserved for the most important or complex cases, ensuring a broad consensus among the Justices.

As for the decisions made by the Court proceeding constitutional control of the acts, the number of Justices deciding on a case is based on the nature of that case

19 The Act of November 30, 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, [Published in the Journal of Laws of the Republic of Poland on 19 December 2016, item 2072] https://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/Am._in_force_6II2019_The_Act_on_the_Organisation_of_the_Constitutional_Tribunal_and_the_Mode_of_Proceedings_Before_the_Constitutional_Tribunal_en.pdf accessed 2nd January 2023

20 Piotr Tuleja, 'The Polish Constitutional Tribunal' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press 2020) 625.

under review. For example, five Justices are required for the constitutional review of legislative acts and international treaties to determine their compatibility with the Constitution or with ratified international treaties. On the other hand, for the constitutional review of subordinate norms, constitutional complaints, and complaints against the rejection of a petition to review a norm, three Justices are sufficient[21]. It is also stated in Article 190 of the Constitution that the decisions of the Constitutional Court are binding and final [22].

II. Polish Constitutional Judiciary

Poland's Constitutional Court has adopted both preventive and suppressive constitutionality reviews[23]. The establishment of a Constitutional Court during communist rule, before the dissolution of the Eastern Bloc, set an example for other Eastern European countries[24]. In addition to the Polish Constitutional Court, the Ombudsman institution, which was established in 1987, is also a pioneer for the Eastern Bloc countries. This institution has made a significant contribution to human rights proceedings in many human rights issues before they are brought before the Constitutional Court[25].

The Polish Constitutional Court, which sets an example for other Eastern European countries, faced two important limitations in the end of the 1990s. One of these limitations was the Sejm's overcoming of the Constitutional Court's unconstitutionality decisions and the obstruction of the use of its judicial powers, and the other was the lack of a human rights catalogue in Poland[26]. The Court has overcome these limitations in various ways; for example, it uses the "rule of law principle" when granting rights that are not expressly regulated in the constitution. Prochazka criticised this attitude of the court[27]. However, there is nothing more natural than removing some sub-principles, rights, and freedoms from basic principles such as the rule of law, democratic state, and the state that respects human rights in the constitution. It is possible to agree with Prochazka's criticism that restricting these rights to principles not included in the constitution rather than creating rights that are not included in the constitution based only on basic principles will cause drawbacks.

21 Tuleja (n 20) 626.

22 The decision of the Constitutional Court enters into force from the day of its publication; However, the Constitutional Court may set another date for the termination of the binding force of a normative law. This period cannot exceed 18 months according to one law or 12 months according to any other normative law. If the decision has financial consequences that are not foreseen in the budget, the Constitutional Court, after taking the opinion of the Council of Ministers, determines the date on which the relevant normative act will cease to be binding. Article 190 of the Constitution.

23 Erdal Onar, *Kanunların Anayasaya Uygunluğunun Siyasal ve Yargısal Denetimi ve Yargısal Denetim Alannda Ülkemizde Öncüler* (2003) 122, 125.

24 Onar (n 23) 134.

25 Schwartz (n 1) 49.

26 Radoslav Prochazka, 'Polonya, Çek Cumhuriyeti ve Slovak Cumhuriyetinde Anayasa Yargısı' in Ozan Ergül (ed), *Democracy and Judiciary* (Türkiye Barolar Birliği 2005) 314.

27 Prochazka (n 26) 314.

It is quite remarkable that the decisions made by the Constitutional Court regarding unconstitutionality were invalidated by the legislative body, the Sejm. However, this practise was ended in 1999 after the adoption of the 1997 Constitution[28].

Considering the constitution of the Republic of Poland, the Constitutional Court not only managed to contribute to the democratic state of law by acting in line with the limits of its jurisdiction but also eliminated deficiencies during the Soviet domination period, producing concepts that would contribute to constitutional democracy[29].

A. Preventive Review

In cases where constitutionality review is carried out by a central judicial body, the review that occurs before the law comes into force is called preventive (a priori) review[30]. Because preventive review is carried out before the law comes into force, it has the function of preventing unconstitutional laws from entering the legal system. The best example of this type of review is the one conducted by the French Constitutional Council[31]. The preventive review method was implemented in Spain between 1980 and 1985 and is still in practise in Portugal and Romania[32].

Article 122 of the Constitution describes the phase of an accepted bill after it is submitted to the President. According to paragraph 3 of Article 122 of the Constitution, the President may apply to the Constitutional Court for adjudication on the constitutionality of a law sent to him/her for signature after it has been accepted by the assembly. After the Constitutional Court judges on constitutionality, the President must sign and publish the bill[33].

According to paragraph 4 of the same Article of the Constitution, the President rejects signing the bill that the Constitutional Court has ruled unconstitutional. If the decision on unconstitutionality is partial and if these parts are not inextricably linked to the entire bill, the President, after obtaining the opinion of the Marshal of the Sejm, signs the provisions not found to be unconstitutional or returns the bill to the Sejm for the elimination of the unconstitutionality.

28 Onar (n 23) 135.

29 Mustafa Erdoğan, 'Anayasa Mahkemeleri Önemli midir?" Orta Avrupa'da Anayasa Yargs ve Demokrasinin Pekişmesi' (2005) 54 Ankara Üniversitesi Hukuk Fakültesi Dergisi 19; the Hungarian and Slovak constitutional courts tried to influence the policies of the parliaments for different reasons and by using different methods compared with the Polish and Czech constitutional courts. However, the courts of Poland and the Czech Republic, while adhering to the ideologies established by their post-revolutionary leaders, were more active than the constitutional courts of Hungary and Slovakia in communicating with local courts. Prochazka (n 26) 313.

30 Onar (n 23) 122.

31 Şeref İba and Abbas Kılıç, *Anayasa Yargısı Dersleri* (Turhan Kitabevi 2022) 65.

32 Wojciech Sadurski, *Rights Before Courts-A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005) 74.

33 Onar (n 23) 135

In paragraph 5 of Article 122, it is mentioned that the President shall send the bill, together with its justifications, to the Sejm for reconsideration, without applying to the Constitutional Court. If the returned bill is re-approved by the Sejm with a three-fifths majority in a session where at least half of the total number of members are present, the President has to sign the bill within seven days and publish it in the Journal of Laws of the Republic of Poland (Dziennik Ustaw). It is not possible for the President to take the bill passed again by the Sejm to the Constitutional Court in accordance with paragraph 3. In other words, the President can never send the bill repassed by the Sejm to the Constitutional Court for preventive review. On the other hand, the President has the option of referring that repassed bill to the Constitutional Court only for suppressive review.

According to Article 133 of the Constitution, in addition to the laws, the President, before ratifying an international agreement, may also apply to the Constitutional Court with a request to adjudicate upon its conformity to the Constitution.

B. Suppressive Review

Suppressive review (a posteriori) occurs at any stage after laws are put into force, either when persons authorised in the constitution may file an application with the Constitutional Court without waiting for the law to be implemented in a case pending in a court or when bringing the norm applied in a pending case to the Constitutional Court with the claim that it is unconstitutional. In the Polish constitutional justice system, in addition to the preventive review mentioned above, there is also suppressive (corrective) review[34]. Suppressive review consists of abstract norm review, concrete norm review, and individual application (constitutional complaint) [35]. The method of individual application is discussed under a separate heading below.

1. Abstract Norm Review

Abstract norm review is a review method that is accepted in all post-communist countries[36]. Abstract review offers a useful instrument for facilitating legislative compromise[37]. According to Article 188 of the Constitution, the Constitutional Tribunal shall decide on the following issues: the conformity of statutes and international agreements to the Constitution; the conformity of a statute to ratified international agreements whose ratification requires prior consent granted by statute; the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements, and statutes; the conformity to the Constitution of

34 Onar (n 23) 122,136.

35 Garlicki (n 6) 273.

36 Sadurski (n 32) 65.

37 Georg Vanberg, 'Abstract Juicial Review, Legislative Bargaining, And Policy Compromise' (1998) 10 (3), 1998, 314.

the purposes or activities of political parties; and complaints concerning constitutional infringements, as specified in Article 79, paragraph 1.

According to sub-paragraph 1 of paragraph 1 of Article 191, the President, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 deputies, 30 senators, the First President of the Court of Appeal, the President of the Council of State, the Chief Public Prosecutor, the President of the Supreme Supervisory Board, and the Commissioner of Citizens' Rights may apply to the Constitutional Court regarding the matters listed in Article 188. However, the application authority of the organs listed in the continuation of Article 191 is limited. The National Council of the Judiciary may apply to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges. The constitutive organs of units of local government, the national organs of trade unions, as well as the national authorities of employers' organisations and occupational organisations, churches and religious organisations may make such applications if the normative act relates to matters relevant to the scope of their activity[38]. According to Article 190 of the Constitution, the decisions of the Constitutional Court are binding and final.

2. Concrete Norm Review

The concrete norm review method refers to the fact that the decision on the merits of a case in a court depends on whether the norm to be applied in that case is constitutional or not[39]. In concrete norm review, the court hearing the case makes it a pending issue to decide whether the norm to be applied complies with the constitution. Concrete norm review is implemented in most Central and Eastern European countries[40]. When ordinary courts refer constitutional questions to them under the concrete review limb, constitutional courts can and should respond to them by carefully considering their arguments. Rather than being viewed as a paternalistic exposition of the constitution by the constitutional tribunal, these constitutional referrals by ordinary courts should be viewed as a forum for conversation on constitutional matters between the constitutional tribunal and ordinary courts[41]. Although in practise, the courts are cautious about applying for concrete norm review, there is an increase in the number of applications[42].

38 Garlicki (n 6) 274.

39 Kemal Gözler and *Türk Anayasa Hukuku* (Ekin Yayınevi 2019) 1141; Erdoğan Teziç and *Anayasa Hukuku* (Beta Yayınevi 2019) 244.

40 Garlicki (n 6) 274; Sadurski (n 32) 65.

41 David Kosař and Sarah Ouředníčková, 'Responsive Judicial Review "Light" in Central and Eastern Europe–A New Sheriff in Town?' (2023) 48 Review of Central and East European Law 452.

42 Garlicki (n 6) 274.

Application to the Constitutional Court can be done through concrete norm review regarding whether a law to be used to resolve a legal issue regarding a case pending at any court conforms to the constitution, approved international agreements, or laws. Article 193 of the Polish Constitution regulates application to the Constitutional Court through concrete norm review.

3. Individual Application

Individual application refers to a legal mechanism that offers individuals the opportunity to object to laws, decisions, or actions of the state that they view as a violation of their constitutional rights by presenting their case directly to a constitutional court. This legal mechanism is also in effect in Poland according to Article 79 of the Constitution of the Republic of Poland. Since the focus of this article is on individual application to the Constitutional Court in Poland, in the following sections, the conceptual framework of this legal mechanism will be given, which is followed by detailed information about how it works in the country.

III. Individual Application in the Polish Constitutional Jurisdiction

The system of individual application[43] (constitutional complaint) shaped on the basis of the Austrian model entered the Polish constitutional justice system with the constitution adopted in 1997[44]. In the Turkish legal system, individual application, which is a newer experience than the Polish constitutional system, is a concept that was included in the Turkish constitutional justice system with the Constitutional Amendment of September 12, 2010. The system of individual application[45], whose acceptance has been discussed in the Turkish legal system since the 1960s, was created on the basis of examples such as Germany and Spain[46]. In the case of Poland, the Austrian model of the individual[47] application system was used[48].

43 Schwartz stated that the individual application system in the Polish Constitutional Court will bring citizens and the Constitutional Court closer together and make a significant contribution to the court in human rights proceedings. Schwartz (n 1) 73.

44 Adam Bodnar, 'Anayasa Mahkemesi'ne Bireysel Başvuru (Doğu Avrupa Deneyimi)' in B. Yücel and İ. G. Şen (eds), *Anayasa Mahkemesi'ne Bireysel Başvuru Hakkı Sempozyumu* Anadolu University (2011) 116.

45 Bahadır Kılınç, 'Karşılaştırmalı Anayasa Yargısında Bireysel Başvuru (Anayasa Şikâyeti) Kurumu ve Türkiye Açısından Uygulanabilirliği', (2008) 24 Anayasa Yargısı 20.

46 Selin Esen Arnwine, 'İspanya'da Amparo Başvurusu ve Türkiye' in B. Yücel and İ. G. Şen (eds), *Anayasa Mahkemesi'ne Bireysel Başvuru Hakkı Sempozyumu* Anadolu University (2011) 100.

47 In the Austrian model, according to Article 140 of the Constitution, people who claim to have been directly harmed by any law due to its unconstitutionality can file an application against the relevant law in the Constitutional Court. However, for this to occur, the law in question must have direct legal consequences without the need for any court decision or administrative action. Gerhart Holzinger, 'Avusturya Anayasa Hukukunda Anayasa Şikâyeti ve Bireysel Başvuru' (2009) 26 Anayasa Yargs, 69; in Austria, people who claim that their rights guaranteed in the constitution have been violated by an administrative action can also apply to the Constitutional Complaint, which is regulated in a separate article of the Constitution (Article 144 of the Constitution), and to the Constitutional Court. The term "administrative procedure" refers to individual proceedings based on public power, such as building permits, tax transactions, and traffic fines. Holzinger (n 37) 62.

48 Bodnar (n 44) 116.

In the Turkish legal system, individual application[49] is defined as a way of seeking justice applied by people whose rights have been violated due to actions taken by the executive and judicial authorities[50]. The Polish individual application system[51], which differs from the German constitutional complaint model[52], combines elements of the Polish constitutional judiciary. In this respect, individual application constitutes a third type of suppressive review besides abstract norm review and concrete norm review[53].

Individual application, which is stated in Article 79 of the Polish Constitution, is available in case the fundamental rights and freedoms included in the constitution are violated as a result of a final judgement or decision given by the courts or public institutions. In the face of such a violation, everyone whose constitutional rights and freedoms have been violated has the right to apply to the Constitutional Court regarding the constitutionality of the law or norm law[54] related to the rights and freedoms specified in the constitution on which the final decision is based. It can be seen here that the issue of unconstitutionality is not about a specific practise but about the content of the relevant legal regulation[55].

Regulations regarding the right to individual application to the Polish Constitutional Court are included in the Polish Constitution and the Constitutional Tribunal Act. The Constitutional Tribunal Act, adopted after the 1997 Constitution, was repealed, and the Constitutional Tribunal Act has been changed several times. The law currently in force is the Act of Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, which entered into force on January 3, 2017.

A. Those with the Individual Application Right

The right to individual application to the Polish Constitutional Court is stated in Article 79[56] of the Polish Constitution. According to Article 79, within the framework of the principles specified in the law, everyone whose constitutional rights and freedoms are violated has the right to individual application to the Constitutional

49 Göztepe lists the basic functions of individual application as "ensuring and protecting the direct use of rights and freedoms, expanding the scope of the principle of constitutional interpretation, ensuring unity in the judiciary, and contributing to the development of citizens' democratic consciousness". Ece Göztepe, 'Türkiye'de Anayasa Mahkemesi'ne Bireysel Başvuru Hakkının (Anayasa Şikâyeti) 6216 Sayılı Kanun Kapsamında Değerlendirilmesi' (2011) 95 Türkiye Barolar Birliği Dergisi 21.

50 Kılınç (n 45) 23.

51 When the individual application method was accepted by the Polish Constitutional Court, it was described as a revolution in the Polish legal system. Ryszard Cholewinski, 'The Protection of Human Rights in the New Polish Constitution' (1998) 22 Fordham International Law Journal, 288.

52 Esen Arnwine (n 46) 99.

53 Bodnar (n 44) 117.

54 "Regardless of any general and abstract form of norm, a norm is a law within the meaning of Article 79."

55 Bodnar (n 44) 117.

56 Constitution of the Republic of Poland. <The Constitution of the Republic of Poland (sejm.gov.pl)> accessed 25th December 2023.

Court for the constitutionality of a law or norm law on which a court or public institution bases its final decision regarding the freedoms and rights specified in the Constitution.

According to Article 79 of the Constitution, it is seen that the expression of "everyone whose constitutional rights and freedoms are violated" is used. The interpretation of certain rights and freedoms in the constitution determines the scope of the individual application system. The right to individual application is undoubtedly a right granted to every Polish citizen. However, since the term "everyone" is used, foreigners and real persons who are not Polish citizens can also benefit, subject to exceptions[57]. Both real and legal persons have the right to apply individually. However, public and state-owned legal entities do not have the right to individual application.[58] Legal scholars and judges accept that the individual application process can also be exercised by legal entities and associations without legal personality, if these organisations can exercise their constitutional rights and freedoms[59].

The Polish Constitutional Court finds individual applications made by municipalities inadmissible. The most important justification of the Court in this regard is that the addressee of the rights arising from individual constitutional rights and freedoms is not the organisation performing public duties[60]. Political parties, religious organisations or labour unions can make individual applications filed by legal entities on the grounds that their constitutional rights have been violated.

Turkish practise and Polish practise are similar in terms of individuals who have the right to individual application because, in both countries, there is no right of individual application for public legal entities. In Turkey, private law legal entities are granted the right to individual application only regarding the violation of rights belonging to the legal entity, whereas in Poland, an application method limited to private law legal entities is accepted for entities such as religious organisations and labour unions.

B. Application Conditions

1. Violation of Constitutional Rights and Freedoms

Individual application is possible when constitutional freedom (right) is violated. If the complainant directly cites a specific provision that regulates a particular

57 Marta Klopocka-Jasinka and Adam Krzywoń, 'On The Right Of Public Law Entities To Lodge A Constitutional Complaint In The Light Of The Jurisprudence Of The Polish Constitutional Tribunal' (2016) 6 Wroclaw Review of Law, Administration & Economics 47.

58 Bodnar (n 44), 117.

59 Klopocka and Krzywoń (no 57) 47.

60 Lech Jamróz, 'The Right to Constitutional Complaint In Poland' in Anna Budnik (ed), *Locus Standi Across Legal Cultures* (Temida 2015) 148.

freedom (right) found in the second part of the Constitution, this does not create much difficulty. However, cases in which the complainant refers to legal principles (Part I provision), such as the democratic rule of law, are problematic. Although the Court accepts that this is not absolutely excluded, it is the duty of the complainant to show that a violation of such a provision results in the violation of his or her rights and freedoms as set out in the Constitution[61]. If a fundamental right is inherent in another right that is included in the constitution and which can be subject to individual application, individual application should also be made in terms of that right[62].

An exception is foreseen in paragraph 2 of Article 79 of the Constitution, and the rights in Article 56 of the Constitution, which relate to granting asylum to foreigners in Poland, are not related to paragraph 1 of Article 79, that is, individual application.

In Polish Constitutional Jurisdiction, an individual application can only be based on a statutory provision in its own right, rather than on the interpretation of the judicial or administrative authority[63]. For individual application to be implemented, domestic legal remedies must be exhausted, but it is not mandatory to apply to the Supreme Court at the legal remedy stage[64].

2. Exhaustion of Domestic Legal Remedies

To operate the individual application system in the Polish Constitutional Court, domestic legal remedies must be exhausted. For individual applications, legal benefits are required. If the violation can be resolved through general courts, there is no legal benefit in making an individual application to the Constitutional Court. Because of the secondary nature of the individual application method, this method can only be used if it is not possible to achieve the purpose of the application in any other way[65].

In the context of exhausting domestic remedies to make an individual application to the Constitutional Court of Poland, an application to the Supreme Court is not mandatory as a domestic remedy. This is because appeal means the interpretation of the law[66].

61 Jamróz (n 60) 153. Tuleja (n 20) 637.

62 Yavuz Sabuncu and Selin Esen Arnwine, 'Türkiye İçin Anayasa Şikâyeti Modeli Türkiye'de Bireysel Başvuru Yolu' (2004) 21 Anayasa Yargs 229,233.

63 Garlicki (n 6) 276.

64 Bodnar (n 44) 117.

65 Sabuncu and Arnwine (n 62) 229.

66 Bodnar (n 44) 117.

C. Application Procedure

1. Matters to be Included in the Application Petition

According to Article 53 of the Act of November 30, 2016, an individual application shall specify a challenged provision of a statute or another normative act upon which a court or a public administration authority has made a final decision on the complainant's freedoms, rights, or obligations specified in the Constitution, and with regard to which the complainant requests the Tribunal to determine non-conformity to the Constitution. It shall also indicate which constitutional freedom or right of the complainant and in what way, according to the complainant, has been infringed. In addition, individual application shall provide justification for an allegation about the non-conformity of the challenged provision of a statute or another normative act to the indicated constitutional freedom or right, including arguments or evidence in support of the allegation. It shall also state relevant facts and substantiate the date of service of the judgement, the decision, or another determination, as referred to in paragraph 1 of Article 77. Finally, individual applications shall provide information on whether an extraordinary means of appeal was filed against the judgement, the decision, or the determination, which are referred to in paragraph 1 of Article 77.

2. Obligation of Representation by a Lawyer or Legal Advisor

According to Article 44 of the Act of November 30, 2016, within the scope of the preparation and submission of a constitutional complaint and an appeal against a decision on refusal to proceed with the complaint as well as with regard to the legal representation of the complainant in proceedings before the Tribunal, there is a requirement that the complainant shall be represented before the Tribunal by an advocate or a legal adviser unless the complainant is a judge, a public prosecutor, an advocate, a legal adviser, a notary public, a professor of law, or a scholar with a post-PhD degree in Law. According to the same Article, where the complainant cannot cover the costs of legal representation, the complainant may file a request with the district court of his/her place of residence for an advocate or a legal adviser to be appointed by the court.

Contrary to Turkish law, the obligation to be represented by a lawyer during individual applications has various drawbacks for Poland. Although a person may request the appointment of a lawyer because of his/her economic weakness, such an obligation will make it difficult to exercise the right to individual application. On the other hand, there may be positive consequences of having individual application requests handled by a professional lawyer.

3. Application Period

There is a time limit for individual applications to the Polish Constitutional Court. This period is determined in Article 77 of the Act of November 30, 2016. Accordingly, the individual application must be made within three months after all domestic remedies have been exhausted, i.e., after the final judgement is given or the legally valid decision reaches the applicant. Three months is a disqualifying period.[67]

4. Court Costs

According to Article 54 of the Act of November 30, 2016, the State Treasury shall cover the costs of proceedings before the Tribunal. The Tribunal shall issue, along with a judgement granting a constitutional complaint, a decision on the reimbursement of the costs of proceedings before the Tribunal to the complainant by a public authority that has issued a normative act that is the subject of the constitutional complaint. Where justified, the Tribunal may decide that the costs of proceedings before the Tribunal are to be reimbursed when a constitutional complaint is dismissed. The Tribunal may determine the costs of legal representation incurred by a complainant lodging a constitutional complaint, payable to an advocate or a legal adviser, depending on the nature of the case and the extent to which the said attorney's involvement contributed to the examination and determination of the case.

D. Types of Decisions

Individual applications do not prove that the applicant's personal rights have been infringed. Instead, the violation of the applicant's individual rights is a prerequisite for considering the application to review the underlying norm. Consequently, the Polish individual application cannot be classified as an actio popularis. When an individual application is deemed admissible, the Constitutional Tribunal solely evaluates the objective constitutionality of the contested norm. At no point in the proceedings does the Tribunal investigate whether the applicant's individual rights have been violated[68].

Determining whether a norm is unconstitutional because of the norm itself or its implementation can often be a complex task. This distinction becomes particularly challenging when one must decide whether the norm itself or its interpretation infringes upon fundamental rights. The Constitutional Tribunal asserts that when provisions are consistently interpreted, their content aligns with their interpretation. In such instances, any violation originates from the norm itself and not its application. Consequently, the complaint is considered valid. However, this approach does not

67 Ibid. 117.

68 Tuleja (n 20) 637.

address the broader issue of how one can independently determine the content of a norm separate from its enforcement[69].

The Polish Constitutional Court may grant upon individual application as follows[70]:

- It can decide that the legal regulation alleged to be unconstitutional, or more accurately, to be contrary to the fundamental rights and freedoms guaranteed in the constitution, is constitutional.

- It can decide that the legal regulation claimed to be unconstitutional cannot be examined according to the justification claimed by the individual applicant, that is, the constitutional provision.

- It can decide that the allegedly unconstitutional legal regulation is unconstitutional.

- It can make interpretive decisions. In other words, if the law is interpreted in a certain way, it can decide whether Article A of the law is contrary to Article B of the constitution or is compatible with it.

- It can also make decisions limited to practise, that is, decisions stating that Article A of the law is unconstitutional as applied in certain cases.

E. Effects of Decisions

In the Polish Constitutional Court, the individual effects of the decisions were expressed in the form of a retrial. In civil and criminal cases, the decision of the Polish Constitutional Court that the provision-underlying the case is unconstitutional does not directly overturn the relevant court decision. In addition, individuals can also demand compensation by filing a separate application[71]. If we express general effects other than these individual effects, the unconstitutionality decision given by the Polish Constitutional Court because of the individual application results in the cancellation of the norm in question. The Polish Constitutional Court may postpone the entry into force of its annulment decision for 18 months. In this respect, it is important for the legislature to make the necessary legal regulations[72]. According to the Constitution of The Republic of Poland Article 190 paragraph 3, a judgement of the Constitutional Tribunal shall take effect from the day of its publication; however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such a time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act.

69 Ibid. 637.

70 Bodnar (n 44) 118.

71 Ibid. 119.

72 Ibid. 119.

IV. Criticisms and Individual Application Decisions

In the Polish Constitutional system, the fact that individual application relates only to legal regulations is criticised as to whether it provides sufficient protection for individuals, and a revision of the individual application system according to the German Constitutional Complaint model is recommended. The legal nature of the decisions of the Polish Constitutional Court, which seemed like a warning about changing the legal regulations, the late decision of individual application requests due to workload, the fact that violations of individual rights in the context of individual applications arise from gaps in the law, and the difficulty in processing the individual application in these cases are all among other problems in relation to individual application made to the Constitutional Court [73].

In one of the individual applications made to the Polish Constitutional Court, the application concerned the pre-trial detention order of trainee judges. The reason for the application was stated as the fact that the trainee judges did not hold the title of judge during the internship period, and in this respect, they did not have the guarantee of independence and were affiliated with the Ministry of Justice. Regarding this application, the Constitutional Court ruled that trainee judges did not have the authority to make decisions. However, the Polish Constitutional Court postponed the entry into force of this decision for 18 months, and during this period, a judicial reform regarding the appointment of judges was carried out[74].

Another individual application was made regarding overcrowding in prisons. In the individual application in question, it was claimed that a provision in the Penal Execution Law was unconstitutional. The relevant provision of the law stipulated that at least 3 m2 of space should be provided for each convict, but in exceptional cases, the prison director could narrow this area. The Polish Constitutional Court also ruled that reducing the area for each prisoner to less than three square metres was against the provision in the constitution stating that inhuman and degrading behaviour cannot be committed. With this decision, the problem of overcrowding in Polish prisons has been resolved[75].

Conclusion

In this study, individual applications to the Polish Constitutional Court, which has an important position in the transition to democracy after the collapse of the Eastern Bloc, are discussed. Among the reasons why Poland was preferred was that this country has the second constitution in the world and the first in Europe, even though it has not come into force, and that Poland has pioneered other Eastern Bloc

73 Ibid. 119.

74 Ibid. 120.

75 Ibid. 120.

countries in the establishment of constitutional judiciary and constitutional courts. In this respect, this study primarily covers the history of the establishment of the Polish Constitutional Court and the types of constitutionality reviews. In this study, the current regulations in the Act of November 30, 2016 which came into force on January 3, 2017, are included.

Individual application, which was included in the constitutional system with the 1997 Constitution, deals with the unconstitutionality of the content of a legal regulation, unlike the German Constitutional complaint, which is of great importance worldwide. Regarding the operation of the individual application remedy, the study mentioned who can operate the individual application remedy, in what circumstances and in what way, the review procedure of the Polish Constitutional Court, the decisions that can be made, and the effects of the decisions.

Within the framework of the principles specified in the Act in relation to individual application to the Polish Constitutional Court, everyone whose constitutional freedoms and rights have been violated has the right to apply to the Constitutional Court for the constitutionality of a law or norm on which a court or public institution bases its final decision regarding the freedoms and rights specified in the Constitution.

To carry out the individual application process quickly and accurately, it is important to require the assistance of a lawyer in making an individual application to the Constitutional Court of Poland. Moreover, it is also quite appropriate to offer free legal assistance to those who are economically weak.

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