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SUITABLE RIGHTS FOR CONSTITUTIONAL COMPLAINT

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The main task to secure the respect of the Constitution belongs in prevailing number of states to their constitutional courts. They fulfil this task by any or all of several possible means: the control of legislation and other acts resulting from the exercising of public functions, the settlement of conflicts arising between the chief organs of the state or between different levels of the power, the adjudication of claims made directly by individuals for the alleged infringement of a basic (fundamental) rights and freedoms. The primary function of the constitutional complaint is therefore to protect the individual subjective rights guaranteed by constitution (constitutional law) but such legal remedy operates at the same time to safeguard the Constitution as part of the objective legal order. Constitutional complaints are generally characterized by four factors:

1. they provide a judicial remedy against violations of constitutional rights;
2. they lead to separate proceedings which are concerned only with the constitutionality of the act in question and not with any other legal issues connected with the same case;
3. they can be lodged by the person adversely affected by an act in question;
4. the court which decides the constitutional complaint has the authority to annul the act that it deems unconstitutional.¹ Such annulment is indispensable to constitutional justice and it must be read as a corollary of the power of constitutional court to interpret constitution as a basic legal text of each state and to ascertain its violation.

Vesting a "special" constitutional court with the power to deal with constitutional complaints of the violations of individual constitutional rights can contribute to strengthening the respect of fundamental rights and freedoms, to intensify the protection of these rights and emphasize their constitutional rank. It is useful to note that the protection of human rights will enjoy the proper priority only if constitutional courts exercise review for constitutionality in practical cases. The mere existence of the constitutional complaints leads to better observation of constitutional rights by the legislature, executive and judiciary. To be effective legal remedy the appropriate number (*numerus clausus*) and "quality" of the rights and freedoms is to be *inter alia* determined as falling under the protection of the constitutional complaint. The main purpose of this paper is to identify both the general approach and concrete criteria which should be taken in account in fixing the circle of such rights and freedoms. Although at this moment there is no unified approach of the states with respect of this matter the analysis of their relevant legal regulations and legislative practices allows nevertheless to identify a number of general tendencies common for states having constitutional complaint as legal remedy (extraordinary legal remedy) for the protection of fundamental rights and freedoms.

I.

Constitutional Rights and Freedoms

Most modern constitutions contain a bill of fundamental rights and freedoms which are directly applicable and not mere declarations of goodwill. The legal "technique" of such constitutional

legal regulation varies from country to country starting with exhaustive list of the fundamental rights and freedoms, by the chapter of the constitution itself devoted to human rights and finishing with recital in the preamble to simply refer to the human rights instruments. Once the constitutions are laid down as supreme laws their observance needs to be guaranteed by the effective judicial remedies. To be effective, the constitutional rights and freedoms require some means of enforcement which may be achieved *inter alia* to provide jurisdiction of the constitutional court to protect them through the constitutional complaints. Such kind of protection therefore generally refers to the **constitutional rights and freedoms** and this tendency is today confirmed by the constitutional regulations no less than 27 countries.² The reasons leading the states to insert concrete rights and freedom into their constitutions are naturally different but their common "background" reflects two principal aspects namely **material and formal**. With respect of material aspect the talk is about rights and freedoms resulting from the origin of each concrete state and its legal culture. Taking into consideration these factors a number ("circle") of concrete rights and freedoms shall acquire the priority within the framework of internal legal order of state whereas due to its constitutional regulation they shall form integral part of its constitutional order. With respect of the formal aspect the "constitutionalising" of human rights and freedoms guarantees first of all their legal stability necessary for each segment of constitutional order. Such kind of legal regulation prevents at the same time the legislator to change or amend a number of the constitutional rights or freedoms by the "ordinary" laws. It follows that states in their legislative practices usually "connect" constitutional complaints with the most important fundamental rights and freedoms forming the part(s) of their constitutional orders. The decision what rights and freedoms shall form the part of constitutional order falls into the exclusive competence of the each legislator and among such rights can be simultaneously inserted civil and political rights, social, economic and cultural rights and even so-called third generation rights. One can distinguishes at the same time between procedural and substantive (material) rights and freedoms as well. These rights differ themselves with respect of their character, wording of their content, (programmatic character of social, economic and cultural rights) and consequently by the obligations of state to respect their practical guarantee (positive obligations). In this connection each legislator therefore has to answer on the question if **all** constitutional rights and freedoms (regardless of their differences) can enjoy the legal guarantees provided by constitutional complaints. The potential "selection" among constitutional rights and freedoms able to be protected by constitutional complaints is pre-determined by their character and wording on the one hand and the necessity to respect the purpose and efficiency of the constitutional complaint as an individual legal remedy on the other hand. Now there is generally recognized that if the constitutional complaint has been founded the decision of constitutional court should be either the cassation of the challenged unconstitutional act or to declare null and void contested act of legislation. Another important criterion what should be pointed out is the intention of legislator to prevent from diverse and divergent judicial practice of its ordinary courts with respect of certain fundamental rights and freedoms. By means of the individual's constitutional complaint the constitutional court may guide the action of the judicial, executive and legislative powers in all matters concerning fundamental rights and freedoms and its decisions resulting from constitutional complaints have therefore a greater systematic rather than individual dimension. The determination of the appropriate number of the constitutional rights and freedoms respect of which may be guaranteed by constitutional complaint is however only one of the factors which should secure its efficiency as a individual legal remedy. Among other factors having impact on the efficiency of constitutional complaint one can mention the number of subjects entitled to lodge complaints to the constitutional courts (juridical persons, natural persons, self-governmental bodies,

communes etc.) and the scope of acts unconstitutionality of which may be challenged by constitutional complaints. At this moment there is general agreement that constitutional complaints should be allowed against individual acts of bodies of administration and judicial practice of states confirm that the court decisions and even legislative acts can be subjected to the constitutional complaints. As a *de lege ferenda* remark it may appear appropriate to extend jurisdiction of constitutional complaints to all acts of public authorities, i. e. administrative acts, court decisions and even legislative (sub-legislative) norms.

II.

International Human Rights and Freedoms

In the process of the determination of rights and freedoms the respect of which should be guaranteed by constitutional complaints following next question can raise. Should the legislator be confined to the rights and freedoms guaranteed only by domestic law or should it extend to those covered by international instruments? If the answer on this question shall be affirmative selected international treaties (their provisions) securing human rights and freedoms shall acquire constitutional status through their incorporation into domestic constitutions (constitutional laws) with or without the accumulated case-law. In such a case any violation of treaty provision would inevitably be a violation of the constitution. Two jurisdictions of two different bodies (Constitutional court and/or European court of Human Rights, Committee of Human Rights) can be however found and the freedom of constitutional interpretation (by the "internal" constitutional court) is confronted with a risk of divergent interpretation of international bodies.³ It is therefore the next task for each legislator to assess if such legal position of its constitutional court is acceptable and on the basis of such evaluation to decide if the "international" human rights and freedoms as well shall include under the protection of constitutional complaint. Generally speaking limiting constitutional complaint in many cases however would simply shift the workload from national (internal) courts to the European court of Human Rights or Committee of Human Rights. It is therefore preferable that judicial redress of violations of constitutional rights and freedoms can be sought and obtained in the country where they have taken place before a case is brought to the international judicial and other institutions for the protection of human rights.

Notes

1. B. Phillip: Constitutional Complaint: The European Perspective. ICLQ No. 1/1994, 142.
2. A. Mav_i_: Slovenian Constitutional Review; Zalo_ba, Nova Revija, Ljubljana, 1995, 57.
3. Protection constitutionnelle et protection internationale des droits de l'homme: Concurrence ou complémentarité? IXe, Conférence des Cours constitutionnelles européennes, Paris, 1993, Volume II, 838.