Chapter 16

The Effectiveness of Constitutional Complaint as a Domestic Remedy for the ECHR Violations

Lessons Learned from the ECtHR's Jurisprudence Regarding Constitutional Complaint in Hungary and in Poland

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Abstract

This article explores the effectiveness of constitutional complaint procedures as domestic remedies within the meaning of Articles 13 and 35 para. 1 of the European Convention on Human Rights (ECHR). It examines the standards applied by the European Court of Human Rights (ECtHR) to domestic remedies in general, as well as the specific criteria relating to constitutional complaints, in order to determine what criteria are applied to assess their effectiveness. The paper focuses on the Hungarian and Polish models of constitutional complaint and analyzes the ECtHR's relevant case-law to establish whether, and under what circumstances, constitutional complaint procedures in these two Central European countries can be considered effective domestic remedies within the meaning of Articles 13 and 35 para. 1 of the ECHR. The analysis shows that the ECtHR's assessment of the effectiveness of constitutional complaints can shift over time, departing from an objective legal framework toward a broader and more ambiguous evaluation of institutional and political developments affecting constitutional adjudication.

Keywords: right to effective remedy, Article 13 ECHR, constitutional complaint, Poland, Hungary, European Court of Human Rights

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1. Introduction

The European Court of Human Rights (ECtHR) has been committed to rendering the European Convention on Human Rights (ECHR)[1] a practical and effective instrument of human rights protection, and not a 'theoretical or illusory' set of declarations by Member States of the Council of Europe. It should not come as a surprise that the existence of domestic remedies, explicitly required under Article 13 ECHR and presumed in Article 35(1) ECHR, has continuously been scrutinised by the ECtHR, as an inherent element of the preliminary examination of complaints, and often at the merit stage, as well. As Shelton noted, the availability of effective domestic remedies has become a crucial factor for the entire ECHR system after its expansion into Central and Eastern Europe, increasing the ECtHR's caseload at an unprecedented rate from the late 1990s (the number of decisions passed from 5,979 in 1998 to 86,063 in 2014).[2]

An important domestic remedy capable of enhancing the overall protection of human rights in the Member States of the Council of Europe is the constitutional complaint procedure. In Poland and in Hungary, the right of individuals to have recourse to a constitutional court was introduced after the democratic transformation in 1989, as an element of protecting the fundamental rights of individuals as well as the constitutional order of the State. The ECtHR's examination of constitutional complaint carried out under Article 13 and Article 35(1) ECHR sheds light on how to interpret the notion of effective remedy in the context of constitutional adjudication of human rights.

This paper examines the ECtHR's standards relating to a constitutional complaint to determine what criteria are applied in the assessment of the effectiveness of a constitutional complaint. The author focuses on the Hungarian and Polish models of constitutional complaint and explores the ECtHR's relevant case-law to establish whether, and under what circumstances, constitutional complaint in these two Central European countries can be considered effective domestic remedy within the meaning of Article 13 and Article 35 (1) ECHR.

1 *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, ECHR), adopted under the auspices of Council of Europe in Rome on 4 November 1950, ETS No. 005.

2 Shelton, 2017, p. 211.

2. The Right to an Effective Remedy under the ECHR

2.1. Article 13 ECHR

Article 13 ECHR states that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Its purpose is to ensure that the substance of the rights and freedoms guaranteed by the ECHR are enforced at national level, regardless of the form in which those rights are secured within the domestic legal system.[3] Morawska argues that the right to an effective remedy permeates the entire ECHR system and gives it a real and effective dimension.[4] The meaning and role of the right to an effective remedy can be better understood in the light of the principle of subsidiarity, which requires that the rights and freedoms guaranteed by the ECHR are protected in the first place at national level and applied by national authorities, in accordance with Article 1 ECHR.[5] As a consequence of the subsidiary nature of the ECHR's supervisory mechanism, individual complaints on human rights violations can be brought before the ECtHR only after all available national remedies have been exhausted, as required by Article 35(1) ECHR.[6] The provisions of Article 13 and Article 35(1) ECHR, in conjunction with the obligation of States Parties to protect human rights within their own jurisdiction (Article 1 ECHR), and to execute final judgments of the ECtHR (Article 46, paragraph 1 ECHR) are the key procedural elements meant to secure the practical effectiveness of the human rights framework set up by the ECHR.

Over the years, the ECtHR in has clarified the normative content of Article 13 ECHR and the scope of the obligations it imposes on States. The ECtHR has declared that Article 13 ECHR requires the availability in domestic law of a remedy capable of dealing with the substance of an arguable claim under the ECHR and of granting

3 Schabas, 2015, p. 550; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, judgment of 24 July 2014, Application no. 7511/13, para. 540.

4 Morawska, 2019, p. 166.

5 According to para. 3 of the 2012 Brighton Declaration of the High Level Conference on the Future of the European Court of Human Rights, "The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level (…)." Text of the Brighton Declaration available online at: https://www.echr.coe.int/documents/d/echr/2012_brighton_finaldeclaration_eng. On the principle of subsidiarity in relation to human rights protection, see e.g.: Vila, 2017; Morawska, 2019.

6 Pursuant to Article 35(1) ECHR, "The Court may only deal with the matter after all domestic remedies have been exhausted."

appropriate redress.[7] According to Shabas, the 'arguable claim' standard limits the scope of Article 13 ECHR in that that there is no right to require a remedy with respect to every supposed violation, however frivolous it might be.[8] The domestic remedy required by Article 13 ECHR must be effective both in legal and practical terms, meaning that it shall be accessible and capable of providing redress in respect of the applicants' complaints, regardless of the nature of violation and the right at stake.[9] An effective remedy must offer reasonable prospects of success, meaning that its effectiveness cannot be linked to the certainty of a favourable outcome for the applicant. According to the ECtHR, the effectiveness of a remedy manifests itself rather in the sense of preventing the alleged violation of law or its continuation, or in providing adequate redress for any violation that had already occurred.[10] The practical effectiveness of a remedy requires that its exercise cannot be unjustifiably hindered by the acts or omissions of State authorities.[11]

The wording of Article 13 ECHR does not require from States Parties any particular type or form of remedy. Where a single remedy does not by itself entirely satisfy the requirements of Article 13 ECHR, the aggregate of remedies provided for under domestic law may be satisfactory.[12] It is accepted that States Parties are free to decide which system is the most suitable for ensuring the necessary protection of ECHR rights, taking into consideration their constitutional traditions and particular circumstances.[13] In the light of the admissibility criteria requiring the exhaustion of effective remedies, the respondent State must be able to prove that the requirements under Article 13 ECHR have been satisfied, and that the domestic legal system provided for accessible and effective remedies for the alleged violations of rights. Therefore, the Government claiming non-exhaustion of remedies is expected to prove that the remedy was an effective one, available in theory and in

7 According to the ECtHR, Article 13 ECHR "requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have their claim decided and, if appropriate, to obtain redress.", see ECtHR, *Klass and others v. Germany*, judgment of 6 September 1978, Application no. 5029/71, para. 64.

8 Schabas, 2015, p. 552.

9 E.g. ECtHR, *Kudła v. Poland*, judgment of 26 October 2000, Application no. 30210/96, para. 157; ECtHR, *Nicolae Virgiliu Tănase v. Romania*, judgment of 25 June 2019, Application no. 41720/13, para. 218, ECtHR, *Sejdovic v. Italy*, judgment of 1 March 2006, Application no. 56581/00, para. 46. See also Shabas, Article 35, pp. 764–766.

10 See e.g. *Kudła v. Poland*, paras. 157–158; ECtHR, *Sürmeli v. Germany*, judgment of 8 June 2006, Application no. 75529/01, para. 99.

11 *Nicolae Virgiliu Tănase v. Romania*, para. 218, *Husayn (Abu Zubaydah) v. Poland*, para. 540.

12 ECtHR, *De Souza Ribeiro v. France*, judgment of 13 December 2012, Application no. 22689/07, para. 79.

13 Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, adopted on 12 May 2004, Appendix, para. 11.

practice at the relevant time.[14] Once this burden of proof has been satisfied, it is the applicant's responsibility to establish that the remedy referred to by the Government was exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case.[15]

In the domestic context, violations of ECHR rights may be challenged and redressed either through right-specific remedies or general remedies. *General remedies* are intended to seek redress for a violation of a Convention-based right or freedom by public authorities without being limited in application to any particular factual or legal context.[16] General domestic remedies have two broad forms: constitutional complaints, on the one hand, and direct invocation of the ECHR provisions in the course of ordinary litigation before domestic courts, on the other hand.[17] At this point it is worth mentioning that the direct applicability of the ECHR, whose purpose is to enable individuals to directly assert their claims arising from international law before a domestic court, is contingent upon numerous conditions, including the proper constitutional anchorage, the framework of the State's legal and political system, as well as the constructional quality of the provisions contained in an international treaty.[18]

Specific remedies are domestic remedies with targeted scope of application, i.e. remedies responding to the violation of a specific ECHR right.[19] The general principles and standards of effectiveness under Article 13 ECHR apply equally to special and to general remedies, all of them need to be effective, sufficient and accessible.[20] Whatever type of remedy is used by the State to redress a violation of the ECHR, particular attention should be paid to the promptness of the remedial action itself,

14 ECtHR, *McFarlane v. Ireland*, judgment of 10 September 2010, Application no. 31333/06, para 107; ECtHR, *Vučković and Others v. Serbia*, judgment of 25 March 2014, Application No. 17153/11 and 29 others, para. 77.

15 *Vučković and Others v. Serbia*, para. 77.

16 Council of Europe (2013), *Guide to Good Practice in Respect of Domestic Remedies*, adopted by the Committee of Ministers of the Council of Europe on 18 September 2013, available at: https://rm.coe.int/guide-to-good-practice-in-respect-of-domestic-remedies/1680695a9f, p. 45.

17 Ibid.

18 Muszyński, 2023, p. 33. Direct invocation of the ECHR is possible in legal systems where the ECHR has the status of domestic law and it is directly applicable by court in the course of ordinary legal proceedings, e.g. in Austria, Ireland, the Netherlands, Norway, the United Kingdom, see: *Guide to Good Practice in Respect of Domestic Remedies*, p. 45, footnote no. 191.

19 For example, in cases concerning the breach of Article 6 ECHR as regards the excessive length of proceedings, the most suitable form of redress is prevention. However, depending on the circumstances of the case, the compensation or a combination of a preventive and a compensatory remedy may also be considered as an effective redress by the ECtHR, see: *Sürmeli v. Germany*, para. 100; ECtHR, *Gazsó v. Hungary*, judgment of 16 July 2015, Application no. 48322/12, para. 39. For further examples of right-specific remedies, see: *Guide to Good Practice in Respect of Domestic Remedies*, 2013, pp. 15–43.

20 *Sürmeli v. Germany*, paras. 97-101. See also: *Guide to Good Practice in Respect of Domestic Remedies*, p. 45

because even the adequateness of the remedy can be undermined by its excessive duration.[21]

The Committee of Ministers of the Council of Europe has observed that if properly interpreted and implemented, specific remedies can be very efficient and reduce the number of complaints submitted to the EtCHR, as well as the number of cases requiring a time-consuming examination.[22] Another observation is that States in which general remedies such as constitutional complaint exist, tend to have fewer cases before the ECtHR.[23]

2.2. Constitutional Complaint as an Effective Remedy under Article 13 ECHR

In many European jurisdictions, individuals can apply to a constitutional court for a remedy against alleged violation of rights protected under the national constitution by filing a constitutional complaint.[24] In this sense, the constitutional courts are national human rights courts, as Balcerzak pointed out, arguing against the idea of setting up separate domestic human rights courts in the States Parties to the ECHR.[25] Through their rulings on individual cases that are later the subject of applications to the ECtHR, the domestic constitutional courts can engage directly in the judicial dialogue between the national and European levels.[26]

The role of a constitutional complaint as a tool of protecting and enforcing human rights can be understood in two ways. On the one hand, it provides an ultimate domestic level of recourse for judicial examination of a complaint concerning an allegation of human rights violation. On the other hand, it contributes to ensuring consistency in the interpretation and application of human rights and freedoms at national level, with the overall result of enhancing their protection, in line with the principle of subsidiarity.[27]

The European legal systems have different modalities for the constitutional complaint procedure, creating broader or narrower possibilities for seeking redress for

21 *De Souza Ribeiro v. France*, para. 81.

22 Recommendation Rec(2004)6, Appendix, para. 9.

23 Recommendation Rec(2004)6, Appendix, para. 10.

24 E.g. in Croatia, Cyprus, the Czech Republic, Germany, Hungary, Poland, Slovakia, Slovenia, Spain, Switzerland. The constitutional complaint procedure is specifically designed to adjudicate and protect fundamental rights; and has the main purpose to safeguard individual liberties and rights as well as to determine (through its case law), the possible grounds and scope of lawful limitation. The institution of constitutional complaint, by which natural and legal persons may initiate a constitutional review, plays a key role in fundamental rights adjudication. In some models, constitutional complaint may be closely connected to the constitutional court's competence of norm control, i.e. deciding on the constitutionality of legislation, that is the most traditional function of constitutional adjudication, according to the Kelsenian model. For more information on the legal institution of constitutional complaint and its place within the constitutional system, see: Tóth J., 2022, pp. 371–376; Sándor, 2022, pp. 388–389; Dürr, 2014, pp. 72–73.

25 Balcerzak, 2006, pp. 24–25.

26 *Guide to Good Practice in Respect of Domestic Remedies*, 2013, p. 46.

27 Ibid.

fundamental rights violations in different countries.[28] Depending on the competences of the constitutional court in the given country, the constitutional complaint procedure may extend to legal norms which affect the petitioner's rights (either directly or through the application by courts and other authorities), and to the decisions of ordinary courts as well. The so-called 'full' (or 'real') constitutional complaint includes both types of examination, as opposed to the normative constitutional complaint, which allows tom challenge allegedly unconstitutional normative provisions, but not their application.[29]

The ECtHR's assessment of effectiveness of constitutional complaint as a remedy takes place on a case-by-case basis and does not allow for making definitive conclusions as to whether constitutional complaint in general can be considered as an effective remedy that needs to be exhausted before bringing a case before the ECtHR. Nevertheless, the ECtHR provides for certain general indications as to when a constitutional complaint can be recognised as an effective remedy within the meaning of Article 13 ECHR and Article 35 ECHR.

The primary requirements include that the rights protected by the national Constitution explicitly include or correspond in substance to ECHR rights. If the national Constitution enshrines a given human right in a wording very similar to those of the ECHR, the ECtHR is satisfied that a relevant constitutional right exists.[30] By contrast, constitutional complaint does not amount to an effective remedy for the purpose of Article 13 and Article, 35(1) if a national Constitution does not set forth guarantees which are at least remotely comparable to those provided for in the ECHR or developed in the ECtHR's case-law.[31] In addition, so as to be considered an effective domestic remedy under Article 13 ECHR, the procedure of constitutional complaint must be directly accessible for individuals, meaning that the applicant must be able to seize the constitutional court directly, and not via the judge hearing their case. Furthermore, it is essential that a remedy before the national constitutional court guarantee the right to have a final determination on a matter submitted to a court, in other words, effective decision-making.[32] Finally, the standard of effectiveness under Article 13 ECHR requires that the constitutional complaint be able to provide effective redress for a violation. It may imply, *inter alia*, the power of the constitutional court to quash the impugned decision or measure, to remit the case to the relevant authority for further proceedings based on the finding of the constitutional court,

28 For more information on different models of constitutional complaint in Central European countries, see: Tóth J., 2022; Sándor, 2022.

29 Sándor, 2022, p. 399. As Tóth has explained, a 'real' constitutional complaint is a legal institution where the person concerned, following a final court decision on the merits of the case affecting their rights, obligations and legal situation, may appeal to the constitutional court not against the law applied by the court but against the court's decision itself and the interpretation of the law contained therein, which they consider unconstitutional, see: Tóth J., 2022, p. 374.

30 ECtHR, *Szalontay v. Hungary*, judgment of 12 March 2019, Application no. 71327/13, para. 34

31 ECtHR, *Apostol v. Georgia*, judgment of 28 November 2006, Application No. 40765/02, para. 38.

32 ECtHR, *Marini v. Albania*, judgment of 18 December 2007, Application No. 3738/02, paras. 119–123.

to order payment of compensation, or to order *restitutio in integrum*.[33] Such powers, aside from existing in theory, must also be effective in practice.[34]

The requirement that the constitutional court be able to order appropriate individual relief manifests itself in the ECtHR's differentiated approach to 'abstract' and 'concrete' constitutional complaints. While individual applicants may resort to 'abstract' constitutional complaint to question the constitutionality of the legislation without necessarily being affected by its implementation, they cannot challenge decisions issued by the courts or the public authorities that directly affect their specific circumstances. Therefore, such constitutional complaint, according to the ECtHR, does not meet the criteria of effective remedy in terms of Article 13 and Article 35(1) ECHR.[35] In contrast, a 'concrete', i.e. specific constitutional complaint makes it possible to seek remedy for violations of rights and freedoms committed by State authorities or, where the infringement of a right guaranteed by the Constitution is the result of an interference other than a decision, to prohibit the authority concerned from continuing to infringe the right, and to order it to re-establish the *status quo* if it is possible.[36] Such type of constitutional complaint also makes it possible to seek remedy for violations resulting immediately and directly from an act or omission of a judicial body, regardless of the facts that had given rise to the proceedings; the abrogation of an unconstitutional law results in the annulment of all the final decisions made by the courts or public authorities on the basis of that law.[37]

Dürr argues that only 'full' constitutional complaints, allowing to challenge both the legislation and the unconstitutional application of law, complies with the requirements set forth in Articles 13 and 35 ECHR.[38] The European Commission for Democracy through Law (Venice Commission is also in favour of the full constitutional complaint, because it provides comprehensive protection of constitutional rights, on the one hand, and because of the subsidiary nature of the relief provided by the ECtHR and the desirability to settle human rights issues on the national level, on the other hand.[39] The full constitutional complaint has the following advantage: when the constitutional court holds that there has been a violation of human rights, it may directly set aside the final judgment or decision, no matter whether the norm

33 *Guide to Good Practice in Respect of Domestic Remedies*, 2013, p. 49.
34 Ibid, p. 50.
35 *Apostol v. Georgia*, para. 40.
36 *Apostol v. Georgia*, para. 42, Coe, p. 51.
37 ECtHR, *Voggenreiter v. Germany*, judgment of 8 January 2004, Application No 47169/99, para. 23.
38 Dürr, 2014, pp. 74–75.
39 The European Commission for Democracy through Law, *Compilation on the Venice Commission Reports, Opinion and Studies on Constitutional Justice (Updated)*, Strasbourg, 14 April 2020, CDL-PI(2020)004), p. 49.

or its application is unconstitutional.[40] Nonetheless, the ECtHR's case law does not prove definitely that the existence of a 'full' constitutional complaint within the domestic legal system is a *sine qua non* condition for the ECtHR to consider constitutional complaint an effective remedy within the meaning of Articles 13 and 35 ECHR.[41]

3. Constitutional Complaint Procedure in Hungary

The judicial review procedure was introduced to the Hungarian legal system following the political transition in 1989, and since then its legal framework has undergone a major change, landmarked by the adoption of the Fundamental Law of Hungary[42] in 2011. In the period between 1990 and 2011, the most prominent procedure before the Hungarian Constitutional Court was the *ex-post* abstract constitutional review of legislation initiated by individuals within the *action popularis* procedure, which did not require applicants to show personal injury. As a result, the Constitutional Court's caseload was very high.[43] Apart from the *ex-post* abstract review, concrete constitutional review in specific cases was also possible, either on the judicial initiative in a pending case, or following a constitutional complaint filed by individual applicants. In the latter case, the Constitutional Court reviewed the constitutionality of the legal provisions applied by ordinary courts, and not whether the specific court decision or administrative act violated the constitutional rights of the applicant.[44] As a result, the remedy the Constitutional Court was competent to provide was the prohibition of further application of the legal provisions that were found unconstitutional. A constitutional review initiated by a constitutional complaint lodged according to the rules in force until the end of 2011 did not lead to the

40 The disadvantage of full constitutional complaints is that they significantly increase the workload of the constitutional court, sometimes representing more than 90 per cent of the caseload. As a result, the constitutional court may be overburdened by cases which lack any constitutional dimension, brought because the parties are dissatisfied with the judgment of the ordinary court. To avoid such situations, countries where a full constitutional complaint exists, have several legal filters in place, such as time limits, mandatory legal representation, simplified decisions on manifestly unfounded cases, etc., see: *Compilation on the Venice Commission Reports, Opinion and Studies on Constitutional Justice (Updated)*, pp. 51–52.

41 As will be discussed later, Poland has not introduced any 'real' constitutional complaint, but the aggregate of remedies provided for under Polish constitutional law may, under certain circumstances, amount to an effective remedy.

42 The Fundamental Law of Hungary (*Magyarország Alaptörvénye*), adopted on 25 April 2011, entered into force on 1 January 2012.

43 Paczolay, 2020, p. 159. According to Gárdos-Orosz, appr. 1,600 actions were brought annually before the Hungarian Constitutional Court within the *actio popularis* procedure, Gárdos-Orosz, 2012, p. 303.

44 Paczolay, 2020, p. 159.

retroactive exclusion of the applicability of the unconstitutional legal provisions in the specific case.[45] Another limitation was that the Constitutional Court was able to provide remedy against a judicial decision if the underlying legislation was unconstitutional, however, as Paczolay has noted, if the judicial decision violated the due process, but the underlying legislation was constitutional, the Constitutional Court could not review the decision.[46]

Against this backdrop, the constitutional complaint governed by the rules in force until the end of 2011[47] was not considered as an effective remedy for the purpose of Article 13 and Article 35(1) ECHR. The underlying reason was that it did not provide any guarantee for an applicant to obtain redress in their individual case. As the European Commission of Human Rights (ECmHR) summarised it in *Vén v. Hungary*, the Constitutional Court was only entitled to control the constitutionality of laws in their generality and could not quash or modify specific measures taken by the State authorities against an individual.[48] A similar stand was adopted by the ECtHR: while it considered the pre-2012 constitutional complaint as an ineffective remedy, because it did not provide any guarantee for successful complainants to have the appellate proceedings repeated and thereby to obtain redress for the violation of their ECHR rights (*Csikós v. Hungary*[49]). Similarly, a mere theoretical possibility for an ordinary court to suspend a pending case to initiate a constitutional review of a legislation before the Constitutional Court could not be considered by the ECtHR as a guarantee of an effective remedy, which would have justified the rejection of a claim under Article 35(1) ECHR for non-exhaustion of domestic remedies.[50]

The domestic legal environment changed in 2012 with the entry into force of the Fundamental Law of Hungary and the new Act on the Constitutional Court (hereinafter: 'ACC')[51], which have brought about important changes in the constitutional adjudication, and in the constitutional complaint procedure as well.[52] The provisions allowing anyone to initiate a posterior norm control within the *actio popularis* procedure were removed from the Hungarian legal system. At the same time, the constitutional complaint procedure was expanded: aside from the formerly existing procedure that allowed for a norm control in a specific case, two other types of proceedings were introduced, including a 'full' constitutional complaint. Consequently, from 1 January 2012, three different types of constitutional complaints have been available under Hungarian law: (i) Article 26(1) ACC allows for a complaint against a

45 Gárdos-Orosz, 2012, p. 303; Paczolay, 2020, p. 159.

46 Paczolay, 2020, pp. 159–160.

47 Article 48 of the Act no. XXXII of 1989 on the Constitutional Court.

48 ECmHR, *Vén v. Hungary*, decision of 30 June 1993, Application no. 21495/93, cf. ECtHR, *Apostol v. Georgia*, paras. 40–41.

49 ECtHR, *Csikós v. Hungary*, judgment of 5 December 2006, Application no. 37251/04, paras. 17-19.

50 ECtHR, *K.M.C. v. Hungary*, judgment of 10 July 2012, Application No. 19554/11, para. 28.

51 Act No. CLI of 2011 on the Constitutional Court (*2011. évi CLI törvény az Alkotmánybíróságról*), adopted on 14 November 2011, in effect from 1 January 2012 (hereinafter: 'ACC').

52 For more information on the changes in the powers of the Hungarian Constitutional Court in the light of the 2011 constitutional reform, see: Tóth J., 2018.

legal provision applied in court proceedings (pre-2012 constitutional complaint); (ii) Article 26(2) ACC provides for an exceptional form of the constitutional complaint to challenge allegedly unconstitutional legislation when, by virtue of their application or their effect, the fundamental rights of the applicant are violated, i.e. without a court decision (the so-called 'exceptional' or 'direct' constitutional complaint); and (iii) Article 27 ACC, providing for a 'full' constitutional complaint against final court decisions (the so-called 'real' constitutional complaint).[53] The Constitutional Court has the power and obligation to annul a legal regulation which has been declared contrary to the Fundamental Law within the proceedings initiated under Article 26(1) or Article 26(2) ACC.[54] If, based on a successful 'real' constitutional complaint procedure regulated in Article 27 ACC, the Constitutional Court declares a judicial decision to be contrary to the Fundamental Law, it has the obligation to annul such a decision.[55]

The competence to quash judicial decisions based on unconstitutional legislation or on unconstitutional interpretation of legislation has provided the Hungarian Constitutional Court with powers that are fundamentally different from those that it had before 2012.[56] As a consequence, the primary competence of the Constitutional Court shifted from the *ex-post* abstract review of legislation to the adjudication of constitutional complaints, i.e. fundamental rights adjudication.[57] That particular development of the legal context governing constitutional adjudication in Hungary has translated into the ECtHR's change of approach towards constitutional complaint in Hungary, albeit not immediately after the entry into force of the new regulations. For some years after the 2011 constitutional reform, the ECtHR has still shown 'distrust' towards the reformed constitutional complaint, while exempting the applicants from

53 The admissibility criteria set forth allowing an individual to bring a constitutional complaint are threefold. First, standing requirements under Articles 26(1), 26(2) and 27 ACC require a violation of the complainant's rights under the Fundamental Law (individual injury). Second, all other domestic remedies must be exhausted before the submission of a constitutional complaint. Third, Article 29 ACC lays down additional admissibility criteria, by allowing the Constitutional Court to admit complaints only if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance.

54 Pursuant to Article 41(1) ACC.

55 Pursuant to Article 43(1) ACC.

56 Paczolay, 2020, p. 160.

57 Gárdos-Orosz, 2012, p. 307. As Tóth demonstrates, between 2012 and 2018, over 90% of the cases before the Hungarian Constitutional Court were constitutional complaints, Tóth J., 2018, pp. 105–106.

approaching the Hungarian Constitutional Court to be able to successfully lodge a claim to the Strasbourg Court.[58]

The ECtHR started to consider the Hungarian constitutional complaints as effective remedy for the purpose of Article 13 and Article 35(1) ECHR in 2018 and 2019, as marked in its landmark decisions in cases *Mendrei v. Hungary*[59] and *Szalontay v. Hungary*[60] one year later. In *Mendrei v. Hungary,* the ECtHR scrutinised the constitutional complaint under Article 26(2) ACC upon the Government's objection of non-exhaustion of domestic remedies. The ECtHR examined whether the 'exceptional' ('direct') constitutional complaint designed to challenge allegedly unconstitutional legislation whose application or effect has led to a violation of fundamental rights can be considered as an accessible and effective remedy, capable of offering sufficient redress. The facts of the case related to the entry into force of the National Public Education Act in 2013, which provided for the *ipso iure* membership of Hungarian teachers in the National Teachers' Chamber. The applicant, a teacher at a public education institution, complained that such compulsory membership to a professional association infringed his rights under Articles 10 and 14 of the ECHR; nonetheless, he had not tried to challenge the questioned regulation before the Constitutional Court with a constitutional complaint, which he had not considered an effective remedy. According to the ECtHR, a successful complaint would have been capable of putting an end to the grievance (i.e. the mandatory membership in the professional association), because the removal of the impugned provisions would have terminated his membership, itself an *ipso iure* consequence of the law.[61] Against this background, the ECtHR considered the 'exceptional' constitutional complaint procedure under Article 26(2) ACC as an effective remedy, and rejected the application for the non-exhaustion of domestic remedies.

In *Szalontay v. Hungary,* the ECtHR commented on the 'real' constitutional complaint, allowing to challenge individual judicial decisions under Article 27 ACC, taken alone or applied in combination with the procedure under Article 26(1) ACC to challenge unconstitutional legal provisions underlying a judicial decision. The applicant was the managing director of a company which leased and sub-leased the

58 The ECtHR Judge Kūris argued, in connection with the reformed Hungarian constitutional complaint, that the ECtHR's refusal to recognise the most important national constitutional instrument was an attempt to effectively invalidate and disqualify the Hungarian Constitutional Court as being irrelevant to the protection of human rights, see: ECtHR, *Király and Dömötör v. Hungary,* judgment of 17 January 2017, Application No. 10851/13, dissenting opinion of Judge Kūris. para. 41; ECtHR, *Könyv-Tár Kft and Others v. Hungary*, judgment of 16 October 2018, Application No. 21623/13, concurring opinion of Judge Kūris, para. 5.

59 ECtHR, *Mendrei v. Hungary*, judgment of 19 June 2018, Application no. 54927/15.

60 ECtHR, *Szalontay v. Hungary*, judgment of 12 March 2019, Application no. 71327/13. According to Dudás, the ECtHR's change of approach can be explained by the fact that in 2017 the former president of the Hungarian Constitutional Court was appointed as ECtHR judge, and as a result the ECtHR gained a much better insight into the functioning of the Constitutional Court in Hungary, see: Dudás, 2020, p. 49.

61 *Mendrei v. Hungary*, para. 35.

premises of a shopping mall in Budapest to hold music events. In 2011, during one of the events a panic broke out in the crowded stairway of the mall, and in the resultant stampede three people were crushed to death. Both the court of first instance and the court of second instance found the applicant guilty of the crime of danger caused by negligent professional misconduct leading to fatal mass casualties. In his claim to the ECtHR, the applicant challenged the decision of the Hungarian criminal courts, on account that his right to a fair trial under Article 6 ECHR had been violated, in that the principle of equality of arms had not been observed during the criminal proceedings, and that the domestic courts had not been impartial.

The Hungarian Government submitted a plea on non-exhaustion of domestic remedies on account that the applicant had not submitted a constitutional complaint, either under Article 26(1) ACC or Article 27 ACC. The ECtHR found that the applicant's grievances concerned (I) the application of a provision of the Hungarian Code of Criminal Procedure barring him from submitting a challenge for bias in an effective manner; and (II) his conviction and sentence resulting from the first- and second-instance judgments that demonstrated a lack of impartiality on the part of the courts.[62] The first of these issues, related to the constitutionality of the relevant provision, could have been challenged under Article 26(1) ACC; whereas the second issue related to the constitutionality of the application of the law by the courts, could have been challenged under Article 27 ACC. According to the ECtHR, a successful constitutional complaint, relying either on a combination of Article 26(1) and Article 27 ACC or Article 27 ACC alone, would have been capable of putting an end to the grievance by prohibiting the application of the impugned rule and ordering new proceedings regarding the applicant's case.[63] Consequently, the ECtHR found that the applicant had not exhausted domestic remedies as required by Article 35(1) ECHR, and therefore, it declared the application inadmissible.

In *Mendrei v. Hungary* and *Szalontay v. Hungary*, the ECtHR found the Hungarian constitutional complaint, more specifically the procedure under Article 26(2) ('direct' constitutional complaint), Article 27 ACC ('real' constitutional complaint), as well as Article 26(1) in combination with Article 27 can be considered as an effective remedy for the purpose of Articles 13 and 35(1) ECHR. The ECtHR made a disclaimer that it was ready to change its approach as to the potential effectiveness of these procedures, if the practice of the Hungarian courts indicates the contrary.[64] In a more recent decision concerning Hungary (*Sándor Varga v. Hungary*), confronted with different factual and legal circumstances of the case, the ECtHR provided a different assessment of the remedy under Article 27 ACC and under Article 26(1)

62 *Szalontay v. Hungary*, para. 33.

63 *Szalontay v. Hungary*, para. 35. The eventual striking down of the impugned legal provision pursuant to Article 26(1) ACC, coupled with the quashing of the court judgments pursuant to Article 27 ACC, would have resulted in new proceedings before the competent criminal courts in accordance with Article 41 ACC. Moreover, a constitutional complaint lodged solely under Article 27 ACC could also have resulted in the quashing of the judgments and in new proceedings in the applicant's case.

64 *Szalontay v. Hungary*, para. 39.

ACC. It pointed out that these provisions do not guarantee effective remedy for the applicant if the applicant cannot claim the *unconstitutionality* of the judicial decision or the underlying legal provisions.[65] When the alleged violation of human rights, such as the institution of life imprisonment without the possibility of release on parole, examined in *Sándor Varga v. Hungary*, is explicitly provided for by the Fundamental Law, it is impossible to challenge the compatibility with the Fundamental Law of either the court judgments or the underlying provisions of law through constitutional complaint under Article 27 ACC or under Article 26(1) ACC, consequently, such remedy is not an accessible and effective legal approach within the meaning of Articles 13 and 35(1) ECHR.

4. Constitutional Complaint Procedure in Poland

The constitutional complaint procedure was introduced to the Polish legal system in 1997 with the adoption of the Constitution of the Republic of Poland (hereinafter: 'the Constitution').[66] It is regulated in Article 79(1) of the Constitution, which guarantees anyone whose constitutional freedoms or rights have been infringed the right to initiate before the Constitutional Tribunal an examination concerning the conformity with the Constitution of a statute, or another normative act based on which a court or an administrative body has made a final decision on their freedoms or rights or on their obligations set forth in the Constitution. Detailed rules on the

65 ECtHR, *Sándor Varga and Others v. Hungary*, judgment of 17 June 2021, Applications nos. 39734/15, 35530/16, and 26804/18. The applicants complained that, under the new mandatory pardon procedure (*kötelező kegyelmi eljárás*) in force as of 2015, their whole life sentences remained *de facto* irreducible, in breach of Article 3 of the ECHR. The ECtHR noted that life imprisonment without the possibility of release on parole is explicitly provided for by the Hungarian Fundamental Law, and that the possibility of exclusion of eligibility for parole is part of the constitutional legal order. Consequently, it cannot be said that any issues of 'constitutionality' or compatibility with the Fundamental Law of the court judgments or the provisions of the Criminal Code arise, therefore the ECtHR considered that the constitutional complaint did not constitute an effective remedy for the applicants' grievances, see: *Sándor Varga and Others v. Hungary*, para. 34.

66 The Constitution of the Republic of Poland adopted on 2 April 1997 (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*), Journal of Laws [Dz. U.] of 1997, No. 78, item 483, as amended.

constitutional complaint procedure are laid down in the Act of 30 November 2016 on Organisation and Procedure before the Constitutional Tribunal.[67]

Out of the two classical models of a constitutional complaint, i.e. a complaint against the unconstitutionality of a court decision and a complaint against the unconstitutionality of a provision of law, the drafters of the Polish Constitution have chosen the latter. The Polish constitutional complaint procedure allows to challenge unconstitutional legislation, and not its application; in other words, the Polish Constitutional Tribunal is not competent to receive and consider complaints lodged directly against judicial decisions, as opposed to constitutional courts in countries where the 'full' constitutional complaint exists.[68] Although there is no direct fundamental rights adjudication in Poland, the primary function of the Polish constitutional complaint is nevertheless to protect the constitutional freedoms and rights of individuals, as the Constitutional Tribunal itself has explicitly stressed.[69] Aside from being an instrument of human rights protection, the Polish constitutional complaint is an instrument of ex-post norm control designed to ensure the compliance of lower-level legal acts with the Constitution and the general coherence of the domestic legal system.[70]

The model of constitutional complaint envisaged by the Polish Constitution bears implications for the effects of successfully initiated constitutional review, which are regulated in Article 190(4) of the Constitution. According to the latter, the Constitutional Tribunal's judgment on non-conformity with the Constitution of legal provisions underlying a final court decision or a decision of an administrative body constitutes the basis for reopening a case or for quashing a decision in separate proceedings.[71] The Constitutional Tribunal does not decide whether the impugned provisions infringed the applicant's constitutional rights, but only whether the

67 Act of 30 November 2016 on Organisation and Procedure before the Constitutional Tribunal (*Ustawa z dnia 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym*), Journal of Laws [Dz. U.] of 2016, item 2072, as amended. The substantive as well as procedural requirements to lodge a constitutional complaint are laid down in the Constitution and in the Act of 30 November 2016 on Organisation and Procedure before the Constitutional Tribunal. One of the basic prerequisites is the existence of a final court ruling or a decision of non-judicial State authority that affects the applicant's rights and freedoms or obligations set forth in the Constitution. Therefore, personal interest needs to be demonstrated while submitting the complaint. The constitutional complaint is a subsidiary and extraordinary remedy, which presumes that it can be lodged after other domestic remedies have been exhausted, and it is admissible only if the alleged violation of constitutional rights cannot be otherwise removed. For more information on the admissibility requirements see: Jamróz, 2015, pp. 150–154.

68 Unlike the constitutional courts in Hungary and in the vast majority of Central European countries, see: Tóth J., 2022, p. 381; Jamróz, 2015, p. 146.

69 Constitutional Tribunal of the Republic of Poland, judgment of 16 November 2011, SK 45/09.

70 Łabno, 2012, p. 51. For more information on the characteristics of the Polish constitutional complaint, see: Syryt, 2021; Jarosz-Żukowska, 2014, pp. 827–848.

71 Additionally, a judgment of the Polish Constitutional Tribunal finding the unconstitutionality of legal provisions have also the result referred to in Article 77(2) of the Constitution, namely it opens the possibility for all persons concerned to claim compensation for any damage caused by the unconstitutional legislation.

impugned provisions are compatible with constitutional provisions. Consequently, the annulment of a decision that had been based on a legal provision successfully challenged by a constitutional complaint does not take place automatically, but requires the applicant to take further legal steps and to initiate further proceedings.[72] Several authors argue that such complex, fragmented procedure undermines the effectiveness of the Polish constitutional complaint as a remedy for human rights violations: it is time-consuming, requires additional efforts and costs from the applicant and does not fully serve legal coherence, especially if the cessation of legal effects of impugned legislation is deferred in accordance with Article 190(3) of the Constitution.[73]

The ECtHR has also been confronted with these issues while examining the admissibility of cases where the Polish Government raised a plea on the ground of non-exhaustion of domestic remedies under Article 35(1) ECHR. In *Szott-Medyńska v. Poland*[74], the first of the series of cases dealing with the effectiveness of the constitutional complaint in Poland, the ECtHR expressed its reservations regarding the scope of the Polish model of constitutional complaint, and the form of redress it provides. It has led to the conclusion that the procedure of the constitutional complaint can be considered as an effective remedy for the purpose of Articles 13 and 35(1) ECHR only in limited circumstances.

In *Szott-Medyńska v. Poland*, the applicants were engaged in a family business, in the course of which they were found guilty of a fiscal offence and were imposed a fine by the Polish authorities for non-payment of income-tax advance on wages. In their appeal, the applicants contested the legal classification of the act, which affected the jurisdiction of the competent authorities and the access to court. The second instance administrative authority dismissed the appeal and upheld the contested decision, against which the applicants had no further appeal. In their complaint to the ECtHR, the applicants claimed that Poland had violated the right to access a court, guaranteed by Article 6(1) ECHR, in that the administrative decision could not be challenged in court. The Polish Government pleaded the non-exhaustion of domestic remedies on the ground that the applicants had not brought a constitutional complaint before the Constitutional Tribunal. The ECtHR noted that the Polish constitutional review procedure does not provide for any immediate redress, as the successful applicant needs to take another step to request the reopening of his or her individual case or the quashing of the decision. However, since in the renewed examination of the case, the authorities will have to disregard the law

72 A judgment of the Constitutional Court on the unconstitutionality of legal provisions does not cause the automatic 'collapse' of the decision that gave rise to the complaint, but only provides a basis for resuming the proceedings or initiating other procedures aimed at repealing such a decision in accordance with Article 190(4) of the Constitution, see e.g. Constitutional Tribunal of the Republic of Poland, judgment of 21 May 2001, SK 15/00, para. 5 of the Reasoning.

73 See e.g. Wojtyczek, 2017, p. 87; Łabno, 2012, pp. 41, 53–58; Jarosz-Żukowska, 2014, pp. 852–853.

74 ECtHR, *Szott-Medyńska v. Poland*, decision of 9 October 2003 on admissibility, Application no. 47414/99.

declared unconstitutional in the proceedings before the Constitutional Tribunal and will have to apply the law as interpreted in its judgment to the particular facts of the individual case, the two-step remedy envisaged under Polish law is able to provide effective redress. Consequently, the ECtHR took the stand that the exhaustion of the constitutional complaint in Poland should be required under Article 35(1) ECHR only where (I) the individual decision, which allegedly violated the ECHR, had been adopted as a result of directly applying an unconstitutional provision of national legislation; and (II) procedural regulations applicable to the revision of such type of individual decisions provided for the reopening of the case or the quashing of the final decision in consequence of the judgment of the Constitutional Tribunal in which unconstitutionality had been found.[75]

The considerations concerning the Polish model of constitutional complaint formulated by the ECtHR in *Szott-Medyńska v. Poland* were upheld in several subsequent cases (e.g. *Pachla v. Poland*[76], *Wiącek v. Poland*[77], *Tereba v. Poland*[78]). They have not lost their relevance, and two decades later were reaffirmed by the ECtHR in *Xero Flor w Polsce sp. z o.o. v. Poland*.[79] In the latter case, however, the effectiveness of the Polish constitutional complaint *per se* was not the centre issue, since it was examined by the ECtHR not in relation to admissibility requirements under Article 35(1) ECHR (the applicant had exhausted the domestic remedial measures, including the constitutional complaint procedure), but in the context of Article 6(1) ECHR, regarding the right to a tribunal established by law, to determine whether it applied to the proceedings before the Polish Constitutional Tribunal.[80] In *Xero Flor w Polsce sp. z o.o. v. Poland*, the ECtHR concluded that in the factual and legal circumstances of the case, the constitutional complaint proceedings were directly decisive for the applicant's civil rights, which, in the ECtHR's opinion enabled the application of Article 6(1)

75 Consequently, the Polish constitutional complaint cannot serve as an effective remedy if the provision in question does not constitute the legal basis for the final judicial or administrative decision, but is merely applied, at some stage of the main procedure, to take an interim or incidental measure, see e.g.: ECtHR, *Brudnicka v. Poland*, decision of 16 January 2003 on admissibility, Application no. 54723/00.

76 ECtHR, *Pachla v. Poland*, decision of 8 November 2005 on admissibility, Application no. 8812/02.

77 ECtHR, *Wiącek v. Poland*, decision of 17 January 2006 on admissibility, Application no. 19795/02.

78 ECtHR, *Tereba v. Poland*, decision of 21 November 2006 on admissibility, Application no. 30263/04.

79 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, Application no. 4907/18.

80 The applicant company submitted that its right to a trial established by law, guaranteed under Article 6(1) ECHR had been violated because the Constitutional Tribunal had examined its constitutional complaint in a panel which, according to the applicant company, was composed in violation of the Polish Constitution. The Government disputed the applicability of Article 6(1) ECHR under its civic head to the proceedings before the Constitutional Tribunal. According to the ECtHR, the relevant test in determining whether proceedings come within the scope of Article 6(1) ECHR, even if they are conducted before a constitutional court, is whether their outcome is decisive for the determination of the applicant's civil rights and obligations, see *Xero Flor w Polsce sp. z o.o. v. Poland*, para. 191.

ECHR.[81] While examining the Polish model of constitutional complaint, the ECtHR reaffirmed that it can be an effective remedy, but has two important limitations, namely its scope and the form of redress it provides.[82]

The latest cases concerning Poland (*Advance Pharma sp. z o.o. v. Poland*[83], *Juszczyszyn v. Poland*[84]*, Tuleya v. Poland*[85]) reflect a major change in the ECtHR's approach towards the effectiveness of the Polish constitutional complaint. The shift can be seen in the ECtHR's departure from the examination based on purely objective legal criteria towards an examination involving a more subjective assessment of the judicial reforms in Poland. In all three cases, the applicants challenged the composition of the highest domestic judicial bodies where their respective cases were heard (the Constitutional Tribunal or the Supreme Court of the Republic of Poland), alleging a violation of Article(1) ECHR. In *Advance Pharma Sp. z o.o.*, the applicant company submitted that it had its cassation appeal examined by the Civil Chamber of the Supreme Court in a panel which, according to the applicant company, was composed in a manner contrary to domestic law and the ECHR. The Government raised a preliminary objection of non-exhaustion of domestic remedies and submitted that the applicant company had failed to lodge a constitutional complaint which would have provided the national authorities with an opportunity to examine its complaint under Article 6(1) ECHR. The ECtHR rejected the Polish Government's preliminary objection, arguing that in the circumstances of the case it "did not see sufficiently realistic prospects of success for a constitutional complaint".[86]

The ECtHR reached a similar conclusion in *Juszczyszyn v. Poland* and *Tuleya v. Poland*, both of which concerned the applicants' suspension from their judicial duties by the Disciplinary Chamber of the Polish Supreme Court, which, in the applicants' submission, did not satisfy the requirements of an independent and impartial tribunal established by law. In both cases, the Polish Government submitted the non-exhaustion of domestic remedies on account that the applicants had failed to lodge a constitutional complaint to challenge the compatibility of the law on the Supreme Court and on the National Council of the Judiciary with Article 45(1) of the Constitution, which enshrines the right to a fair hearing before a competent, impartial and independent court. In both cases, the conditions formulated by the ECtHR in *Szott-Medyńska v. Poland* to consider the constitutional complaint as an effective remedy for the purpose of Article 35(1) ECHR were fulfilled. Nevertheless,

81 However, as Judge Wojtyczek pointed out, declaring Article 6 ECHR applicable to the judicial review of legislation, was not unproblematic and triggered serious objections and concerns, see: *Xero Flor w Polsce sp. z o.o. v. Poland,* Judge Wojtyczek's party concurring and partly dissenting opinion, paras. 12–17.

82 *Xero Flor w Polsce sp. z o.o. v. Poland,* paras. 197–200.

83 ECtHR, *Advance Pharma sp. z o.o. v. Poland*, judgment of 3 February 2022, Application no. 1469/20.

84 ECtHR, *Juszczyszyn v. Poland*, judgment of 6 October 2022, Application no. 35599/20.

85 ECtHR, *Tuleya v. Poland*, judgment of 6 July 2023, Applications nos. 21181/19 and 51751/20.

86 *Advance Pharma sp. z o.o. v. Poland,* paras. 319–320.

the ECtHR held that it was not enough to examine the legal framework of the constitutional complaint, and that its effectiveness of had to be analysed in conjunction with the general context in which the Constitutional Tribunal operated.[87] In the ECtHR's assessment, there were no sufficiently realistic prospects of success for a constitutional complaint to consider it as an effective remedy.[88]

5. Conclusions

The effective implementation of the European system of human rights protection largely depends on the existence of effective domestic remedies, which enables the enforcement of ECHR rights and freedoms at national level according to the principle of subsidiarity. A constitutional complaint that meets the standards of effective remedy under Article 13 ECHR may successfully enhance the overall level of human rights protection in the given jurisdiction. The ECtHR holds that to be considered as an effective remedy, a constitutional complaint should satisfy all the general requirements expected from domestic remedies, i.e. it must provide an accessible remedy, must be capable of providing redress in respect of the alleged grievances and offering reasonable prospects of success. It also sets out the specific prerequisites of effectiveness, which apply specifically to this constitutional instrument, namely that (I) the rights protected by the national Constitution must correspond in substance to the ECHR rights; (II) the applicant must be able to resort to the constitutional court directly; (III) the constitutional complaint must guarantee effective decision-making; and finally that (III) a constitutional complaint procedure must provide effective redress for any violation, which implies the power of a constitutional court to quash the impugned decision or measure, or to remit the case for reopening, or to take other meaningful steps to remedy the unlawful situation.

These criteria have been used by the ECtHR to assess whether the constitutional complaint in Poland and in Hungary complies with Article 13 ECHR. In both jurisdictions, constitutional complaint was introduced after the democratic transition, together with other instruments inherent to a democratic State governed by the rule of law and providing human rights protection.

In Hungary, the earliest form of constitutional complaint, in force until 31 December 2011, was limited in scope and allowed for a constitutional review of legal provisions applied by the courts in individual cases. It did not constitute an effective remedy for the purpose of Articles 13 and 35(1) ECHR. According to the ECmHR and the ECtHR, the mere control of the constitutionality of laws initiated with a constitutional complaint, without the Constitutional Court's power to quash or amend

87 *Juszczyszyn v. Poland*, paras. 149-151; *Tuleya v. Poland*, paras. 308–310.
88 *Juszczyszyn v. Poland*, para. 150; *Tuleya v. Poland*, para. 309.

individual decisions did not provide sufficient relief. The current Hungarian constitutional framework offers three types of constitutional complaints, two of a norm control type, and a 'full' constitutional complaint to challenge both the legislation and its application in individual cases. As a result, the Hungarian Constitutional Court has equally the power to annul any impugned legal provision and to set aside any impugned decision, in the latter case, without the applicant having to initiate separate proceedings. The constitutional reform put in place in 2012 and the introduction of new types of constitutional complaints have changed the ECtHR's evaluation of the Hungarian general remedy. In *Mendrei v. Hungary*, the 'exceptional' constitutional complaint, while in *Szalontay v. Hungary* the 'real' constitutional complaint alone or in combination with a normative type of constitutional complaint was considered as an effective remedy that needs to be exhausted before bringing a case to Strasbourg. The effectiveness of the constitutional complaint resided in the fact that in the given circumstances of the examined cases, it could have put an end to the grievance, either by removing impugned legal provisions, or by quashing the individual judgments and ordering new proceedings.

In Poland, the legal framework governing constitutional complaint has remained unchanged since its adoption in 1997, and it represents a normative model of constitutional complaint applied to challenge unconstitutional legislation. The Polish Constitutional Tribunal, unlike its Hungarian counterpart, is not competent to annul individual judicial decisions. The redress offered by the Polish constitutional complaint is available under a two-step procedure: a judgment of the Polish Constitutional Tribunal on the unconstitutionality of legal provisions underlying a final court decision allows for the applicant to request the reopening of a case or the annulment of a decision in separate proceedings. The constitutional complaint envisaged by the Polish Constitution, requiring a two-step procedure to achieve the annulment of an individual decision can be considered as an effective remedy for the purpose of Articles 13 and 35(1) ECHR, as it was concluded in *Szott-Medyńska v. Poland*. Nonetheless, the ECtHR has found that, in certain circumstances, the effectiveness of the constitutional complaint in Poland might be limited by the complex legal framework it operates in, affecting the scope of applicability and form of redress it provides; one of the main concerns being that the judgment of the Constitutional Tribunal does not automatically quash an individual decision in relation to which the constitutional complaint was lodged.

Recent cases concerning constitutional complaint in Hungary (*Sándor Varga v. Hungary*) and in Poland (*Advance Pharma Sp. z o.o. v. Poland, Juszczyczyn v. Poland, Tuleya v. Poland*) prove that the ECtHR's assessment of a given remedy can change fundamentally over time and depending on the circumstances. The same remedy, once considered as an effective redress, in a different case and in different circumstances may as well be declared ineffective. The change of assessment concerning the effectiveness of constitutional complaint in Hungary was clearly related to the difference in legal premises, the different legal circumstances that led to a different conclusion. The Polish cases demonstrate that even the comparable legal premises

can lead to a different assessment of effectiveness of a constitutional complaint. The ECtHR has embarked on a new approach which, alongside the examination of the legal framework of the constitutional complaint in Poland, includes an assessment of the 'general context' in which the Constitutional Court has operated since 2015. Such assessment, in the ECtHR's case-law, involves the scrutiny of the Polish reform of the judiciary, and undoubtedly, forms part of the test to establish whether the remedy is effective both in legal and practical terms, in line with the ECtHR's general practice. Nonetheless, there is always a risk that departing from making an assessment solely on the basis of objective legal premises towards a more vague assessment of the 'general context', especially if it lacks objective and thorough reasoning, can make the ECtHR's conclusion that it "does not see sufficiently realistic prospects of success"[89] sound like a fortune-teller's reading from a crystal ball.

89 *Advance Pharma sp. z o.o. v. Poland,* para. 319.

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