

Constitutional complaint in Ukraine: theory and practice

TATYANA MILOVA¹, PAVLO PINCHUK^{2*}, NATALIYA RYBALKO³ and
SERHII HRECHANIUK⁴

The article covers issues of the essence, structure and mechanism for filing a constitutional complaint in Ukraine. The essence of the institute of a constitutional complaint is as the right of citizens to appeal to bodies of judicial constitutional control with a request the verifying the constitutionality of acts of power that violate their rights and freedoms. Authors determine the key structural elements of the constitutional complaint institute, in particular: subjects of the right of submitting a constitutional complaint; the subject of a constitutional complaint; grounds and conditions for the admissibility of the constitutional complaint; procedure for proceedings on a constitutional complaint. The identified elements of the constitutional complaint institute are analyzed in terms of their features of constitutional and legislative regulation both in Ukraine and in foreign countries. The emphasis is on acutely debatable issues of the implementation of human and citizen's right of appealing to the authority of constitutional jurisdiction with a constitutional complaint. The scientifically substantiated recommendations on the mechanism of the introduction and functioning in Ukraine of certain structural elements of the constitutional complaint institute, in particular the circle of entities, subject, grounds and conditions of acceptability of a constitutional complaint, are formulated.

Keywords: constitution, constitutional complaint, constitutional rights and freedoms of human and citizen, Constitutional Court of Ukraine.

¹Department of State-Legal Disciplines and Administrative Law, Volodymyr Vynnychenko Central Ukrainian State Pedagogical University, 25006, 1 Shevchenko Str., Kropyvnytskyi, Ukraine

²Declaration Department, PJSC "Ukratnafta", 04053, 3-5 Nestorivskiy Lane, Kyiv, Ukraine

³National Prosecution Academy of Ukraine, 04050, 81-b Yurii Illenko Str., Kyiv, Ukraine

⁴Department of Constitutional, Administrative and Financial Law, Ternopil National Economic University, 46009, 11 Lvivska Str., Ternopil, Ukraine

*Corresponding author

INTRODUCTION

Known to many countries the constitutional complaint institute is one of the modern institutes of democracy, which envisages the possibility of a person to actively participate in the control over the activities of the supreme bodies of state power, which is implemented accordingly in rulemaking, law-enforcement and justice forms. Deprivation or lack of the right of citizens to appeal to the judicial constitutional control bodies with a request to verify the constitutionality of authorities acts, which, in their opinion, are violated, their rights and freedoms substantially restrict citizens in the protection of their constitutional rights and freedoms. The constitutional implementation of the rights of a person and a citizen to a constitutional complaint by the Law of Ukraine "On Amendments to the Constitution of Ukraine" (in relation to justice) of 02.06.2016 and the elaboration of the main aspects of this right in the Law of Ukraine "On the Constitutional Court of Ukraine" of 13.07.2017 actualized the need for a thorough study of the institute and the peculiarities of its functioning in Ukraine.

The Institute of Constitutional Complaint was studied by such scholars as M.M. Gultai (2010), Y. Kyrychenko (2012), L. A. Okunkov (2001), A.S. Golovin (2012), T. Volkova (2001) etc. But despite the fact that the individual problems of the institute of constitutional complaint were investigated by domestic specialists, at present, in conditions of the constitutional implementation of this institute and the formation of a legislative mechanism for its functioning, a comprehensive study of its structural elements becomes of particular importance.

The purpose of the article is to further analyze the constituent elements of the constitutional complaint institute, to reveal the peculiarities of their introduction and functioning in Ukraine through the prism of the proposed changes to the current legislation.

The essence of the institute of a constitutional complaint is as the right of citizens to appeal to bodies of judicial constitutional control with a request to verify the constitutionality of authority acts that violate their rights and freedoms.

MATERIAL AND METHODS

Methods of research are selected with allowance for the object, subject and purpose of the study. In the course of the study general scientific and special methods of legal science were used. The basic method of research is the dialectical method, which substantiates the content of the constitutional complaint. General scientific methods of generalization, synthesis, comparison, analysis, induction, deduction, analogy were used in clarifying and specifying the features of the filing a constitutional complaint. Also, the methodological foundations of the research are the following scientific methods: formal-dogmatic, system-structural, historical-comparative and logical methods.

The institute of constitutional complaint is primarily the invention of European democracy. Today its application can be found in most European countries. There fore, it is quite obvious that in the course of the implementation of the course on Ukraine's accession to the EU, our state included a constitutional complaint in the national legal system.

According to the current legislation of Ukraine, the constitutional complaint is a written application to the Constitutional Court of Ukraine regarding a check on compliance with the Constitution of Ukraine (constitutionality) of the law of Ukraine (its separate provisions), which was applied in the final judicial decision on the subject of the right to a constitutional complaint (p. 1, Article 55 of the Law of Ukraine "On the Constitutional Court of Ukraine").

The Institute of Constitutional Complaint can be characterized through its structure, that is, elements, groups of norms that this institution contains. The concept of "structure" comes from the Latin "construction", "placement", from "to build", "to construct", means the mutual placement and interconnection of the constituent parts of the whole.

In its content, the structure of the institute constitutional complaint is a set of interconnected, mutually impacted legal norms are intended to ensure the effective functioning of this institution and to ensure the protection of human and citizens' rights and freedoms by the constitutional justice authority.

Constitutional complaint in Ukraine: theory and practice

According to M. Gulta (2010), the structure of the institute of a constitutional complaint should include: the norms regulating the grounds for proceedings on a constitutional complaint; norms concerning the subject of appeal, which includes normative legal acts that contain a possible violation of constitutional rights and freedoms, and verification the constitutionality of which is attributed to the jurisdiction of the Constitutional Court of Ukraine; norms establishing the peculiarities of the legal status of participants in a constitutional appeal; norms, which fix the very procedure for proceedings on a constitutional complaint.

In the opinion of A. Golovin (2012), the most important issues related to the introduction of a constitutional complaint in Ukraine are the following: the subject of a constitutional complaint; the subject of the right to a constitutional complaint; circumstances that make it impossible the considering of a constitutional complaint; ensuring the consideration of constitutional complaints by the Constitutional Court of Ukraine within a reasonable time; ensuring the implementation of the decision of the Constitutional Court, adopted on the results of consideration of the constitutional complaint.

In our view, the key structural elements of the constitutional complaint institute in Ukraine are substantive and procedural norms that regulate respectively the issue of: the subject of the right to submit a constitutional complaint; the subject of a constitutional complaint; the grounds and conditions of admissibility of the constitutional complaint; procedure for proceedings on a constitutional complaint. The indicated elements of the constitutional complaint institute partially entrenched in the Constitution and in the near future they require a detailed legislative regulation (Gultai 2012).

Note that Part 3 of Art. 55 of the Constitution of Ukraine (1996) guarantees everyone the right to appeal to a body of constitutional jurisdiction with a constitutional complaint on the grounds established by the Constitution and in accordance with the law.

At the level of the domestic scientific space has long been dominated by the point of view of the granting of this right to the maximum number of subjects. Such an approach legally consolidated the new Law of Ukraine "On the Constitutional Court of Ukraine" of July 13, 2017. Thus, Art. 56 of this Law the subject of the right to a constitutional complaint defines as a person who considers that the law of Ukraine (its separate provisions) used in the final court decision in the case is contrary to the Constitution of Ukraine (1996). Such persons may be individuals and legal entities of private law. Some authors note that the institute of constitutional complaint is limited in the part of legal entities of public law.

Note that in the Draft Law "On Amendments to the Law of Ukraine" On the Constitutional Court of Ukraine "(regarding the implementation of the constitutional right of citizens to a constitutional complaint) No. 6426 dated May 4, 2017, the circle of subjects of this right were also proposed to complement by the local governments.

However, in our opinion, even the current legislative approach is not justified, since this right belongs in the first place to the constitutional rights and freedoms of man and citizen, that is, an individual. In addition, as pointed out by individual authors, legal entities and associations of citizens consist of individual members who are individuals. And they, in turn, will already have the right to a constitutional complaint, therefore, such duplication should be avoided, which can have as implication an abuse of the right by filing several complaints about the same issue. Thus, we believe that such entities should only be individuals (citizens of Ukraine, foreigners and stateless persons).

The subject-matter of the constitutional complaint is the range of legal acts, the constitutionality of which is appealed. The Constitution of Ukraine (1996) in Art. 151-1 clearly defined that the subject-matter of a constitutional complaint of a person may be only the law of Ukraine, which was applied in the final court decision in the case.

Appeal of constitutionality of laws in the order to constitutional complaint is the most widespread and envisaged by the legislation of most countries in which this institution operates (Brazil, Germany, Spain, Slovenia, etc.). In this case, in Germany, Switzerland and Hungary, the range of subjects-matter of constitutional complaint contains, in addition to the laws, the general and personal acts of the state administration.

A significant number of scholars taking the position that the subject of the appeal of a domestic constitutional complaint should be the constitutionality of laws and other normative legal acts of central bodies of state power. In the words of I. Bakirova (2013), everything that is outside the sphere of powers of the national system of courts of general jurisdiction.

The opinion of A. Golovin (2013) is right that in the realities of the Ukrainian legal space the restriction of the subject of a constitutional complaint exclusively by acts of the highest bodies of state power will not solve the problem of raising the level of protection of human rights and freedoms. In this aspect, positive is the experience of Italy, whose legislation provides for the possibility of appeal the constitutionality of any act of public authority – legislative, executive, as well as actions or omissions of officials of state authorities (including the judiciary), if by such an act, in the opinion of an individual, its rights are violated.

The basis for submitting a constitutional complaint is a dispute between the complainant and the state authority, which issued a certain legal act. A controversy means that in this act the complainant sees a violation of his constitutional rights and freedoms, which prompts him to appeal to the Constitutional Court. However, this basis, which can be called the substantive basis, is not the only one. The existence of a dispute by itself does not generate the constitutional proceedings. The procedural basis for the proceedings is a constitutional complaint as a procedural document, which is recognized by the Constitutional Court admissible and on the basis of which constitutional proceedings have commenced. (Akhatov 2018).

A separate role in the structure of the institute of the constitutional complaint is played by a set of circumstances that are taken into account when deciding on the commencing of a constitutional proceeding or the refusal to commence it. These are the so-called conditions for the admissibility of a constitutional complaint.

First of all, they include: the presence and proof by an individual of the fact of the violation of its constitutional rights and freedoms, the use of all other legal possibilities for the protection of violated rights and freedoms, adherence to the established deadlines for the submitting of a constitutional complaint, in some countries – payment of state duty, etc.

According to the provisions of Art.151-1 of the Constitution of Ukraine (1996), a constitutional complaint may be filed in the event that all other national remedies have been exhausted. In our opinion, it is justified the detailing of this condition in the current legislation in order to avoid differences in its interpretation. Thus, Part 1 of Art. 77 of the Law of Ukraine "On the Constitutional Court of Ukraine", the exhaustion of all national remedies provides for the existence of approved in an order of appeal a court decision , which has come into legal force, and in provided for by law possibility of a cassation appeal providing – a court decision made in the order of cassation review. In addition, in Part 2 of Art. 77 of Law established the terms for filing a constitutional complaint as a condition for its admissibility, namely that no more than three months may elapse from the date of entry into legal force of the final court decision, in which applying the law of Ukraine (its separate provisions).

Provided for by law a three-month time limit for submitting a constitutional complaint, in our opinion, is insufficient. Note that the draft Law on Amendments to the Law of Ukraine "On the Constitutional Court of Ukraine" (regarding the implementation of the constitutional right of citizens to a constitutional complaint) in Art. 101 offered a significantly longer term – up to one year, which would be sufficient for filing a complaint. However, the legislator, in Part 2 of Art. 77 of the current Law, provides for only one exception for the adoption of a constitutional complaint outside the specified period of three months if the Constitutional Court finds that its consideration is necessary for reasons of public interest.

RESULTS AND DISCUSSION

We believe that in order to prevent abuse of the right to a constitutional complaint, the condition of the admissibility of a constitutional complaint should be a violation of the constitutional rights and freedoms of the complainant as a result of the application of the law of Ukraine or certain of its provisions, the constitutionality of which is being challenged. Attempt of

Constitutional complaint in Ukraine: theory and practice

such restriction is partially registered in paragraph 6 part 2 of Art. 55 of the Law, where indicated that in the constitutional complaint it is mandatory substantiating the allegations of unconstitutionality of the law of Ukraine or its separate provisions, indicating the fact that, in the opinion of the subject of the right to a constitutional complaint, the violation was committed because of application of the law.

Such a requirement is quite reasonable, because a constitutional complaint must contain evidence of a violation of namely constitutional rights and freedoms of a person and a citizen who are fundamental in nature, and not any subjective rights that indirectly appear, in the opinion of the complainant, from its human rights. In so doing, since in considering the constitutional complaint the question of the constitutionality of laws or their individual provisions, violated by "guaranteed by the Constitution of Ukraine of human rights" is to be understood in the narrow sense as the rights and freedoms enshrined in the Constitution of Ukraine (1996).

Such an approach is in no way a limitation of the person's possibilities of the appealing to the body of constitutional jurisdiction, it fully complies with the jurisdictional nature of the Constitutional Court of Ukraine. In addition, if the condition of the admissibility of a constitutional complaint will be only a violation of human and civil rights and freedoms granted and guaranteed by the Constitution, it will ensure the effectiveness of the consideration of such complaints avoiding a congestion of the body of constitutional jurisdiction. (Kyrychenko 2012).

Important processual norms in the mechanism of proceedings for a constitutional complaint are the norms, which provide for a number of measures to contribute the effective consideration of cases in a reasonable terms. Such measures are the following: restriction of limitation periods for filing a constitutional complaint; introduction of a special procedure for preliminary consideration of constitutional complaints by its relevant working bodies; a special procedure for the consideration of cases of such a category, etc.

Some measures have been consolidated in the current legislation of Ukraine. Thus, the Senate, which belongs to the bodies of the Constitutional Court of Ukraine, considers the issue of conformity the Constitution of Ukraine (1996) (constitutionality) of the laws of Ukraine (its separate provisions) on constitutional complaints. In the event of the Senate refusing to hear the case, a constitutional complaint is submitted to the Grand Chamber, Part 4, Article 36, Clause 9, Part 2, Article 35 of the Law of Ukraine "On the Constitutional Court of Ukraine" (Verkhovna Rada of Ukraine 2019).

The board of judges, acting in the composition of three judges of the Constitutional Court of Ukraine, decides issue about the commence of constitutional proceedings in a case under a constitutional complaint (Article 37 of the Law). The proposed procedure for consideration of a constitutional complaint by court board is criticized as it impedes citizens' access to justice.

A preliminary check of appeals to the Constitutional Court of Ukraine is carried out by the Secretariat. Requests are sent by post or sent directly to the Secretariat. In order to simplify the procedure for applying to the Constitutional Court of Ukraine and unloading its work with constitutional complaints, the idea of introducing an electronic appeal is right. Electronic justice, on the one hand, will contribute to the effective functioning of the Constitutional Court of Ukraine, and on the other hand, it will facilitate the application of the appeal procedure for individuals in order to protect their rights and freedoms.

If the constitutional complaint in the form does not correspond to the established requirements, the head of the Secretariat returns its to the subject of the right to a constitutional complaint. The return of a constitutional complaint does not prevent a repeated appeal to the Court in compliance with the requirements of this Law (Article 57 of the Law of Ukraine "On the Constitutional Court of Ukraine"). The grounds for refusal to commencing a constitutional proceedings in cases of constitutional complaints, as well as measures to secure a constitutional complaint are provided by the current legislation of Ukraine .

The length of proceedings in cases based on a constitutional complaint must not exceed six months. According to the results of consideration of cases on constitutional complaints, the decision of the Constitutional Court of Ukraine is adopted by the Senate, and in case of refusal of the Senate

in consideration of a case on a constitutional complaint at the discretion of the Grand Chamber – is adopted by the Grand Chamber. (Aisulu & Rustemova 2019).

It should be noted that since the institution of the constitutional complaint in Ukraine at the legislative level, according to the information on May 31, 2018, 690 complaints were filed with the Constitutional Court of Ukraine. According to V. Zaporozhets, the head of the department for the preliminary examination of constitutional complaints of the Constitutional Court of Ukraine, only 167 of these complaints have undergone a formal requirement to comply with the Law. Of the complaints that passed this check, on 131 complaints were taken the decisions on the refusal to commence the proceedings, 14 – were submitted for admissibility to the Senate, and regarding only 8 complaints were commenced court proceedings. The overwhelming majority of constitutional complaints filed are related to social issues and access to justice.

A similar situation is observed in other countries. As an example, reference may be made to the data of the Federal Constitutional Court in Germany. There every year the court receives about 6 thousand constitutional complaints. From them, the court commences proceedings only in 1% of cases. The court recognizes unconstitutional rules of law in 0,003% of cases.

Thus, the multi-aspectuality of the functional content of the constitutional complaint institute, as well as the long experience of its application in many countries of the world, necessitates the further development of scientifically substantiated recommendations regarding the mechanism for the introduction and functioning of the institute of a constitutional complaint in Ukraine.

Complaints are handled by senates. If there are difficulties in interpreting the Constitution or other legal difficulties, the senate may refuse to handle the case at the discretion of the Grand Chamber. But what if while the complaint is being processed the rights continue to be violated? In this case, the Grand Chamber may issue a so-called enforcement order imposing a temporary prohibition on certain actions. This order is issued in exceptional cases to prevent irreversible consequences that may arise in connection with the execution of a final court decision. The “exceptional nature” of each case will be determined by the practice of the Constitutional Court. However, the question of how the Grand Chamber should initiate the issuance of an enforcement order if it does not deal with the case, especially since such orders must, as the circumstances require, be made within the shortest possible time remains the disputed issue. And who should then deal with the case – the Senate or the Grand Chamber? These questions are not yet regulated, but it is anticipated that they will be resolved within the framework of the regulation. Currently they are debatable, and more detailed information on the options for their solution is available in the full text of the report, which is posted on the Center for Political and Legal Reforms website.

CONCLUSIONS

The Constitutional Court is not the fourth court instance! It does not replace the courts, law enforcement agencies, etc. It considers solely the compliance of decisions with the Basic Law of Ukraine. If you do not agree with a certain decision, for example, in a divorce case, the Constitutional Court does not deal with this. If you consider this decision as the one restricting your constitutional rights – that is another thing.

Experts predict that about 6 thousand complaints will be received annually to the Constitutional Court. “The ability to file constitutional complaints is the most important step in ensuring human rights and freedoms, – the head of the Constitutional Court of Ukraine emphasizes. – The Constitutional Court is one of the main components of the legal foundation of democracy.

In the coming year, the civilized world will celebrate the centenary since the founding of the first Constitutional Court. It was created in Austria in 1920, its father was an outstanding lawyer Hans Kelsen. After the Second World War a revolution took place in the views on the Constitutional Court. Before that freedom of speech was enshrined in the Constitution, but the law on freedom of speech was also necessary. These days, human rights get their carrier – an individual. And the purpose of the Constitutional Court is not only to protect the rights of individuals guaranteed by the Basic Law, but also to bring the legislation of the country in line with the Constitution”.

Constitutional complaint in Ukraine: theory and practice

We believe that this study is relevant for all countries where the Constitutional Court, as a court with a special jurisdiction, is at the head of the judicial branch. Today, the constitutional complaint has ceased to be just a subject of scientific research, discussions and investigation in a narrow circle of experts. It finally acquired the value of a practical protection tool. At the same time, it should be noted that the constitutional complaint does not appear to be a general panacea.

RECOMMENDATIONS

In our opinion, the domestic institute of the constitutional complaint should consolidate such features of structural elements:

1) subjects of the constitutional right of a person and a citizen to constitutional complaint must be solely individuals (citizens of Ukraine, foreigners and stateless persons), which is quite sufficient to avoid duplication of proceedings on the same issues;

2) restriction of the subject of a constitutional complaint solely by the laws of Ukraine does not correspond to the needs and realities of Ukrainian society in terms of guaranteeing human and civil rights and freedoms and, eventually, should be extended to a system of normative acts of state authorities;

3) it is expedient to outline the eligibility conditions of a constitutional complaint by violating the constitutional rights and freedoms of the complainant as a result of the application of a normative act, the constitutionality of which is being challenged;

4) during the developing a comprehensive mechanism for the functioning of the constitutional complaint institution in general, and procedures for constitutional complaint handling, particular attention should be paid to the issues of effectiveness of the consideration of cases in a reasonable terms, avoiding excessive overloading of the authority of a constitutional jurisdiction. A constitutional complaint is a means of legal protection of the constitutional rights of a person. As the appeal to the European Court of Human Rights, an appeal to the Constitutional Court of Ukraine with a constitutional complaint is intended to play an extraordinary, exclusive role and can be implemented if all other national legal remedies are exhausted. However, the exclusive mission of a constitutional complaint should not be equal to impossibility. Similarly, the public effect of a constitutional complaint must not substitute its practical significance for the applicant individual. It is revealing that the solution of the above problems requires a functional interaction between the various bodies of the state, the unification of their efforts in the fulfillment of the state's decisive obligation – the establishment and safeguarding of human rights and freedoms. We really want to believe that the Verkhovna Rada of Ukraine, the Constitutional Court of Ukraine and the courts of the judicial system together will be able to turn this declarative slogan into reality. Alone they definitely will not succeed in it.

LITERATURE CITED

- Aisulu, S. and G. Rustemova. 2019. The role of international conventions and covenants in achieving economic and environmental justice: a conceptual review. *Journal of Legal, Ethical and Regulatory Issues* 22: 23-28.
- Akhatov, B.I. 2018. State and legal framework for the social state formation and development. *Journal of Legal, Ethical and Regulatory Issues* 21: 23-28.
- Constitution of Ukraine. 1996. Available at <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> (Accessed date 23.08.2019)
- Golovin, A. 2013. Some issues related to the introduction of the Constitution constitutional complaint in domestic law. *The Law of Ukraine* 23: 244-268.
- Golovin, A.S. 2012. *Protection of human and civil rights and freedoms as the only body of constitutional jurisdiction in Ukraine*. Logos, Kyiv, 58 p.
- Gultai, M.M. 2010. On the issue of the need to implement a constitutional complaint in Ukraine. *Bulletin of the Constitutional Court of Ukraine* 3: 116-118.
- Gultai, M.M. 2012. Constitutional complaint as institute of constitutional law. *The Word of the National School of Judges of Ukraine* 1: 111-118.

- Kyrychenko, Y. 2012. The New Law on the Constitutional Court of Ukraine: Lacks and Achievements. *The Law of Ukraine* 13: 120-132.
- Okunkov, L.A. 2001. *Constitution of the states of Europe*. Norma, Kyiv, 98 p.
- Verkhovna Rada of Ukraine. 2019. Draft Law on Amendments to the Law of Ukraine "On the Constitutional Court of Ukraine" (on realization of the citizens' constitutional right to a constitutional complaint). Available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61752 (Accessed date 22.08.2019)
- Volkova, T. 2001. *Universal dictionary of foreign languages of the Russian language*. Veche, Kyiv, 143 p.

*Publication of this issue became possible with the
valuable support of our partners:*



www.publ.science
info@publ.science
rus: +7 (487) 244 05 08
ua: +38 (044) 392 45 52
kz: +7 (727) 312 27 86



Beyond Excellence©



Beyond Excellence©

81 Governor F.T. San Luis Avenue, Masaya, Bay 4033
Laguna, Philippines
Celfone nos. (063) (049) 0916-526-0164; 0977-706-0972
e-mails: asialifesciences@yahoo.com
wsmgruezo@gmail.com
<http://emptub.com/journals/ALS/>

©Rushing Water Publishers Ltd., Philippines 2019

Asia Life Sciences has an Impact Factor of 0.180

The papers published in *Asia Life Sciences* are indexed/covered by SCOPUS, Elsevier B.V., Radarweg 29, 1043 NX, Amsterdam, The Netherlands; CABI, Wallingford, Oxon, UK; China National Knowledge Infrastructure (CNKI), 66 Xixiaokou Avenue, Haidian District, Beijing, China; J-Gate, Informatics Publishing Limited, No. 194, RV Road, Basavanagudi, Bangalore-560004, Karnataka, India and EBSCO Publishing, Inc., 10 Estes Street, Ipswich, Massachusetts, 01938-0682, USA.

Asia Life Sciences is a recipient of the Journal Accreditation Award of the Commission on Higher Education (CHED), Republic of the Philippines (2010-2016).

Printed on acid-free papers

Asia Life Sciences Supplement 21(2) 2019