

CONSTITUTIONAL COMPLAINT IN UKRAINE AND INTERNATIONAL EXPERIENCE

Ukrayna'da Bireysel Başvuru ve Uluslararası Deneyim

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ÖZ

Makale, kimi ülkelerin bireysel başvuru kurumuyla ilgili deneyimlerinin bazı yönlerini ele almaktadır. Makale'de, Ukrayna'da ve diğer ülkelerde bireysel başvurunun lehinde ve aleyhinde öne sürülen farklı görüşler ele alınmıştır. Ayrıca, Ukrayna'da bireysel başvurunun kabulüyle ilgili değerlendirme yapılmıştır. Bireysel başvuru, sadece yargısal korumanın bir başka aracı olmayıp, aynı zamanda ulusal mevzuatın kalitesini etkileyen bir araçtır. Bununla birlikte, Ukrayna'da bireysel başvuru kurumu bulunmamaktadır.

Anahtar Kelimeler: Bireysel Başvuru, Bireysel Başvuru Kurumu, Yasal Koruma, Anayasa Yargısı, Anayasa Mahkemesi.

ABSTRACT

The article analyzes some aspects of the experience of individual countries about the institution of the constitutional complaint. Separate points of view on the implementation of the constitutional complaint to Ukraine and International Experience, for and against, are considered. The expressed own views on the introduction of the institution of the constitutional complaint into the Ukrainian legislation. A constitutional complaint shall be considered not only as another mechanism for judicial protection, but also as a means to influence the quality of the national legislation. However, there is no such legal institution in Ukraine and International Experience.

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Problem Statement

A special place in the system of ensuring implementation and protection of constitutional rights and freedoms of a human and a citizen is occupied by judicial protection of the rights and freedoms, both by national and international courts, and, in particular, constitutional jurisdiction bodies. One of the most popular procedures used by the constitutional jurisdiction bodies in many foreign countries for protection of the rights and freedoms of a human and a citizen is consideration of constitutional complaints.

The essence of the institute of a constitutional complaint today is reduced to the right of the citizens to appeal to the bodies of judicial constitutional control with a request for verification of the constitutionality of statutory instruments, violating their rights and freedoms. A constitutional complaint shall be considered not only as another mechanism for judicial protection, but also as a means to influence the quality of the national legislation. However, there is no such legal institution in Ukraine.

Research Status

The issue of the constitutional complaint drew attention of various Ukrainian experts. In this Article, I referred to the following ones: *I. Bezzub*, *Yu. Shemshuchenko*, *M. Onishchuk* and others. Moreover, constitutional provisions of various foreign countries are included in the scope of the research in this Article.

Relevance of Research

However, it should be noted that this institute has just been established and the number of comprehensive research papers devoted to the institute of constitutional complaint is insufficient, which determined the choice of the given subject.

Objective of the Article

Objective of the Article is the systemic scientific and legal analysis of both scientific approaches and provisions of the international law, constitutional provisions with regard to the constitutional complaint.

Presentation of Basic Material

The institute of constitutional complaint is primarily the invention of European democracy. At present, its application may be observed in the majority of the European countries. Therefore, it is clear that in the process of implementation of the EU accession course, Ukraine is bound to apply the constitutional complaint in its national legal system.

Article 3 of the Constitution of Ukraine envisages the provisions, pursuance to which a person, his/her life and health, honour and dignity, inviolability and security shall be recognized as the highest social value in Ukraine. Pursuant to the constitutional provisions, the rights and freedoms and their guarantees shall determine the content and direction of the activity of our state. However, the present reality does not demonstrate protection of the constitutional rights of the citizens by means of constitutional control. It is not a secret that in many cases, the Constitution itself only proclaims the fundamental rights and freedoms of the citizens, but provides no specific mechanisms and guarantees against their violations.

In the opinion of the director of the Institute of State and Law of the National Academy of Sciences of Ukraine *Yu. Shemshuchenko*, the Constitution being in force in Ukraine today, is fairly good, however, it “has lost its highest intended purpose” due to the fact that it is difficult to fulfil its provisions given their excessive pretentiousness. Such provisions shall be complemented by the norms of law in order to bring the public institutions and specific representatives of government to justice in case of violation of the constitutional rights and freedoms of a specific citizen or even all citizens in general. *Yu. Shemshuchenko* believes that it is necessary to strengthen the guarantees of legitimacy and law and order in the country, to establish liability for violation of the fundamental rights and freedoms of the citizens at the constitutional level. To accomplish this, it is necessary to complement the Constitution by the principle of constitutional legitimacy, to enroot the principles of judiciary and judicial procedure, to improve the structure and powers of the Constitutional Court; in particular, it is necessary to implement the institution of individual complaint of the citizens with regard to violation of their constitutional rights and freedoms.¹

¹ http://nbuviap.gov.ua/index.php?option=com_content&view=article&id=2128:zaprovadzhenya-institutu-konstitutsijnogi-skargi-v-ukrajini&catid=8&Itemid=350.

Indeed, the existing mechanism of protection of constitutional rights of the citizens, namely, the Constitutional Court of Ukraine demands modernisation, therefore it becomes especially relevant to determine the necessity and prospects of the institute of constitutional complaint in Ukraine as a special form of protection of the violated rights.

Current issues of judicial procedure and reforms of the judiciary, including implementation of the institute of constitutional complaint in Ukraine, have been actively discussed by both national and foreign experts and constitutional scholars. For example, in Latvian Republic the institute of constitutional complaint is not available, but there are other instruments protecting the constitutional rights of the citizens of the country.² Successful experience of implementation of the institute of constitutional complaints is being observed in the Republic of Poland.

The supporters of implementation of the institute of constitutional complaint in Ukraine see its advantages in establishment of additional guarantees for protection of human rights and freedoms, provision of people with a direct access to constitutional justice and improvement of the work of the Constitutional Court of Ukraine in general, and their opponents point to the possible negative consequences of the novelty, namely: impossibility to solve the most important issues of social life, fundamental issues with regard to human rights; actual transformation of the constitutional control body into the “fourth” instance for the cases being subject to consideration by the courts of general jurisdiction, etc.

Herewith, some people doubt the necessity to implement the institute of individual constitutional complaint as they think that the violated rights may be restored by other means. In opinion of the scientists, absence of the institute of constitutional complaint may be compensated by the possibility of filing the request by the individuals and legal entities to the Constitutional Court for official interpretation of the Constitution and laws of Ukraine, which complies with the European standards of a direct, individual access of the citizens to the constitutional justice. Implementation of the second form of the direct access, namely, constitutional complaint, would be excessive. It is expected that in

² <http://www.president.gov.ua>.

case of non-compliance of the complaint with the requirements established by the law, it shall not be considered and shall be returned to the complainant.

To develop the Ukrainian model of the constitutional complaint it would be reasonable to refer to the experience of foreign counties and explore the existing models of the constitutional complaints.

Each modern democracy recognizes the right of the citizens to protection of their interests in the court, in particular in the Constitutional Court, which should serve a human and a citizen and be the means of protection of their rights and freedoms. The right to file the constitutional complaint exists in many European states (Austria, Hungary, Belgium, Germany, Spain) and the states of Latin America (including, Brasilia), Asia (Mongolia, Syria, Taiwan, Korea), Africa (Benin, Mauritius, Senegal, Sudan). During the last decades the institute of constitutional complain has been widely recognized in the countries of Eastern Europe and the Baltics (Poland, Slovenia, Slovakia, Hungary, Czech Republic, Latvia, Lithuania), as well as in some CIS countries (Russian Federation, Kyrgyzstan, Georgia, Kazakhstan).³

In different countries, the Constitutional Courts consider complaints of the citizens that are quite different by their content. There is no well-defined standard for the institute of individual constitutional complaint – each country solves this issue at its own discretion.

A common example of the country where the constitutional complaint is an efficient means of protection of the rights of the citizens is the Federal Republic of Germany. A specialized system of the constitutional control in Germany takes in account all basic characteristics of a democratic, social and federal state as it is defined by the Constitution of the Federal Republic of Germany.

The analysis of the constitutional legislation enables to identify the elements of the German model of the constitutional complaint: the subjects appealing the Constitutional Court in the Federal Republic of Germany may be the individuals, legal entities, communities and associations of communities in the cases determined by the law. The object of appeal shall be any enactments (laws, administrative enactments, judgements). In addition,

³ Official web-portal of the Verkhovna Rada of Ukraine (<http://www.rada.gov.ua>).

both action and inaction of the executive authority of the Federation or Federated State may be appealed. The terms of filing the constitutional complaint shall be exhaustion of all national means of legal protection, compliance with the terms envisaged for filing complaints (depending on the type of the disputable enactment: from one month to one year), as well as proving by the claimant of a direct connection between a legal enactment and violated right. The constitutional complaint may also be filed without its consideration in general court procedure if the complaint is of public significance or if a person incurs dire consequences, unless it is urgently considered.⁴

The experience of the European countries (in particular, Austria, Spain) also deserves attention, as these countries, while complying with the postulate of classical liberal theory of human rights, restrict the ground for the constitutional complaint to the violation of the so-called negative rights (fundamental group of rights to independence from the government) and do not apply such form of protection to positive (socio-economic rights). In Spain the so-called “remedy of amparo” is being applicable, this is a special procedure constituting the means of protection of the fundamental constitutional rights of a person, namely, it is of exclusively individual nature.

The foreign experience points out to the opportunity to grant the right to file a complaint with the Constitutional Court on violation of the constitutional rights and freedoms not only by the individuals but also legal entities, including the associations of citizens (Czech Republic, Switzerland).

In certain countries, in addition to the constitutional complaints of certain persons for protection of their fundamental rights and freedoms, there are also so-called *actio popularis* (the right inherent to each member of the society to exercise a legal action to protect the common interest). They are widespread mainly in the countries of Africa, Central and North America (Benin, Ghana, Congo, Brazil, Venezuela, Colombia, Panama, etc.).⁵

In certain countries, there is a spreading tendency with regard to recognition of violation of human rights stipulated in international legal treaties as the ground for constitutional complaint. Thus, in Turkey, pursuant

⁴ Government portal: <http://www.kmu.gov.ua>.

⁵ Official web-site of the Ministry of Justice of Ukraine: <https://minjust.gov.ua/ua>.

to Article 148 of the Constitution, each person may file an individual complaint with the Constitutional Court in case of violation of his/her fundamental rights and freedoms provided for by the Convention for the Protection of Human Rights and Fundamental Freedoms as of 1950 by the government authorities. Such approach promotes implementation of international standards of protection of the rights in the national legal system.

As regards the post-socialist countries of Eastern and Northern Europe, their institution of constitutional complaint differs substantially from its prototype. It is possible to identify a number of features, existence of which is predetermined by the specificity of the constitutional development of these states, namely:

- any person may file a complaint with the Constitutional Court considering the claims of the individuals and legal entities (Poland);
- only those rights defined in the Constitution (Latvia, Poland, Hungary, Czech Republic) and fundamental rights envisaged by the international treaty ratified by the state and published in accordance with the procedure determined by the law shall be subject to protection (Slovakia);
- the complaint shall be drawn up with the assistance of an attorney representing the interests of the plaintiff during the sessions (Poland, Czech Republic);
- the constitutional justice shall consider only observance of an enactment or part of the provisions of the Constitutional Law, on the basis of which the authorities have delivered a final judgement. For example; in Latvia and Czech Republic the accuracy and legitimacy of the court judgements are not subject to consideration, and in Poland it is the same with the procedure for their adoption;
- the right to file a complaint with the Constitutional Court shall arise in the case when not only judicial but all existing legal means of restoration of the rights have been exercised;
- the Constitutional Court prohibits consideration of the relevant civil, criminal or administrative case in a court of general jurisdiction before the date of announcement of the judgement thereof;

- if non-compliance with the norms of the Constitution has been detected, the prior judgements shall be abolished, however, the constitutional control body may not change them to the benefit of the complainant and shall only transfer the case for new consideration;

Such model of constitutional complaint, in comparison with the classical one, is characterized as the limited one. Therefore, the scientists of Western Europe are highly critical of its modification functioning in the post-socialist countries in general, as any restriction in the terms of filing the constitutional complaint calls into question the existence of an idea of the comprehensive constitutional state.

For implementation of the institute of constitutional complaint in Ukraine it may be useful to refer, in particular, to the experience of Latvia, where such institute was implemented in 2001. Their model differs from the classical German model. Thus, in Latvia each person may file a complaint if any enactment violates his/her rights granted by the Constitution after applying to all judicial authorities. However, the facts of impairment of the rights shall not be subject to consideration if such impairments have been made by the court.⁶

In Latvia with the population of about 2 million people, the Constitutional Court is represented only by seven judges. This court receives annually about 500-600 complaints. About 200-250 of them are recognized as such complying with the formal requirements. The latter shall be submitted to the three-judge panel, which decides whether the proceeding in the case shall be initiated.

The period within which it is possible to apply with the Constitutional Court in Latvia shall be six months after delivery of the final judgement. Such term has been recognized as the best one by the legislative bodies in order to give time to the complainant to draw up a complaint and to prevent the government authorities from being in limbo for some time. Herewith, *A. Lavins* believes that this is quite a long term and refers to Spain, where it is only 20 days. In the Czech Republic, Hungary, Slovakia and Slovenia it is 60 days, and in Germany it is one month.

⁶ Official web-site of the Constitutional Court of Ukraine: <http://ccu.gov.ua/uk/index>

Some scientists specify both positive and negative consequences of such model. For instance, on the one hand, establishment of such institute has strengthened the mechanism of mutual control and counterbalances of the branches of government, as well as it provided the persons with the right to assert efficiently their fundamental rights against encroachment of the government. Herewith, limitations in filing the constitutional complaint prevents overloading of the Constitutional Court of Latvia and create the conditions for consideration only the cases related to the interests of the whole society. On the other hand, a person has received partial possibility to protect his/her interests, since the facts of violation of the fundamental rights by the courts of general jurisdiction and administrative institutions shall not be subject to consideration in the Constitutional Court of Latvia.

Conclusion

In view of the practise of the most of the European countries, where this institute has been implemented and is efficient means for protection of the human rights, we may draw a conclusion that it is necessary to implement the institute of constitutional complaint in Ukraine. In order to create the best model for Ukraine, it is necessary to conduct a comparative study of the models of the constitutional complaints of the foreign states. However, it is important, while using the experience of the European countries, to adapt it to the Ukrainian environment and predict how such model will work in Ukraine. Therefore, Ukraine as a state oriented to strengthening of the democratic grounds should constantly improve the mechanisms of protection of the rights and freedoms of a human and a citizen. One of such mechanisms is the institute of constitutional complaint developed in the European countries and the USA.⁷

Implementation of the constitutional complaint in Ukraine will ensure that the legislative framework will comply with the present realities by means of its permanent updating (as the citizens may apply to the Constitutional Court of Ukraine with regard to examination of the provisions of the law violating or resulting in violation of the constitutional rights and freedoms of

⁷ Web-site of the Human Rights Information Centre: <https://humanrights.org.ua>.

a human and a citizen; such issues shall remain urgent as they arise in the process of law enforcement with regard to certain persons and finding solutions will promote elimination of the existing urgent problems), will be directed to the fullest extent to protection of the constitutional human rights and reflect a high level of legislation in Ukraine as the European state.