

МІЖНАРОДНЕ ПРАВО

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Taras Shevchenko National University of Kyiv,
Mykolas Romeris University**C. G. Bühler**Doctor of Juridical Sciences,
Student of the University of Konstanz*THE CONSTITUTIONAL COMPLAINT AS AN EFFICIENT TOOL
TO SECURE THE EFFECTIVENESS OF THE RULE OF LAW

Every country has its constitution. Most of them guarantee fundamental rights to citizens, but not all States give to them a legal way to appeal directly on them. In the following article is going to be analyzed the current situation of the constitutional complaint in Germany, Austria and Switzerland and set in contrast with the current situation in Ukraine and Lithuania.

If to talk about Ukraine, the situation in accordance to this institute in the last year has started its changes. On September 30, 2016 came into force the Law of Ukraine “On Amendments to the Constitution of Ukraine (about justice)” from June 2, 2016 № 1401-VIII. As a consequence due to the new law significantly have changed the powers of the Constitutional Court of Ukraine, in particular, Ukraine introduced the institute of constitutional complaint.

The Constitution of Ukraine was supplemented with Article 151-1, according to which the Ukrainian Constitutional Court decides on the accordance of the Law of Ukraine to the Constitution of Ukraine (constitutionality) after the constitutional complaint of a person, who believes that in the final judgment in its case, the law of Ukraine contradicts the Constitution of Ukraine. The constitutional complaint may be filed when all other domestic remedies are exhausted.

Thus, consideration of the constitutional complaint in the Constitutional Court of Ukraine will start after making changes by Verkhovna Rada of Ukraine to the Law “On the Constitutional Court of Ukraine”, which will identify requirements for constitutional complaints and the procedure for its consideration.” [1] Currently, the Law “On the Constitutional Court of Ukraine” in art. 38 provides only two forms of appeal to the Constitutional Court of Ukraine: constitutional request and constitutional application [2].

So, as we see, on the current stage, the constitution already provides the possibility of an individual

complaint, but there is no procedure for it, so it is still not working, and will start to work only after the amendments to the special law.

The situation in Lithuania is the same, as it was in Ukraine before. There is still not the institution of individual constitutional complaint. According to the article 106 of the Constitution of Lithuania according to which: “Not less than 1/5 of all the Members of the Seimas and the courts shall have the right to apply to the Constitutional Court concerning the conformity of the acts of the President of the Republic with the Constitution and laws. Not less than 1/5 of all the Members of the Seimas, courts, as well as the President of the Republic, shall have the right to apply to the Constitutional Court concerning the conformity of the acts of the Government with the Constitution and laws”.

This contradicts the idea of the Article 30 of the Constitution of the Republic of Lithuania, which guarantees that “the person whose constitutional rights or freedoms are violated shall have the right to apply to the court. There are no exceptions, or other constitutional conditions providing to which court a private person is entitled to apply and to which court his or her application is limited” [3] too. Currently the system of Lithuanian courts includes courts of general competence, administrative courts and the Constitutional Court of the Republic of Lithuania. The Constitutional Court does not belong to the court system of general competence, and is not part of the administrative courts system. Is the Constitutional Court a judicial institution in Lithuania [4, p. 158]?

As already stated, citizens in Lithuania, contrary to other countries, may not apply directly to the Constitutional Court; however, it should be stated that a number of claims (issues related to the implementation of constitutional rights of a private person) are submitted to the Constitutional Court by implementing the provision of Article 6 of the Constitu-

tion. This article provides for Constitution a title of integral and directly applicable act, and everyone may defend his or her right by invoking the constitutional notions directly [4, p. 160].

Additionally, the concept of individual constitutional complaint was created and developed by the notions of the Constitution of the Republic of Lithuania and case law (the jurisprudence) of the Constitutional Court of the Republic of Lithuania” [4, p. 167].

The Parliament of Lithuania has already approved this concept, but its implementation was frozen for economic reasons. Moreover, indirect application is popular in Lithuania: Lithuanian courts may and are obliged to respond directly to the Constitutional Court if the case involves a law which may contradict the Constitution. This does not require approval of higher authorities. Nevertheless, it remains to the discretion of a judge and not a claimant [5]. Such courts may apply to the Constitutional Court, however, how efficiently this measure is used depends on the competence and determination of courts.

But let's look what Ukraine and Lithuania are trying to achieve on the example of how is the situation in Germany? One of the most effective tools to secure the effectiveness of the rule of law for an individual in the Federal Republic of Germany is the constitutional complaint. A constitutional complaint makes it possible for all citizens – and in most of the situations also for other actors – to assert their freedoms that are guaranteed under the Constitution vis-à-vis the state. This is what distinguishes the unique German variant from other countries. For example, until recently in Ukraine and in Lithuania such Constitutional Complaints could not be made by ordinary citizens. Because of this in 2015, for instance, the German Constitutional Court had 5.891 cases [6]. Even on this numbers can be seen, how little effective those complaints can have, if nearly “no one” can raise them.

However, the constitutional complaint is also in Germany not part of the avenue of appeal from regular courts. It is an extraordinary remedy in the course of which the German Federal Constitutional Court only examines whether the specific constitutional law was violated or not. Further details are provided in Art. 93 sec. 1 no. 4a and 4b of the Basic Law (that is how the German Constitution is called, “Grundgesetz”) and in §§ 90 et seq. of the Federal Constitutional Court Act [7].

Constitutional complaints are by far the most common type of proceedings at the Federal Constitutional Court. Since September 7th 1951 the amount of 96,58% of all proceedings have been Constitutional complaints. Until the end of 2015 had been 212.827 proceedings brought to the court [8]. At the beginning of the Court's work, in 1951, just 481 constitutional complaints per year were brought

before it. Until 1980, this number increased to 3,107, reaching its all-time peak in 2014 with 6.811 proceedings per year [9]. Also out of this increase of numbers we can see the development of the complaint and that nowadays it is established as an effective method to secure the rule of law, which is accepted by the citizens.

A constitutional complaint may be lodged by any natural or legal person if they believe that their fundamental rights (which can be found in Art. 1 to Art. 19 of the Basic Law) or specific rights which are equivalent to fundamental rights (which are written down in the Art. 20 sec. 4, Art. 33, Art. 38, Art. 101, Art. 103, Art. 104 of the Basic Law) have been violated by a German public authority. That means in fact, that the way to a constitutional complaint is opened to nearly everyone. After Article 18 of the TFEU it is forbidden for the Member States to discriminate their citizens because of their citizenship. [10] It follows, that the constitutional complaint is, first of all, opened for every Citizen of a Member State of the European Union, even if in the specific Article of the Basic Law is literally mentioned that “all Germans” should have those rights. But even for citizens from third states, there are lots of possibilities for a constitutional complaint. For example, the fundamental rights of Arts. 3 or 1 of the Basic law, which guarantee its rights to everyone.

In order to understand the work of the constitutional complaint in Germany it is worth to provide *an example for a Constitutional Complaint*.

The district authorities revoke the concession of the owner of a taxi company. After unsuccessful objection proceedings on administrative level, the owner then firstly brings an action before the administrative court and after passing through all instances, subsequently lodges a constitutional complaint. The Federal Constitutional Court then essentially reviews whether the relevant provisions in the Carriage of Passengers Act and the way they were applied are compatible with the company owner's freedom of occupation given by Art. 12 sec. 1 of the Basic Law [9]. It could also be reviewed if more than one fundamental right or specific right, which is equivalent to the fundamental rights, was infringed. In our example the owner's fundamental right of property, Art. 14 sec. 1 of the Basic Law, could also be checked.

Sovereign acts of all three German state powers, which there are judiciary, executive branch and legislature may be challenged with a constitutional complaint. The decisive questions are whether the law, on which the challenged sovereign act was based on is constitutional, and whether the complainant's fundamental rights and specific rights which are equivalent to fundamental rights, were respected in the application of these laws. Therefore, if a consti-

tutional complaint challenges errors in the application of a law, but does not have a specific connection to fundamental rights, the constitutional complaint will not be successful. The complainant must be affected individually, presently and directly with regard to his or her fundamental rights. It is not even mandatory for the complainant to be represented by an attorney. In fact that means, that every citizen by himself can apply to the constitutional court. Just in the very rare cases, when an oral hearing takes place, an attorney must represent the complainant. In fact most of the cases are without an oral hearing. The complainant may, however, be represented by an attorney if it is the wish of the applicant.

Formal requirements exist regarding the substantiation of a constitutional complaint. It must be submitted in writing. It may be submitted by telefax, but not by email. Constitutional complaints against court and administrative decisions must be lodged within one month after the decision in order to be admissible. Within this period, the complainant must also provide the complete reasoning, including all documents required.

Generally, the constitutional complaint is only admissible if all legal remedies before the regular national courts have been exhausted. Apart from that, all other available possibilities to correct or prevent the challenged violation of the Constitution must have been used (this is called subsidiarity of the constitutional complaint). It follows from these principles, that generally all remedies available before the regular courts (e.g. appeals on points of fact and law, appeals on points of law, immediate complaints, complaints on points of law and complaints against denial of leave to appeal) must have been unsuccessfully used before the constitutional complaint can be lodged. If a violation of the right to a hearing in court (Art. 103 sec. 1 of the Basic Law) is challenged, a corresponding complaint must have been unsuccessfully lodged before the competent regular court [7].

A constitutional complaint is subject to admission for decision. But this does not mean, that the Court is free to decide. The constitutional complaint shall be admitted for decision by the Federal Constitutional Court if it has general constitutional significance, or if this appears necessary in order to enforce the complainant's own rights under the Constitution. Therefore, each decision not to admit a constitutional complaint is preceded by an intensive legal review. The Federal Constitutional Court may find an act of public authority unconstitutional, reverse an unconstitutional court decision and remit it to a competent court, as well as even declare a law unconstitutional. It is for the regular courts to render such subsequent decisions if necessary. The Federal Constitutional Court, does not award damages and does not order measures of prosecution [5]. Whenever

er a law is declared unconstitutional, it is up to the court to declare that the law is immediately not valid anymore or it can demand from the legislative to create a new law within a specific time limit.

But this is the situation in Germany, let's have a closer look on *Austria*? In Austria such a Constitutional Complaint for individuals as in Germany did not exist for a long time. There an individual could only call the Constitutional Court since 1975 when he thought, that a decision of an authority was based on an unlawful regulation or an unconstitutional law, but not if his action was towards a judgment. In such a case, he had to rely on the fact that a second-instance court by itself disputes the provision at the Constitutional Court. But there was no legal claim that the second-instance court had to do so. But why not?

This is probably due to the long-overdue fiction, that in the matter of the independent courts, in contrast to the administrative authorities, which are exposed to political influences, there would be no need for the individual to be subject to the right of appeal to the Constitutional Court, because the legal validity of a court-decision is much higher, than a decision from the administration. The courts can be trusted, but not the authorities. The courts would make use of their right to bring the case in front of the Constitutional Court, if this would be necessary. This was emphasized by the Austrian Supreme Court of Justice in a press release on the law complaint. This, so the court, should not be doubted [11].

This argumentation is not convincing. If we disregard political interventions, it is not understandable why a judge should "judge" more correctly than an official jurist. Dependency in the administration is not synonymous with "error-prone"; On the other hand does independence not protect from mistakes! Just because of a courts fault to make a judgment, based on an unconstitutional law, because it failed to recognize the unconstitutionality of the legal act, the individual should not be able to do anything? But if an authority makes that mistake then he should have the right for a Complaint to the Constitutional Court? Why should the citizens not also have the possibility to take legal action against court judgments? If the courts have already applied to the Constitutional Court, there is no need for another legal complaint. If the court has correctly refused to do so, the Constitutional Court will not uphold the law complaint, but if the court has wrongly assessed constitutional conformity, the Constitutional Court will abolish the law. Then a new judgment must be made.

If the conditions for a legal complaint are formulated properly, the Constitutional Court will not become a supervision body that controls the Supreme Court of Justice, which is apparently feared. Checked should not be the decision itself, just if the underlying law is unconstitutional. Certainly, the Su-

preme Court of Justice has to accept the fact that the Constitutional Court is examining whether it has rightly failed to submit an application. But this is a meager argument against the Constitutional Complaint. There remains therefore only the fear that it would come to disproportionate procedural delays. Well, this problem is not new and is already solved e.g. in Germany, by the fact, that there such a Constitutional Complaint has no suspensory effect.

So the situation in Austria until the year 2014 was that a Constitutional Complaint was for individuals just possible against administrative decisions. Against judgments of a court, an individual could not by himself bring the case to the Constitutional Court. It needed the help and goodwill of the Supreme Court of Justice or any court of second instance. But since 2014 the Constitutional Complaint (in Austria called "Gesetzesbeschwerde") is also possible for an individual against a decision of an administrative court. Since January 1st 2015, also procedural parties of civil and criminal proceedings can apply directly to the Constitutional Court (in Austria called "Verfassungsgerichtshof, VfGH"), if they find that a first-instance judgment has been made on the basis of an unconstitutional law. An appeal against the judgment itself is still not possible in Austria.

This new possibility is mostly celebrated as a revolution and a way to make the constitution stronger. But there are not just positive reactions. For example, Werner Zinkl, the President of the Austrian Judiciary Association, has a completely different opinion. The regulation, as it was now created, was quite unnecessary, he said. The Supreme Court and the courts of the second instance already had the opportunity to appeal to the VfGH. "If one transfers this authority to the parties, I see the danger that the application for a legal complaint will, of course, also be made for purely procedural reasons." Even now, the average length of stay of the applications submitted by the courts is one year [12].

How is the situation of the individual constitutional complaint *in Switzerland*? In Switzerland, there is no separate court for Constitutional Complaints. There not even a legal remedy called Constitutional Complaint. But still there is a possibility for the individual to appeal on his constitutional rights. In the context of the "ordinary complaints" which are submitted, the Swiss Federal Court (in Switzerland called "Bundesgericht") also assesses complaints about the violation of constitutional rights of the citizens. If no ordinary complaint is permitted, e.g., because the case does not reach the value-limit of at least 15 000 CHF [13], which is in civil-cases normally necessary to open a dispute to the Federal Court, the infringement of constitutional rights can anyway be criticized against cantonal judgments. On the other

side federal law shall, according to Article 190 of the Federal Constitution (BV), be binding to the Federal Supreme Court and all the other law enforcement authorities, so it can not reverse, invalidate or deny them the application. In fact that means, that the Federal Court is, therefore, entitled to establish, that a federal law is contrary to the constitution, but it must still apply it. Because of this, there is only a limited constitutional jurisdiction in Switzerland. But, there is a full constitutional jurisdiction over the cantonal law [13].

All in all, it is worth to say, that the world practice approves, that countries which are counting themselves as democratic and developed and are taking care about their citizens, should also provide them a sufficient amount of constitutional rights, and forceful sources of its protection on national and international level. Just that guarantees the supremacy of the rule of law in the country. Fundamental rights are insignificant, if they cannot be used against the state. That is, what they are made for, as a stronghold against the state. It lies in their nature, that they should be used by the people against the regime. All states, that guarantee fundamental rights to its citizens, should also give them a legal way to uphold the law by applying on those rights to an independent court. That there will also be a big amount of rejected complaints is no argument. A society does not just need to know which actions are unconstitutional, its of the same importance to know that several sovereign acts are constitutional.

The current article represents different efforts how the protections of rights and freedoms should be secured by the constitution on the examples of divergent constitutional complaints in Ukraine, Lithuania, Germany, Switzerland and Austria. Especially Germany is well known for its social protectiveness, its economic development and a huge protection of its citizens basic rights. All this can also be approved by the fact that the Constitutional Court is an influential body that can provide the rule of law in the country as an independent organ of constitutional control. Austria made big steps in this direction by changing their law as above mentioned and giving the power of the constitutional complaint to the individual. Ukraine and Lithuania are already on the way to establish the institute of the constitutional complaint. But this new way of protection is still not working because it's not established in all laws, especially not in the procedure laws.

Furthermore, one of the guiding principles in most countries is the provision that the country guarantees that a person whose constitutional rights or freedoms could be violated shall have the right to apply to a court. In order to provide the guidance of the principle of the rule of law in the country, to guarantee citizens enough sources of protection of

their rights, the most important of which is judicial protection. It is worth to guarantee the individual constitutional complaint, to give the way for it by implementation to all needed laws that this system will start to work.

That is why in Ukraine it is worth to make those changes in the Law on the Constitutional Court of Ukraine, by which the constitutional complaint of an individual and a procedure for its review will be provided. The first step for it was already done, while it was prescribed in the Constitution of Ukraine by amendments to it. But that is not enough for a real implementation in the judicial practice. The for its review coercively necessary procedural law should be provided as soon as possible.

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Summary

Borodii I. V., Buehler C. G. The constitutional complaint as an effective tool to secure the effectiveness of the rule of law. – Article.

The article discusses the institute of constitutional complaint and its existence in different European countries on the example of Ukraine, Lithuania, Germany, Austria and Switzerland. It is proved the necessity of constitutional complaint for the providence of the principle of the rule of law in the country and is suggested steps for its practical realization in Ukraine.

Key words: constitutional complaint, application.

Анотація

Бородій І. В., Бюлер К. Г. Конституційна скарга як інструмент забезпечення ефективності верховенства права. – Стаття.

У статті розглянуто інститут конституційної скарги та його існування у різних європейських державах на прикладі України, Литви, Німеччини, Австрії та Швейцарії. Обґрунтовано є необхідність конституційної скарги для запровадження принципу верховенства права у державі, запропоновано кроки для її практичної реалізації в Україні.

Ключові слова: конституційна скарга, заява.

Аннотация

Бородий И. В., Бюлер К. Г. Конституционная жалоба как инструмент обеспечения эффективности верховенства права. – Статья.

В статье рассмотрены институт конституционной жалобы и его существование в различных европейских государствах на примере Украины, Литвы, Германии, Австрии и Швейцарии. Обоснованной является необходимость конституционной жалобы для внедрения принципа верховенства права в государстве, предложены шаги для ее практической реализации в Украине.

Ключевые слова: конституционная жалоба, заявление.