THEORETICAL PROBLEMS OF LAW AND POLITICS

Mykhailo Gultay, PhD in Law

COMPARATIVE ANALYSIS OF THE CONSTITUTIONAL COMPLAINT AND THE CONSTITUTIONAL APPEAL IN UKRAINE IN THE CONTEXT OF THE EUROPEAN INTEGRATION

The article is devoted to comparative analysis of constitutional complaint and constitutional application of individuals and legal entities for official interpretation of the Constitution and laws of Ukraine. The similarities and differences of the elements of their legal functionality are consistently expounded. It's proved that constitutional application is an effective way of direct individual access to constitutional justice with the goal to protect constitutional rights and freedoms that reflects the individuality of the Ukrainian system of the constitutional justice. However it can not be considered as a full replacement for the "classic" constitutional complaint. As a consequence, the optimal model of constitutional complaint for Ukraine is offered in the article.

From the time of its independence Ukraine actively seeks to improve national ways of enhancing protection of human rights. Constitutional Court of Ukraine is the only court of constitutional jurisdiction in the nation and, therefore, is integral to the process. As a result, leading Ukrainian constitutionalists that have long worked on various aspects of constitutional justice (A. Golovin, Yu. Barabash, P. Evgrafov, V. Kampo, A. Petrishin, A. Portnov, A. Selivanov, V. Skomorokha, A. Strizhak, P. Tkachuk, V. Tykhiy, V. Shapoval, S. Shevchuk, etc), are in discussion as to the need to introduce the institute of constitutional complaint in Ukraine.

In the broader sense, the concept of the **constitutional complaint** in all its various models comes down to the recognition of the right of individuals and legal entities to complain to the courts of constitutional jurisdiction with written requests to check constitutionality of laws and other legal acts that are in violation of constitutional human rights and

freedoms[1]. Constitutional complaint is a well tested in leading world countries efficient remedy for protection of fundamental human rights, strengthening of the rule of law and development of democracy. These key values form major grounds of European constitutionalism that reflects their joint constitutional heritage and liberal axiology[2].

This being said though, constitutional law of Ukraine contains provisions for the unique concept – **constitutional application for official interpretation of the Constitution and laws of Ukraine** (hereinafter, unless otherwise stated – constitutional application). Some of the famous constitutionalists believe (P. Tkachuk, V. Shapoval, V. Tykhiy, etc.) this remedy compensates the absence of constitutional complaint in Ukraine. Some researchers call constitutional application "a limited type of individual constitutional complaint"[3]. In fact a research-based answer to the question of correlation of constitutional complaint and constitutional application could be reached through the comparative analysis of these two constitutional law instruments. Such analysis will highlight their similarities and differences, as well as suggest ways for improving access for individuals and legal entities to constitutional justice in Ukraine as remedy to rectify their rights and freedoms. This article aims at some of the above tasks.

First let's look at the basics of the comparative method for legal research. One of its basic principles is the principle of comparability of the studied phenomena, concepts and institutions. During preparation and carrying out of comparative research this comes down to the need to strictly adhere to the requirement according to which "the objects of comparison need to be comparable", in other words, there need to be a direct relation among the notions. The comparability of the different phenomenon is determined depending on whether they have common characteristics, belonging to the same type or kind, common structures and functionality, common usage area, common tasks and goals[4]. With this, comparison and differentiation of the studied objects needs to be

[1] Гультай, М.М. (2011). Функціональні характеристики інституту конституційної скарги та модель його впровадження в Україні. *Вісник Конституційного СудуУкраїни, 4-5,* 185-193.

[2] See.: Барабаш, Ю.Г., Дахова, І.І., Євсєєв, О.П., Колісник, В.П., Кушніренко, О.Г. [та ін.] (2012). *Конституційна юрисдикція.* Харків: Право, 25-29.

[3] Петришин, О.В., Барабаш, Ю.Г., Серьогіна, С.Г., Бодрова, І. І. (2010). *Проблеми та перспективи запровадження індивідуальної конституційної скарги в Україні.* Київ: Атіка-Н, 36.

[4] Марченко, М.Н. (2002). *Курс сравнительного правоведения.* Москва: ООО «Городец-издат», 36-37.

conducted based on a number of traits, features, that is, comparative characteristics.

For the purposes of comparative analyses of the constitutional complaint and constitutional application some of the criteria could be the elements of the legal functionality of the constitutional complaint, identified by a number of inductive and deductive methods as part of the study of many national constitutional complaint models that allow to study them through single logical system in comparative aspect. Most academic research of the constitutional complaint in this or that way looks at the analysis of the various individual elements of the legal functionality of the constitutional complaint (although the actual term may not be used), and this allows to identify its following major elements[1].

– subjects, the agent that enjoys the right to file a constitutional complaint to the court of constitutional jurisdiction;

– object of the constitutional complaint, that is the pool of legal acts that could be subject to complaint for contradicting the constitution;

– grounds for filing the complaint, that have to constitute the violation of rights and freedoms guaranteed by the Constitution, legal enactments and acts or omissions of the government authorities and their officials. It is this element of the legal functionality of the constitutional complaint that unifies all its models and acts as its constituting element;

– procedural rules for admission of the constitutional complaint (the so called "filters"), that is, the pool of circumstances and conditions that are to be taken into account when accepting constitutional complaint for process or refusing to do so. Such procedural conditions include exhausting all other legal remedies for the constitutional rights and freedoms that were breached; adhering to the rules for the form of the constitutional complaint, adhering to the filing terms, etc.;

– finally, the ultimate element of the legal functionality of the constitutional application are legal consequences of the constitutional court's decisions, reached following the review of such complaints as well as its jurisdiction both in time and in person.

Based on the above methodological statements, the similarity (comparability) of the constitutional complaint and constitutional application first and foremost supported by to the single generic concept, that is individual access to constitutional justice. The forms and process for such access are described in detail in the Report of the European Commission for Democracy through Law (Venice Commission) "On Direct Access to

[1] See. Гультай, М.М. (2010). До питання про необхідність впровадження конституційної скарги. *Вісник Конституційного Суду України, 6,* 116-118.

Constitutional Justice" (85th plenary hearing, Venice, 17-18 December 2010), aimed at enhancement of national remedies for human rights[1]. According to it, direct individual access includes all legal remedies that the individual enjoys for direct application to the constitutional court as to the constitutionality of the legal acts or individual acts through no other authorities. Among such remedies there are both "classic models" of the direct individual access: public complaint (actio popularis), quasi public complaint (quasi actio popularis), individual offer, amparo, normative and full constitutional complaint[2], and "peculiar" national models, including constitutional application for interpretation of the Constitution and laws of Ukraine.

Under the Constitutional Court of Ukraine Act, dated 16.10.1996 № 422/96-ВР (hereinafter, unless otherwise stated – the Law), the constitutional application is a written petition to the Constitutional Court of Ukraine as to the necessity of the official interpretation of the Constitution and laws of Ukraine with the goal to insure implementation and protection of the constitutional human rights and freedoms for both individuals and legal entities (art. 42 of the Law). Such a definition points directly at the functionality of the constitutional application that is insuring and protection of constitutional rights and freedoms, and this brings it close with the constitutional complaint.

The subjects under the law for the constitutional application are Ukrainian nationals, foreign nationals, stateless persons as well as legal entities (art. 43 of the Law). This means that access to the constitutional justice based on constitutional application, as in the case of "classic constitutional complaint", is granted to both individuals and groups. With this, according to the case-law of the Constitutional Court of Ukraine every Ukrainian national is entitled to bring a constitutional application to the sole court of constitutional jurisdiction (Ruling dated 20 December 2005 № 31-у).

---

[1] Hereinafter: Report of the European Commission for Democracy through Law (Venice Commission) *"On Direct Access to Constitutional Justice"* (*85th plenary hearing, Venice, 17-18 December 2010*). <http://www.venice.coe.int>.

[2] See.: Арутюнян Г. (2011). Індивідуальна конституційна скарга: європейські тенденції системного розвитку. *Захист прав людини органами конституційної юстиції: можливості і проблеми індивідуального доступу:* матеріали міжнар. конф., м. Київ, 16 верес. 2011 р. Київ: Логос, 75-76; Гультай, М. (2011). Питання вдосконалення індивідуального доступу до консти-туційного правосуддя в Україні. *Захист прав людини органами конституційної юстиції: можливості і проблеми індивідуального доступу:* матеріали міжнар. конф., м. Київ, 16 верес. 2011 р. Київ: Логос, 261-267.

The object of the constitutional complaint depending on its various models could be represented by legal acts: laws and their particular provisions; international treaties, enactments by the head of the state, the government, other enactments including, in some countries, – enactments by local authorities (in case of a "normative" constitutional complaint); as well as individual acts – enforcement orders by administrative authorities and final court rulings (in case of "full" constitutional complaint). The Constitution of Ukraine (articles 147, 150) and the Constitutional Court of Ukraine Act provide an exhausting list of legal acts that could be the object of interpretation by the Constitutional Court of Ukraine. These are the Constitution of Ukraine and the laws of Ukraine, and for this purpose the Constitution in effect and the laws of Ukraine enacted both before and after the Constitution of Ukraine came into effect. The laws that have not taken effect or those that have lost effect cannot be the object of the constitutional application[1]. As the constitutional complaint has to do with the official interpretation of the above top effect legal acts, Venice Commission concluded that such an application in Ukraine "in fact functions as normative constitutional complaint"[2].

The grounds for the constitutional application are the "diversity in application of the provisions of the Constitution or the laws of Ukraine" by the courts or other government authorities, if the applicant believes this could lead or has lead to the violation or his/her constitutional rights and freedoms (art. 94 of the Law). This being said, the law does not require that lack of unified implementation be attested by the ruling of the higher courts or other supreme government authorities. This is deemed more favorable to citizens than exhausting all judicial and administrative remedies as a necessary precondition for admission of constitutional complaints in many of their national models[3].

It has been pointed out in Ukrainian literature that following the letter of the law the application of the Constitution or the laws of Ukraine that is unified but violating rights and freedoms cannot be the object of

---

[1] Барабаш, Ю.Г., Дахова, І.І., Євсєєв, О.П., Колісник, В.П., Кушніренко, О.Г. [та ін.] (2012). *Конституційна юрисдикція.* Харків: Право, 62.

[2] See.: par. 78 Reports of the Venice Commission *"On Direct Access to Constitutional Justice"* (85th plenary hearing, Venice, 17-18 December 2010)

[3] On issues of «diverse implementation» for more detail see.: Скомороха, В.Є. (2007). *Конституційна юрисдикція в Україні: проблеми теорії, методології і практики.* Київ: «МП Леся», 484; Тихий, В. (1999). Захист прав і свобод людини Конституційним судом України. *Механізми захисту прав людини в Україні,* Київ, 6-13; Ткачук, П. (2006). Конституційний Суд України: теоретико-правові питання діяльності. *Вісник Конституційного Суду України, 4,* 26–28.

the constitutional application. This being said though, the Constitutional Court of Ukraine is standing for the broader interpretation of this provision and reviews individual application in cases where the application of the constitutional provisions or laws of Ukraine is uniform but is incorrect (unconstitutional) and in the view of the applicant can lead or have lead to the violation of his/her constitutional rights[1]. Such a legal provision needs to be enacted by the legislature though.

Article 42 of the Constitutional Court of Ukraine Act also sets formal requirements for the constitutional application, and in particular: just as constitutional complaint, it has to be in writing. Besides, it has to contain information on the applicant and his/her representative, references to the articles (provisions) of the Constitution of Ukraine or the law of Ukraine, the interpretation of which is required from the Constitutional Court of Ukraine; the justification of the necessity for the official interpretation; information on other documents and materials, that are being referred to by the legal subjects for the constitutional complaint, as well as their copies with the list of attached documents and materials. Constitutional application, documents and other materials are to be filed in three copies.

Inconsistency of the constitutional complaint with the requirements, set by the Constitution of Ukraine and the Constitutional Court of Ukraine Act, constitutes one of the grounds for refusal to admit the application for the constitutional review procedure, stated in art. 45 of the Law. At the same time, there is no set time window to bring the constitutional application, while for the constitutional complaints there is usually a set time window, that starts with the enactment of the law (action or omission), that is being appealed as well as the decision of the judicial authority based on it that violates constitutional rights and freedoms (in case of the "normative" constitutional complaint).

Leading Ukrainian experts on constitutional justice (A. Golovin, P. Tkachuk, V. Shapoval, V. Tykhiy, etc), believe that similarity of the constitutional complaint and constitutional application shows in provisions of par. 2 art. 95 of the Constitutional Court of Ukraine Act. It reads that in cases where the interpretation of the law of Ukraine (or its provisions) manifests the traits of its inconsistency with the Constitution of Ukraine, as part of the same procedure the Constitutional Court of Ukraine determines whether the law is unconstitutional. And this is logic, as only those provisions that are consistent with the Constitution can be subject

[1] Тихий, В. (2001). Захист конституційних прав і свобод Конституційним Судом України за зверненням фізичних та юридичних осіб. *Вісник Конституційного Суду України, 2,* 70.

to interpretation. So in Ukraine the law provides the remedies for violated rights and freedoms for both individuals and legal entities through recognizing the applied law unconstitutional as a result of the review of the constitutional application for the official interpretation by the court of constitutional jurisdiction[1].

V. Skomoroha asserts that in such a way the Constitutional Court of Ukraine insures human rights and freedoms for a wider circle of individuals and not just for the applicant. This substantially enhances the potential of the sole court of the constitutional jurisdiction for the protection of human rights and freedoms and makes the absence of the institute of constitutional complaint less important for Ukraine[2]. V. Tykhiy makes an even more categorical conclusion, saying that in "such a manner, the Constitution and the laws of Ukraine allow individuals to in fact bring constitutional complains to the Constitutional Court of Ukraine to protect their constitutional rights"[3].

It is hard to agree to the above statement, as first, in case of the constitutional application for the official interpretation of the Constitution and laws legal control are imposed on provisions of the law, while in case of the constitutional complaint control may be imposed on a much wider pool of enactments.

Second, although the ruling of the Constitutional Court of Ukraine for the official interpretation of the Constitution and the laws of Ukraine is mandatory for application on the territory of Ukraine, is final and cannot be appealed, it is not considered to be a new circumstance and therefore, does not lead to new process for the court decisions that have taken effect. At the same time, procedure codes of Ukraine consider the ruling by the Constitutional Court on unconstitutionality of the law, other enactment or any provision thereof applied by a court in a particular case to be new circumstances. As a result, if there were constitutional complaint in place in Ukraine, the decision of the court of constitutional jurisdic-

---

[1] Ex, Ruling dated 3 July 2003. In constitutional application by citizen Ivan V. Diaka and constitutional justification of 49 MPs of Ukraine on official interpretation of the of par. 6 art. 29 Member of Parliament of Ukraine Election Act; Ruling dated 30 October 1997 constitutional application on official interpretation of art 3, 23, 31, 47, 48 Information Act and art. 12 Prosecutors Office Act (Ustimenko case).

[2] Скомороха, В.Є. (2007). *Конституційна юрисдикція в Україні: проблеми теорії, методології і практики.* Київ: «МП Леся», 482.

[3] Тихий, В. (2001). Захист конституційних прав і свобод Конституційним Судом України за зверненням фізичних та юридичних осіб. *Вісник Конституційного Суду України, 2,* 67.

tion on such complaints could provide for reinstating violated rights and freedoms of the individual by way of review of the final court decision.

Third, and the most important, the above control procedure under the constitutional application eliminates personal initiative of an individual or legal entity in regard to requesting the decision on constitutionality by the court of constitutional jurisdiction of the law or other enactment. This downscales the whole essence of the constitutional complaint, thus depriving it of most of its functionality[1]. As a consequence, constitutional application could hardly be deemed a full replacement for the "classic" constitutional complaint.

With this, the jurisprudence of the sole court of constitutional jurisdiction in Ukraine shows that in recent two years the number of decisions on cases of constitutional applications has grown four times and, at present, the review of constitutional applications is one of the major activities of the Constitutional Court of Ukraine[2]. This is being enhanced by the active work of the Court on improving the citizens' knowledge of its competence and activities as to the ensuring and protecting of constitutional rights and freedoms (in particular, systemic consultations for the citizens by the experts of the Legal Expertise Department of the Secretariat of the Constitutional Court of Ukraine, developing memos for the individuals and legal entities on the procedure of bringing constitutional applications, placing informational and methodological materials on preparation of such applications on the Court's website[3] , etc.).

Thus, in Ukraine constitutional application is an effective way of direct individual access to constitutional justice with the goal to protect constitutional rights and freedoms of individuals and legal entities. This legal remedy to a substantial degree reflects the individuality of the Ukrainian model of the constitutional justice and characteristic aspects of its national identity. As a consequence, when settling academic discussion in Ukraine on constitutional complaint as a way to "replace"

---

[1] For more detail see: Гультай, М.М. (2011). Функціональні характеристики інституту конституційної скарги та модель його впровадження в Україні. *Вісник Конституційного СудуУкраїни, 4-5,* 185-193.

[2] See.: Новости на zakon.org.ua. <http://www.zakon.org.ua/comment/164>.

[3] In particular, Rules for review procedure for the applications by citizens and personal consultations at the Constitutional Court of Ukraine, The rules for bringing application to the Constitutional Court of Ukraine by citizens. Офіційний сайт Конституційного Суду України. <http://www.ccu.gov.ua/uk/publish/category/6133>.

or supplement to constitutional application[1], the following needs to be taken into account:

1) positive functional experience of the constitutional application, conditioning its preservation as an effective remedy of constitutional rights and freedoms;

2) the need to clearly delimitate by law constitutional complaint and constitutional application based on their major goals. The goal of the constitutional application is to provide official interpretation of the provisions of the Constitution and the laws of Ukraine in cases of ununiformed application that contradicts the spirit and the letter of the Constitution and leads to the violation of the human rights and fundamental freedoms. As a result of the introduction of the constitutional complaint, the constitutional application should stop being, as defined by V. Shapoval, "palliative of the complaint" where individuals and legal entities by way of such application are attempting to recognize certain provisions of the law unconstitutional.

Thus, constitutional application needs reforming with the goal to enhance its importance as a "safeguard" against human rights violations in law enforcement practices. In its turn constitutional complaint will become a remedy for constitutional rights and freedoms from unconstitutional legislation, where violations in law enforcement are conditioned by application of the provisions of the law or other enactments that are inconsistent with the Constitution of Ukraine.

When defining the future of introducing of the constitutional complaint, it is necessary to first of all take a look at the "classic experience" of European countries – the experience of the founder countries for the constitutional complaint (FRG, Austria, Spain), as well as the experience of the countries, that have common historic heritage to Ukraine (Poland, Russian Federation). In latter countries the complaint was introduced recently, but they have already developed practices of its implementation, and both advantages and disadvantages thereof are to be collected and analyzed for the purposes of the national model of the constitutional complaint of Ukraine.

---

[1] See.: Шаптала, Н. (2010). Особливості національного конституціоналізму в питаннях захисту Конституційним Судом України прав і свобод громадян. *Вісник Конституційного Суду України, 6,* 130; Ткачук, А.П. (2012). *Конституційний суд у механізмі захисту основних прав і свобод людини: модельний підхід: а*втореф. дис. ... канд. юрид. наук. Київ, 14; Бакірова, І. (2008). Конституційне звернення та конституційна скарга: переваги та недоліки. *Бюлетень Міністерства юстиції України, 1,* 93-102.

In a series of works we proposed and justified the optimal, in our opinion, model of the constitutional complaint that would allow the right for Ukrainian nationals, foreign nationals, stateless persons as well as legal entities, once all national legal remedies are exhausted, to bring a complaint to the Constitutional Court of Ukraine as to the constitutionality of the laws of Ukraine and other enactments subject to constitutional controls in cases where the application of those laws in a concrete case led to the violation of the constitutional rights and freedoms of the applicants.

We suggest the model of the constitutional complaint is to be put forward for a broad discussion. In general, the introduction of such legal institute should be preceded by the development on the government level of the academically justifies Concept of legislative introduction of the institute of the constitutional complaint[1], that will be widely supported both by professionals and civil society[2].

[1] This suggested was also put forward by the present Chief Justice of the Constitutional Court of Ukraine A. S. Golovin. See.: Головін, А.С. (2011). *Захист прав і свобод людини і громадянина при здійсненні правосуддя у рішеннях Конституційного Суду.* Київ: Логос, 274, 277, 278.

[2] For the purposes of this publication all references to the original articles and academic works as provided in the footnotes have been translated from Ukrainian an Russian into English.