

UDC 340.12:342.7
DOI: 10.33270/01211203.66

Filing a Constitutional Complaint as a Tool for Protecting Human Rights in Ukraine

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■ **Abstract.** The purpose of the study is to consider the constitutional complaint in Ukraine as a new tool for the protection and restoration of human rights, the authority of which is constantly growing. Every year, the number of complaints filed increases rapidly, which is due to several factors, which are analysed in the study. The methodological tools were chosen in accordance with the purpose of the study, which is to analyse the Ukrainian model of constitutional complaints in the context of the initial experience of their consideration in the Constitutional Court of Ukraine. Firstly, this is about the “originality” of a constitutional complaint as a tool that a person can use to protect themselves from state interference at the level of the “law of Ukraine”, which was not previously provided for within the national legal order. Secondly, in March-April 2018, the Constitutional Court of Ukraine reorganised its activities, creating a Grand Chamber, two senates and collegiums, which activated the mechanism for considering constitutional complaints in Ukraine. Although no decision has been made as of September 1, 2018, constitutional proceedings in dozens of cases on constitutional complaints have reached the finish line, so in the near future, the public will get acquainted with the first decisions. Despite the fact that the essence of the constitutional complaint is actively investigated by Ukrainian researchers, the subject of the study does not lose its relevance, since the constitutional complaint as a phenomenon is only beginning to be established in the constitutional practice of Ukraine

■ **Keywords:** Constitution, human rights, constitutional complaint, Constitutional Court of Ukraine

■ Introduction

First of all, it should be noted that the constitutional complaint as an instrument has become an important component of the right to judicial protection, outlined by the Constitution of Ukraine in Art. 55. According to part four of Art. 55 of the Constitution of Ukraine, “everyone is guaranteed the right to file a constitutional complaint with the Constitutional Court of Ukraine on the grounds established by this Constitution and in accordance with the procedure established by law”.

The following researchers devoted their works to the study of these problems: K.B. Airiian [15], M.M. Hultai [2-4], H. Berchenko, Ye. Tkachenko [4], R. Chornolutskyi [6], O. Shcherbaniuk [7], and others. However, many aspects of the problem raised require thorough research.

The wording of the appeal with a constitutional complaint “in accordance with the procedure determined by law” became an obstacle to the consideration of a constitutional complaint by the Constitutional Court of Ukraine in the period after their implementation in the constitutional order on September 30, 2016, by the law on amendments to the Constitution of Ukraine of June 2, 2016 [8].

The scientific originality of the study consists in the analysis of the features of a constitutional complaint identified in the professional literature, including the following: 1) the complaint should be related to a specific case in which the final decision of the competent authorities has been made; 2) the basis of the complaint should only be a violation of rights and freedoms that are directly enshrined in the text of the Basic Law of the state; 3) the complaint has a subsidiary character, which means that it can be introduced only after all other available remedies have been exhausted; 4) consideration of the complaint falls within the competence of the constitutional justice body, whose decision is final and obliges other

■ Suggested Citation:

Kopcha, V.V. (2021). Filing a constitutional complaint as a tool for protecting human rights in Ukraine. *Scientific Journal of the National Academy of Internal Affairs*, 26(3), 66-70. doi:10.33270/01211203.66

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■ Received: 02.06.2021; Revised: xx.xx.2021; Accepted: xx.xx.2021

state bodies [9]. This study does not fully share these features, given their excessive generalisation.

■ Results and Discussion

In fact, this trial was initiated in the Constitutional Court of Ukraine in April-May 2018.

According to statistics, in 2018, 491 constitutional complaints were filed with the Constitutional Court of Ukraine [10].

The key features of the model of constitutional complaint in Ukraine are laid in the new Art. 151-1 of the Constitution of Ukraine: “The Constitutional Court of Ukraine decides on compliance with the Constitution of Ukraine (constitutionality) of the law of Ukraine on the constitutional complaint of a person who believes that the law of Ukraine applied in the final court decision in their case contradicts the Constitution of Ukraine. A constitutional complaint may be lodged if all other remedies have been exhausted”.

In this regard, it should be noted that although the construction of a constitutional complaint does not provide for its conditionality to protect basic (constitutional) human rights and freedoms, such constitutional wording should not be interpreted in a different context. The legal content of the complaint as an individual instrument determines the inextricable connection of the constitutional complaint as an institution with the need to protect (restore) human rights – in this case, this is about a specific person or group of persons. Focusing on the constitutional formula of Art. 151-1 of the Constitution of Ukraine (“when making a final court decision in its case”), the norm of the Constitution also certifies the connection of this legal remedy with protection against violation of the rights of an identified subject. Even if, based on the results of consideration of a constitutional complaint, the normative potential of human rights violations is clarified, which reflects the systemic problem of constitutional legal order (which should be primarily aimed at the activities of the Constitutional Court), this does not change the nature of the constitutional complaint [11].

The outlined features of the constitutional complaint model should be taken in the context and in relation to other constitutional norms related to constitutional jurisdiction. For example, Art. 152 of the Constitution of Ukraine provides: “Laws and other acts by the decision of the Constitutional Court of Ukraine are recognised as unconstitutional in whole or in a separate part, if they do not comply with the Constitution of Ukraine or if the procedure established by the Constitution of Ukraine for their consideration, adoption or entry into force has been violated.” It follows that a person (subject of the right to a constitutional complaint) can justify

the unconstitutionality of a law that is “applied in a final court decision in their case” on the grounds of both the content of the law and on the grounds of violating the constitutional procedure for its consideration, adoption, or entry into force.

Thirdly, the Law of Ukraine “On the Constitutional Court of Ukraine” (hereinafter referred to as the Law), adopted on July 13, 2017, regulated the model of a constitutional complaint in more detail [12].

Art. 55 of the Law stipulates that “a constitutional complaint is a written request submitted to the court for verification of compliance with the Constitution of Ukraine (constitutionality) of the law of Ukraine (its individual provisions), which is applied in the final court decision on the case of the subject of the right to a constitutional complaint” (part one of the article). In the second part of Art. 55 of the Law, it is established that the constitutional complaint contains: 1) the surname, first name, patronymic (if any) of a citizen of Ukraine, a foreigner, or a stateless person, the address of the registered place of residence of the person (for a foreigner or a stateless person – the place of stay) or the full name and location of the legal entity, and the number of the means of communication, e-mail address, if any; 2) information about the authorised person acting on behalf of the subject of the right to a constitutional complaint; 3) a summary of the final court decision in which the relevant provisions of the law of Ukraine were applied; 4) a description of the course of consideration 5) specific provisions of the law of Ukraine that should be checked for compliance with the constitution of Ukraine, and specific provisions of the Constitution of Ukraine that should be checked for compliance with the law of Ukraine; 6) justification of claims about the unconstitutionality of the law of Ukraine (its individual provisions) indicating which of the human rights guaranteed by the Constitution of Ukraine, in the opinion of the subject of the right to a constitutional complaint, was violated as a result of the application of the law; 7) information about documents and materials referred to by the subject of the right to a constitutional complaint, with the provision of copies of these documents and materials; 8) A list of documents and materials that are attached.

Art. 56 of the Law stipulates that “the subject of the right to a constitutional complaint is a person who believes that the law of Ukraine (its individual provisions) applied in the final court decision in their case contradicts the Constitution of Ukraine. Subjects of the right to a constitutional complaint do not include legal entities under public law”. It is also established that “an individual signs a constitutional complaint personally”.

Art. 77 of the law stipulates that a constitutional complaint is considered admissible if it meets

the requirements provided for in Art. 55, 56 of this Law, and if: 1) all national legal remedies have been exhausted (if there is a court decision adopted in the order of appeal review that has entered into legal force, and in the case of the possibility of cassation appeal provided for by law – a court decision issued in the order of cassation review); 2) no more than three months have elapsed from the date of entry into force of the final court decision in which the law of Ukraine (its individual provisions) has been applied. The second part of Art. 77 of the Law also stipulates that “as an exception, a constitutional complaint may be accepted outside the requirements established by paragraph 2 of part one of this article, if the Court considers its consideration necessary for reasons of public interest.” Important for the admissibility of a constitutional complaint is part four of Art. 77, which provides: “the Court refuses to open constitutional proceedings, declaring a constitutional complaint inadmissible if the content and requirements of the constitutional complaint are obviously unsubstantiated or there is an abuse of the right to file a complaint”.

According to Art. 78 of the Law, the means of securing a constitutional complaint are established, which provide that during the consideration of a constitutional complaint, the Grand Chamber, in exceptional cases, on its own initiative, may take measures to secure a constitutional complaint by issuing an interim order, which is an enforcement document (part one), and the basis for securing a constitutional complaint is the need to prevent irreversible consequences that may occur in connection with the execution of a final court decision (part two).

The specific features of this model of constitutional complaint allow characterising it as “partially normative”, its subject matter is covered exclusively by the “law of Ukraine”, effectively depriving a per-

son at the constitutional level of protecting the right guaranteed by the Constitution of Ukraine from their violation by other normative acts, first of all – from the actions (inaction) of public authorities. On the other hand, only the Law of Ukraine “On the Constitutional Court of Ukraine”, and not the norm of the Constitution of Ukraine, provides for a constitutional complaint to protect basic (constitutional) human rights and freedoms. This approach does not seem acceptable, since it allows a person (after a trial and a final decision) to transfer virtually any legal dispute through a constitutional complaint directly to the Constitutional Court if only the person believes that the relevant act of legislation “contradicts the Constitution of Ukraine”. This can be a civil, administrative, economic-legal dispute, or other types of disputes. The study also supports the opinion that the definition in Art. 151-1 of the Basic Law of the subject of filing a constitutional complaint also certifies its limited nature, since it refers only to the “person”. Expanding the list of subjects of filing a complaint at the level of the Law of Ukraine “On the Constitutional Court” is appropriate, but rather doubtful, given the constitutionality (Lemak, 2017, p. 52-54) [11].

■ Conclusions

The “partially normative” model of constitutional complaint, which was introduced in Ukraine, can potentially become an effective tool for protecting human rights guaranteed by the Basic Law. The condition for its effectiveness is the effective activity of the Constitutional Court of Ukraine. Proposals to “expand” the subject of appeal in it are considered premature.

The effectiveness of a constitutional complaint also depends on understanding its role as a means of combining the protection of individual human rights with the protection of the objective rule of law, which is defined in the Constitution of Ukraine.

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Звернення з конституційною скаргою як інструмент захисту прав людини в Україні

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■ **Анотація.** Мета статті – розглянути конституційну скаргу в Україні як новий інструмент захисту та відновлення прав людини, авторитет якого постійно зростає. Щороку кількість поданих скарг стрімко збільшується, що зумовлено декількома чинниками, які й проаналізовано в статті. Методологія. Методологічний інструментарій обрано відповідно до поставленої мети статті, що полягає в аналізі вітчизняної моделі конституційної скарги в контексті початкового досвіду їх розгляду в Конституційному Суді України. По-перше, ідеться про «новизну» конституційної скарги як інструменту, яким людина спроможна захистити себе від державного втручання на рівні «закона України», чого раніше не було передбачено в межах національного правопорядку. По-друге, у березні–квітні 2018 року Конституційний Суд України реорганізував свою діяльність, створивши Велику палату, два сенати та колегії, чим було активізовано механізм розгляду конституційних скарг в Україні. Наукова новизна. Хоча станом на 1 вересня 2018 року жодного рішення не було ухвалено, конституційні провадження в десятках справ за конституційними скаргами вийшли на фінішну пряму, тож найближчим часом суспільство ознайомиться з першими рішеннями. Висновки. Попри те, що сутність конституційної скарги активно досліджують вітчизняні вчені, предмет дослідження не втрачає актуальності, оскільки конституційна скарга як феномен лише починає утверджуватися в конституційній практиці України

■ **Ключові слова:** Конституція, права людини, конституційна скарга, Конституційний Суд України