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"INDIVIDUAL CONSTITUTIONAL COMPLAINT TO THE CONSTITUTIONAL COURT OF UKRAINE"

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REPORT

"The individual constitutional complaint (Verfassungsbeschwerde) in German Law with comparative references to Ukrainian Law"

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1. Finality, History and Basic Structure

a) The finality of the individual constitutional complaint (ICC) is to give the individual a judicial remedy to defend his/her fundamental rights (and other important guarantees protected by the Constitution) before the Federal Constitutional Court (FCC). Additionally to this subjective dimension, the ICC is destined to contribute to the objective development of constitutional law, to its interpretation and further evolution (CCF vol.33, p. 247,258).

This remedy is considered to be the ultimate remedy after all other courts involved have denied a fundamental rights violation. However, the FCC is not an additional, a fourth instance but examines only a specific violation of constitutional law.

b) The ICC has not been foreseen by the original text of the German constitution, the Basic Law (BL) which was adopted in 1949. In the preparative deliberations of the Parliamentary Council which prepared the BL it was strongly debated whether to introduce such a remedy into the Constitution or to leave it essentially to the administrative justice to control administrative actions (which were regarded as the main threat to fundamental rights)under the issue of a violation of fundamental rights. The compromise was not to mention this remedy in the text of the constitution but to leave it to the legislator to establish the ICC remedy by ordinary law. The Act on the FCC of 1951 has introduced the ICC on the level of ordinary legislation. In 1969, when emergency laws were adopted, the ICC was constitutionalized by introducing no. 4 (a) to article 93.1 BL which enumerates the competences of the FCC. The aim was to make it impossible for the ordinary legislator to abolish this remedy in times of emergency.

c) The basic structure of the ICC in Germany is similar to that in Ukrainian law except of what can be submitted by this remedy to the review of the constitutional court: in Germany *all forms of public power* can be impugned by ICC, executive action, judicial decisions as well as legislation if it affects directly the fundamental rights of the complainant. The ICC is subsidiary and can only be lodged after the exhaustion of the ordinary remedies. The deadline is in general one month, if directed against a piece of legislation a year.

The ICC must be admitted to be examined in substance by the FCC (§93a FCC Act). This provision clearly prescribes the prerequisites the FCC must fulfill in order to be admitted § 93 a.2 FCC Act). Most of the ICC, more than 90%, are not admitted.

2. The rights which can be defended by the ICC

a) Article 93.1 no. 4a BL and § 90.1 FCC Act declare the following rights defendable by ICC: “the fundamental rights” which are enumerated in articles 1- 19 BL as well as the rights embodied in articles 20.4 BL (right of resistance), 33 (the rights resulting from equal citizenship in all the German member states), 38 (the right to vote in the parliamentary elections), 101 (the ban on extraordinary courts and the right to the lawful judge), 103 (fair trial) and 104 (habeas corpus).

It shall be mentioned in this context that breaches of *objective constitutional law* are not defendable by the ICC. However, if a public power act interferes with the right to freedom of a person (article 2.1 BL) it can be asserted that this act does not comply with objective constitutional norms (for example that the law enabling this intervention has not been adopted within the constitutional competence or the procedure foreseen by the constitution or that this act is not proportional, etc.). The violation of objective constitutional law can be at the same time a violation of a fundamental right.

It shall be explained that the German constitution does not contain fundamental rights in form of programmatic norms. In contrast to the Weimar constitution, the BL formulates all fundamental rights as subjective, directly applicable rights which can be invoked before the courts. In contrast, programmatic norms are orientations for politics and in particular the legislator to implement the programs through legislation, without an exact time limit to do so. In the field of fundamental rights such uncertainty inherent in programmatic norms has been avoided. This has not excluded that the BL also provides *objective finality norms* (which are similar to programmatic norms), such as the finality of *Social State* as expressed in article 20 BL, norms which cannot be invoked by ICC as they are not subjective fundamental rights.

b) All the 16 member states of the German Federation have created own constitutions with fundamental rights (with some divergences to the BL and to the constitutions of other member states). These rights are defendable before the constitutional courts of the member States, however only with regard of public power actions of the member states, not of the Federation.

c) The violation of human rights guarantees embodied by the European Convention of Human Rights (ECHR) is not defendable by ICC. However, as the FCC has stated, the fundamental rights of the BL shall be interpreted in the light of this Convention and of the jurisprudence of the European Court of Human Rights in Strasbourg. Therefore the ECHR guarantees have indirect importance for the ICC.

d) The European Union Fundamental Rights Charter embodies rights which are directly applicable within the member states (if they are not mere programmatic guarantees) but they are not defendable by the ICC as they are not part of the German constitutional order. If the EU Charter is applicable in accordance to its article 51.1, the German fundamental rights do not apply. In such case the ICC which is necessarily based on German fundamental rights is not available. It shall be shortly mentioned that the scope of the EU Charter's applicability in Germany is to some extent differently understood by the EU Court of Justice on the one hand and the German FCC on the other hand. The German court interprets the applicability clause of the Charter in a narrower way than the Luxembourg court.

3. <u>The objects of review through ICC</u>

a) The relevant provisions of the BL and the FCC Act speak generally of fundamental rights (and other rights, see above) breaches made by the "public power" (that means of the *German* public power, not of the supranational EU power though EU law has direct effect within the national legal order): legislation, executive action and judicial decisions.

b) <u>Legislation</u>: *formal* legislation (legislation adopted by Parliament) of the Federation or of one of the member States; also (only) *material* legislation (regulations or bye laws adopted by the executive on authorization by a parliamentary law or resulting from institutional autonomy); also the laws on the *budget* (which are purely formal laws) and the laws of *approval to international treaties*.

Also *constitutional law* (of the Federation as well as of the member states) can be object of the ICC (see FCC vol.109, p. 279; in Germany the doctrine of "unconstitutional constitutional law" is accepted albeit in discussion).

It shall be mentioned that the ICC against a piece of legislation is only admissible after the legislative procedure has been completed. An exception has been made by jurisprudence for Acts of approval to an international treaty. In order to avoid the problems which would arise if this Act would be declared unconstitutional after the entry into force of the international treaty, the constitutional review (by abstract control as well as by ICC) is admitted already before the entry into force of the Act of approval, after the parliamentary procedure has been finished but the promulgation and publication has not yet taken place.

It is important to mention in this context that the ICC against a piece of legislation is only admissible if the complainant is *personally, presently and directly* affected in his/her fundamental rights.

(1)The legislation must affect the fundamental rights of the *person of the complainant* in a legal sense; the ICC is not an *actio popularis* (FCC vol. 40,p. 141, 156; Lechner/Zuck, BVerfGG,7th ed. 2015, § 90/129).

(2) Furthermore, it must be *clearly recognizable at present* that and how the piece of legislation affects in the moment or will affect the complainant's rights in the future (FCC vol.114,p. 258, 277; Lechner/Zuck,ibd. § 90/ 130). In certain cases it is sufficient that it is "likely" that the person's fundamental rights will be affected (case of "big eavesdropping" – Großer Lauschangriff – or case of the air security law (shooting down of a plane captured by terrorists).

(3) The complainant is *directly affected* if the violation occurs by the legislation itself and not by an executive measure which carries out the piece of legislation. Legislation can for example prohibit certain actions (e.g. not to smoke in restaurants) which are directly applicable for all persons or prescribe the fulfillment of determined conditions. In such cases legislation itself forbids or prescribes and even sanctions non-compliance with these legislative orders.

§ 95. 2 FCC Act lays down that the FCC declares void a piece of legislation if the judicial decision is unconstitutional because it is based on the unconstitutional legislation. This means that the ICC lodged against the final decision of the supreme (administrative) court can end up in the annulment of legislation if it is the reason for the unconstitutionality of the impugned judicial decision.

Omissions by the legislator can also be object of the ICC if the omission violates a constitutional mandate for the legislator to act (which can be directly prescribed by the constitution or result from the obligation to protect sufficiently the values embodied by fundamental rights).

c) Executive actions: All actions of the executive which affect fundamental rights (or the other constitutional rights able to be impugned by ICC) can be reviewed by ICC, including actions of the government in the field of foreign policy. The advanced concept of rule of law as it has been developed in Germany by the FCC does not allow areas exempt of judicial review if there is a connection with fundamental rights.

However, regularly the administrative courts are involved before the ICC is admissible. So the ICC has to be directed against the executive action as confirmed by the final administrative court decision, principally by the Federal Administrative Tribunal. The ICC is therefore directed against a judicial decision except in the case of § 90.2 second sentence (decision of the FCC without exhaustion of remedies for the "general importance" of the ICC or if prior recourse to other records would entail a serious and unavoidable detriment) or if the exhaustion of the judicial remedies is not acceptable (tolerable) by the complainant.

d) Judicial decisions : The decisions (not only preparatory judicial measures except those, for example in criminal proceedings, which have an own onerous, burdening effect) of all State courts (not of the FCC itself, but of the member States constitutional courts) can be object of ICC.

Also omissions of a court can be impugned, such as the omission to make a preliminary question to the FCC according article 100.1 or 2 BL or even if the EU Court of Justice is arbitrarily not involved according article 267 Treaty on the Functioning of the EU (TFEU).

There is a further important problem which is connected with the ICC directed against the last instance judicial decision: the FCC is not a fourth instance, it is not a "superrevision". Legality is not in the focus of the FCC, it is *constitutionality* which is relevant for the constitutional review. If the decision of the instance courts (the ordinary, administrative, social or labor courts) interprets and applies ordinary law erroneously, the decision is not legal. But this is not a matter which is examined by the constitutional court. Only if there is a specific breach of constitutional law, the FCC can review the decision. It is not easy to distinguish between illegality and unconstitutionality because an erroneous interpretation of ordinary law is against rule of law and can also affect the freedom of the individual. The FCC is not competent to review illegality, the erroneous interpretation of ordinary law, but only unconstitutionality, that is the failure to comply *with specific constitutional law* (FCC vol.18, p. 85, 92; so-called *Heck* formula which diverges to some extent to the so-called *Schumann* formula; Lechner/Zuck ibd. §90/98 and 103).

e) Articles 55, 151 of the Ukrainian Constitution and Art. 55, 56 of the Act on the Ukrainian Constitutional Court (ACC) deal with the constitutional complaint. This remedy is given to the persons who consider that the law of Ukraine applied in the final court judgment in his or her case (specific provisions thereof) contradicts the Constitution of Ukraine. In these formulations fundamental rights are not specifically mentioned. It seems that all rights which are claimed in court can be defended by the constitutional complaint with the argument that the legislation on which these rights are based in the final court judgment is unconstitutional. However, article 55.2 ACC mentions in its number 6 that the complaint shall specify the human rights which are considered to have been violated by the application of this law. It does not get totally clear from this formulation whether only fundamental rights or also rights resulting from ordinary legislation are concerned.

In conclusion it can be said that the object of the constitutional complaint is legislation as applied by the final instance court

4. Who is entitled to lodge an ICC?

The laws say: "everybody". This means natural persons and, according to article 19.3 BL, also legal persons (of private law) insofar as the nature of fundamental rights permits it.

Some of the fundamental rights are reserved to German citizens (articles 8, 9, 11, 12, (rights the enjoyment of which has been enlarged to all EU citizens), 16, 33, 38.1 BL) while the other rights are human rights. This is also relevant for the question who is entitled to lodge the ICC. The fundamental rights reserved to German and EU citizens cannot be enjoyed by third states nationals or state less persons; for substitute they enjoy the general freedom of action, article 2.1 BL) which can only be limited by laws conform to the constitution, especially complying with the principle of proportionality.

Also the embryo is entitled by fundamental rights (right to life, article 2.2 BL, human dignity, article 1.1 BL, and the right of succession, article 14.1 BL).

Minors are also entitled to fundamental rights, however they cannot invoke and defend these rights through ICC by themselves as not having yet attained majority. They get able to do this autonomously if they have obtained sufficient maturity for the relevant field of fundamental rights.

Legal persons of public law (e.g. public broadcasting entities, universities, etc.) do not enjoy fundamental rights because they belong themselves, despite a certain autonomy, to the public power. However, they are entitled to defend their specific areas of freedom, such as freedom of press, article 5.1 BL, or freedom of research and academic teaching, article 5.3 BL.

By the way, municipalities enjoy local autonomy and self-administration which they can defend by a specific sort of ICC against autonomy affecting legislation (article 93.1no. 4b BL; § 91 FCC Act).

Also in Ukrainian law public legal entities are denied to have the right to constitutional complaint (Art. 56.1 second phrase Act on the CC).

5. The exhaustion of the legal remedies

Subsidiarity of the ICC means that the violation of fundamental rights has to be eliminated first within the instance courts, and as an ultimate remedy the constitutional court can be involved.

There are already mentioned exceptions as in particular foreseen by § 90.2 FCC Act.

In case of the ICC directed against the piece of legislation there is no prior remedy; this case there is an immediate access to the FCC.

The Ukrainian Constitution also foresees in article 151 that a constitutional complaint may be lodged “after exhaustion of any other domestic remedies”. This shows the subsidiarity of the constitutional complaint.

6. A limine refusal or admission of the ICC by the Chamber (*Kammer*) or by a Senate (*Senat*).

a) The refusal/admission ICC filter system is highly important for the functioning of constitutional justice. The statistics of 2017 show that 5 784 ICCs have been lodged, 5 268 ICCs have been refused *a limine* by the Chambers, 8 have been refused by the Senate, 91 have been declared well-founded in merits by a Chamber according to § 93 c FCC Act. 9 ICCs had success in merits before a Senate.

The statistics demonstrate the big number of ICCs lodged the FCC per year and the small number of ICCs which are admitted by the Chambers to the examination by the Senates and the even smaller number of ICCs which have success in merits. However, the successful ICCs have great importance despite their reduced number. Important concepts of constitutional law have been developed by ICCs such as the principle of proportionality. The issues of daily life have been reflected on the criteria of constitutional law with help of this remedy. The fundamental rights idea has been very much promoted by the existence of the ICC.

b)The mentioned possibility for a Chamber to declare an ICC well-founded (§ 93 c FCC Act) gives the Chamber the power to decide positively on the ICC if the relevant constitutional issue has already been decided by the FCC and if the ICC is obviously well founded. Such a Chamber decision is equivalent to a Senate’s decision. However, a Chamber cannot declare a piece of legislation void for incompatibility with the constitution.

c) Back to the system of § 93a FCC Act:
The Chamber can refuse the ICC with a unanimous vote of the three judges. If the ICC is not refused in this way, the Senate decides; if three judges of the Senate admit, the ICC is deemed by the law to be admitted and will be reviewed by the Senate.

The refusal by the Chamber is final. For this decision no reasons must be given. In practice, however, reasoning is often given. The Chambers decide without oral hearings.

The law says clearly that the ICC shall be admitted if the issue has basic importance for the constitutional law or if it is appropriate for enforcing fundamental rights or the other rights enumerated in § 90 ICC Act. This latter aspect can also be fulfilled if the complainant would suffer a particularly serious disadvantage if the ICC would not be admitted.

d) Also in Ukrainian law the initiation of constitutional proceedings in case of the constitutional complaint shall be delivered by the ruling of a Board composed of three constitutional judges (Art. 61.3 Act on the Constitutional Court) which has to decide to initiate proceedings or to reject them regularly within one month from the assignment of a Judge-rapporteur. It is up to the Senate if it disagrees with the Board's ruling (not delivered unanimously) to reject them. The unanimous decision of the board to reject constitutional proceedings is final and cannot be overruled by the Senate.(Art. 37.2, 5 second phrase and Art. 61.3 Act on the Constitutional Court).

The grounds for rejection to initiate constitutional proceedings are enumerated in article 62 Act on the CC, in particular if the person who lodges the complaint is not entitled to do so, in case of non-compliance with the legal requirements or if the complaint is inadmissible.

It is also laid down in article 63.3 Act on the CC that the Senate or the Grand Chamber can reject the termination of the consideration of the complaint if the issues raised in the complaint are of “particular social importance in the protection of human rights”, even if the complaint has been withdrawn by the complainant.

7. The decision

According to § 95 FCC Act, the FCC shall annul the decision (with effect *ex tunc*), that means an administrative or judicial decision; in the latter case the FCC remands the matter to a competent court to decide anew following the opinion of the FCC.

If a law is unconstitutional, the FCC has to declare this law void. However, in this case the court has developed different modes of decision such as the declaration of unconstitutionality, in particular if equality is concerned or in case of unconstitutional omissions of the legislator. In contrast to the annulment the declaration of the unconstitutionality keeps the law valid; however this law cannot be applied. The FCC can establish an interim law. The legislator is obliged to amend the law which has been declared unconstitutional, obligation which has to be fulfilled without any delay. The FCC can also establish a time limit for the adoption of a law conform to the constitution. Furthermore, the FCC can declare a piece of legislation as (yet) constitutional but order to legislator to amend it (“appeal decision”).