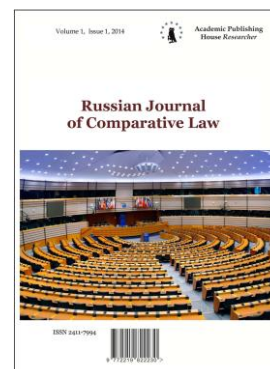


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## The Right to a Constitutional Complaint in Eastern Europe

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### Abstract

The purpose of the article is to study the legislation on constitutional courts and constitutional complaints in Eastern Europe. The authors investigate the right of citizens to a constitutional complaint in Eastern Europe. The authors conclude that in four countries of Eastern Europe there is no right of citizens to have individual access to constitutional justice. The right of citizens to a constitutional complaint has not been established in Bulgaria, Belarus, Moldova and Romania. The authors analyze the models of constitutional complaints in the countries of Eastern Europe: Russia, Czech Republic, Slovakia, Hungary, Poland, Ukraine. In particular, the authors analyze the list of acts that can be appealed in the constitutional courts of these countries. The first group includes countries that establish the right of citizens to a full constitutional complaint, which includes the right to appeal an administrative act, a court decision and a normative act in a constitutional court (Czech Republic, Slovakia). The second group includes countries that establish the right of citizens to file a normative constitutional complaint, which includes the right to appeal to the constitutional court against any normative act applied in a specific case of the applicant (Poland). The third group includes countries that establish the right of citizens to file a normative constitutional complaint, which includes the right to appeal in a constitutional court against a certain list of normative acts applied in a specific case of the applicant (Russia, Hungary, Ukraine). The authors do believe that a full constitutional complaint could become a reality in Eastern European countries.

**Keywords:** Constitutional Courts in Eastern Europe, constitutional complaint, individual access to constitutional justice, subject of constitutional complaint, full constitutional complaint, normative constitutional complaint, comparative law.

### 1. Introduction

The right of citizens to a constitutional complaint is one of the most important rights in a democratic state. A complaint to the constitutional court is an opportunity for citizens to directly influence the legislation of their country. A constitutional complaint is an effective mechanism for protecting the constitutional rights of citizens in the field of law enforcement and in the field of legal regulation.

There are various classifications of constitutional complaints. So, for example, the European Commission for Democracy through Law – Venice Commission conducted a Study on individual access to constitutional justice ([Venice Commission, 2010](#)). This study identified the following types of individual complaints to national constitutional courts:

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1) *Actio popularis*, which means «anyone is entitled to take action against a norm after its enactment, even if there is no personal interest»;

2) *Quasi actio popularis*, which means an applicant has the right to file a complaint against the published normative act, but there is «necessity to prove a lawful interest»;

3) Normative constitutional complaint, where an applicant has the right to file a complaint against a normative act if the norm has been applied to the applicant in a specific case;

4) «Constitutional revision, where an individual is given a remedy against final decisions by ordinary courts, but not against individual administrative acts»;

5) Full constitutional complaint, where a person can appeal against any act of authority (normative act, judgment, administrative act) if this act violates fundamental rights of applicants;

6) Some other types of complaints, for example, a constitutional petition in Ukraine, where citizens have the right to apply for an interpretation of a normative act to the constitutional court. Thus, a constitutional petition can be considered as a type of normative constitutional complaint.

The Constitutional Court was created in Russia in 1991, the Federal Constitutional Act «On the Constitutional Court of the Russian Federation», 1994 enshrines the right of citizens to a constitutional complaint. A constitutional complaint in Russia is a normative constitutional complaint. Over the past 25 years, the right to a constitutional complaint has developed in Russia.

First, the list of subjects who have the right to submit a constitutional complaint has increased. The Constitutional Court substantiated the right of foreign citizens and stateless persons, as well as legal entities, to file a complaint with the Constitutional Court, thereby expanding the range of subjects for filing a constitutional complaint. For example, the Constitutional Court of Russia indicated that «the possibility of protecting rights and freedoms through constitutional justice should be provided to everyone, including foreign citizens and stateless persons, if their rights and freedoms guaranteed by the Constitution of the Russian Federation are violated by law». ([Decision of Constitutional Court of Russia № 6-P, 1998](#)).

The right to file a constitutional complaint by foreigners is still not enshrined in legislation, but exists only in the form of an obligatory legal position of the Constitutional Court. In Russia, in 2020, a reform of the legal regulation concerning the constitutional complaint took place. According to the amendments, the subjects of the constitutional complaint are «the citizens, legal persons and municipalities represented by municipal authorities», «as well as – in the interests of such natural and persons – the High Commissioner for Human Rights in the Russian Federation, ombudsmen for the constituent entities of the Russian Federation, other ombudspersons for particular spheres of rights or particular persons provided for by the federal laws, other authorities or officials in accordance with federal law, All-Russian organisations that in accordance with federal law can represent the interests of such citizens and legal persons». ([Constitutional Court Act of Russia, 1994](#)).

Second, the requirements for filing a constitutional complaint have become more complex. The initial version of the Constitutional Court Act of Russia enshrined the applicant's right to submit a constitutional complaint about the constitutionality of the law «that has been applied or could be applied in a particular case». Since 2010, the applicant has the right to submit a constitutional complaint against a law that has been applied and the case must be completed. In 2020, the conditions for filing a complaint were supplemented by the requirement to exhaust all other domestic remedies.

Thirdly, the list of normative acts, the constitutionality of which could be appealed to the Constitutional Court of Russia, has also undergone changes. In the initial version of the Federal Constitutional Act «On the Constitutional Court of the Russian Federation» only the law could be the subject of a complaint. From November 9, 2020, a list of normative acts was established. This list includes laws and regulations.

In connection with the reform of the constitutional complaint in Russia, it is of interest to study the constitutional complaints regulation in other countries.

Aim. Based on the classification of constitutional complaints developed by the Venice Commission, we aim to investigate the right to a constitutional complaint in Eastern European countries, as well as highlight the features of the legal regulation of constitutional complaints in Eastern European countries.

## 2. Materials and methods

2.1. The main sources for writing the article were the constitutions and the constitutional court acts of the Eastern Europe countries, the official websites of the constitutional courts of the Eastern Europe countries, materials of journal publications. The authors used the classification of countries in the UN regions. According to the UN classification Eastern Europe includes Belarus, Bulgaria, Hungary, Poland, Moldova, Russia, Romania, Slovakia, Ukraine, Czech Republic.

2.2. The study used the method of comparative jurisprudence. The method of comparative jurisprudence determines the difference in the models of constitutional complaints in the countries of Eastern Europe. The authors also used a pro-gonostatic method, making an assumption about the development of the right to direct access to constitutional justice in the Eastern Europe countries.

## 3. Results

Comparing the countries of Eastern Europe, we used the following criteria:

1. Constitutional control bodies;
2. The right to a constitutional complaint and types of constitutional complaints in Eastern European countries;
3. Features of the subject to appeal in the constitutional courts.

**Constitutional control bodies in Eastern Europe.** Bodies of constitutional control are created in all countries of Eastern Europe in the form of a constitutional court. Comparing the countries of Eastern Europe with all European countries, we can note that constitutional control is an institution that exists in all European countries, except for one - the Vatican. The analysis showed that in 30 European countries constitutional courts have been created, in two European countries (France and San Marino) constitutional councils have been created, in 11 European countries the constitutional review function is entrusted to the supreme courts or ordinary courts, depending on the model of centralized or decentralized constitutional control. The analysis is presented in form of [Table 1](#) «Constitutional control bodies in Europe».

**Table 1.** Constitutional control bodies in Europe

Country	Constitutional Court	Constitutional Council	Supreme Court or ordinary courts as constitutional control bodies	No institution of constitutional control
Eastern Europe				
Belarus	V			
Bulgaria	V			
Hungary	V			
Poland	V			
Moldova	V			
Russia	V			
Romania	V			
Slovakia	V			
Ukraine	V			
Czech Republic	V			
Western Europe				
Austria	V			
Belgium	V			
Germany	V			
Luxembourg	V			
Liechtenstein	V			
France		V		

Monaco			V	
Switzerland			V	
Netherlands			V	
Northern Europe				
Latvia	V			
Lithuania	V			
Andorra	V			
Denmark			V	
Ireland			V	
Iceland			V	
Norway			V	
Estonia			V	
Great Britain			V	
Finland			V	
Sweden			V	
Southern Europe				
Albania	V			
Bosnia and Herzegovina	V			
Spain	V			
Italy	V			
Malta	V			
North Macedonia	V			
Serbia	V			
Slovenia	V			
Croatia	V			
Montenegro	V			
Portugal	V			
Greece	V			
San Marino		V		
Vatican				V

The presented analysis shows the countries of Eastern Europe in comparison with all European countries. In Europe, there are three models of constitutional control bodies: constitutional courts, constitutional councils, constitutional review through supreme courts or ordinary courts. All Eastern European countries have established constitutional courts.

The right to a constitutional complaint and types of constitutional complaints in Eastern European countries. The right to a constitutional complaint and direct individual access to constitutional justice is established in 6 out of 10 countries in Eastern Europe: in Hungary, Poland, Russia, Slovakia, Ukraine, Czech Republic. The legislation of Belarus, Bulgaria and Moldova does not enshrine the right of citizens to a constitutional complaint. ([Constitutional Court Act of Belarus, 2014](#); [Constitutional Court Act of Bulgaria 1991](#); [Constitutional Court Act of Moldova, 1994](#)). In Romania, despite the fact that there is no right to a constitutional complaint, there is a mechanism for the indirect access of citizens to constitutional justice: “exception of unconstitutionality”. The Romanian Constitution provides for such powers of the constitutional court as «to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration». ([Constitution of Romania, amended in 2003](#)). «The exception can be raised at the request of either party or ex officio, by the court of law or of commercial arbitration hearing the case. Likewise, the prosecutor is entitled to raise this exception before the court in cases where he attends trial proceedings» ([Constitutional Court Act of Romania, 1992](#)).

So, the right to a constitutional complaint is provided in 6 countries of Eastern Europe. The legal regulation of each country has common and different features. The types of constitutional complaints in Eastern European countries are presented in [Table 2](#).

**Table 2.** The types of constitutional complaints in Eastern Europe

	Actio popularis	Quasi actio popularis	Normative constitutional complaint	Constitutional revision	Full constitutional complaint
Czech Republic	–	–	V	V	V
Slovakia	–	–	V	V	V
Hungary	–	V	V	V	–
Poland	–	–	V	–	–
Russia	–	–	V	–	–
Ukraine	–	–	V	–	–

The analysis showed that the countries of Eastern Europe have not established in their legislation the right of citizens to abstract control in the “Actio popularis” procedure. Hungary is the only country in Eastern Europe, which established the citizens’ right to abstract review in the “Quasi actio popularis” procedure, where the applicant is obliged to prove that the published normative act affects his or her rights and his or her rights were violated by the published normative act. A court decision is not required if there is no judicial procedure for the protection of rights. ([Constitutional Court Act of Hungary, 2011](#)).

T. Dumbrovsky and L. Tichy describe the reasons why the power of the constitutional courts for abstract review is less common than the power of review related to a specific case: «Rulings of the Constitutional Court are, in general, better received when Constitutional Court’s interference with the contested act or decision is only minimal and thus avoids judicial activism. This moderate approach is typical for Constitutional Court’s adjudication on constitutional complaints in concrete review. Ruling on constitutionality of laws in abstract review is typically subject to sharp criticism. This is because, among others, the Constitutional Court deems not only the decision, but also its reasoning to be generally binding, that is, a source of law. Nevertheless, the approach of the Constitutional Court must be defended from the perspective of the protective function of the Constitution» ([Dumbrovsky, Tichy, 2019](#)).

Citizens in the following Eastern European countries can file a constitutional complaint related to a specific case: Hungary, Ukraine, Poland, Russia, Slovakia, Czech Republic. The right to a full constitutional complaint is established in the Czech Republic and Slovakia ([Constitution of the Czech Republic, 1993](#); [Constitution of the Republic of Slovakia, 1992](#)). The full constitutional complaint provides the possibility to appeal against an individual act of the authorities, against a judgment, against a normative act. Researchers note some problems that arise from establishing a full constitutional complaint in Czech Republic: «With respect to the judiciary, the Constitutional Court may review decisions of ordinary courts. This review is restricted solely to the constitutionality of such decisions, that is, to their compliance with constitutionally-guaranteed fair trial rights. Most constitutional complaints target decisions of general courts in civil, administrative, and criminal matters, which causes a significant overload of the Constitutional Court. The Court has repeatedly emphasized its determination to minimise its interference with adjudicative practice of general courts» ([Dumbrovsky, Tichy, 2019](#)).

Hungary has established the right of citizens to constitutional review and normative constitutional complaint. And finally, in Russia, Poland and Ukraine, citizens are granted the right to a normative constitutional complaint. Thus, we can state that the most common model of constitutional complaint in Eastern European countries is a normative constitutional complaint.

#### **Features of the subject to appeal in the constitutional courts in Eastern European countries.**

Constitutional complaints in Eastern European countries differ in the subject to appeal.

Russia. Applicants in Russia can petition the following regulations to be unconstitutional:

- A) Federal constitutional acts;
- B) Federal acts;
- C) Normative acts of the State Duma;



- D) Normative acts of the Federation Council;
- E) Decrees of the President;
- E) Government decrees;
- G) Constitutions and charters of the constituent entities of the Russian Federation;
- I) Acts of the constituent entities of the Russian Federation;
- K) Other normative acts of the constituent entities of the Russian Federation. ([Constitutional Court Act of Russia, 1994](#)).

In Russia, the list of regulations that may be the subject of a constitutional complaint is strictly established. This list does not include normative acts of the Ministries, as well as normative acts of local self-government bodies. A normative constitutional complaint is established in Russia. An individual act cannot be the subject of a constitutional complaint in Russia, but only a normative act. However, in Russia there is a tendency towards full constitutional complaint. «The Constitutional Court of the Russian Federation shall pass the decision on the case assessing both the literal meaning of the act under consideration and the meaning attributed to it by an official and other interpretations or the prevailing law-applying practices» (art. 74 of Constitutional Court act of Russia, 1994). This formulation is similar to the right to constitutional appeal against a court decision, which, for example, is enshrined in Hungary.

Poland. In accordance with the Constitution of the Republic of Poland «everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution» ([Constitution of the Republic of Poland, 1991, art. 79](#)). «A constitutional complaint shall be considered by the Tribunal in accordance with the rules and procedures for the consideration of applications concerning the conformity of statutes to the Constitution as well as the conformity of other normative acts to the Constitution or statutes» ([Constitutional Tribunal Act of Poland, 2016](#)). As we can see, the subject of a constitutional complaint in Poland are a) statutes, b) other normative acts. Subject of a constitutional complaint in Poland includes all legal acts, with no exceptions.

Hungary. According to the Constitutional Court act of Hungary, 2011: «Person or organisation affected by a concrete case may submit a constitutional complaint to the Constitutional Court if, due to the application of a legal regulation contrary to the Fundamental Law in their judicial proceedings their rights enshrined in the Fundamental Law were violated» ([Constitutional Court Act of Hungary, 2011, section 26](#)). A regulation of any legal force can be appealed for unconstitutionality in Hungary. However, the Hungarian Constitution limits the powers of the constitutional court to review fiscal laws. «Insofar as the level of the government debt exceeds half of the gross domestic product, the Constitutional Court shall - within its competence under Points b)-e) of Paragraph (2) of Article 24 - have powers to review laws on the central budget, the implementation of the central budget, central tax revenues, duties and contributions, customs duties, and on the central government conditions for local taxes for conformity with the Fundamental Law solely as pertaining to inherent rights to life and human dignity, the right to protection of personal data, the right to freedom of thought, freedom of conscience and freedom of religion, or the rights in connection with Hungarian citizenship, and may annul such laws only in the case of any infringement of these rights. The Constitutional Court shall have powers to annul the aforementioned laws unconditionally, if the formalities and procedures laid down by the Fundamental Law concerning the adoption and publication of those laws are not satisfied» ([Fundamental Act of Hungary, 2011, art. 37](#)).

Péter Krasztev and Jon Van Til conclude: «The Fidesz government restricted the Constitutional Court's jurisdiction. In order to plug gaping budget holes, the Fidesz government established a 98 percent retroactive tax on the customary departing bonuses of those who had left public employment in the preceding five years. The Constitutional Court, before it could be packed with a working majority of new judges, struck down this tax as unconstitutional. Parliament responded by amending the constitution to take away the court's power over fiscal matters» ([Krasztev, Van Til, 2015](#)).

Ukraine. The Constitutional Court act of Ukraine establishes the following: «The powers of the Court shall include deciding on conformity to the Constitution of Ukraine (constitutionality) of laws of Ukraine (specific provisions thereof), upon a constitutional complaint of an individual who

considers that the law of Ukraine applied in the final court judgment in his or her case contradicts the Constitution of Ukraine» ([Constitutional Court Act of Ukraine, 2017](#)). Thus, we can conclude that only laws are the subject of a complaint to the Constitutional Court of Ukraine. The Constitutional Court Act of Ukraine did not establish the right of citizens to file a constitutional complaint against regulation other than the law.

**Czech Republic.** A full constitutional complaint is established in the Czech Republic, which implies the possibility of submitting a complaint against any act of the state to the constitutional court. At the same time, there are no restrictions on appealing the constitutionality of any types of normative acts. «A constitutional complaint may also propose annulment of a provision of a legal regulation, but, under § 74 of the Act on the Constitutional Court, only if application of that provision led to a circumstance that is the subject matter of the constitutional complaint, and only if the complainant claims that the legal regulation or the provision is inconsistent with a constitutional act (or another law, in the case of a sub-statutory legal regulation) ([Guide on proceedings on constitutional complaints, 2021](#)).

Thus, in the Czech Republic, the subject of a constitutional complaint regarding normative acts is not limited, if the applicant proves that they violate not only the applicant's rights, but also the constitution ([Constitutional Court Act of Czech Republic, 1993](#)).

**Slovak Republic.** Slovakia has established the right to a full constitutional complaint. In accordance with the first paragraph of Article 24 of the Constitutional Court Act, anyone who demonstrates legal interest may lodge a petition to initiate the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority. In accordance with the second paragraph of the same article, legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner\* directly interferes with his rights, legal interests, or legal position ([Constitutional Court Act of the Slovak Republic, 2018](#)). Thus, legislation of Slovak Republic does not limit the range of normative acts that can be appealed in the constitutional court.

Thus, the 6 countries of Eastern Europe provide citizens with the opportunity to petition for the unconstitutionality of the normative act. The difference lies in the scope of the subject matter of the constitutional complaint.

**Table 3.** Countries that provide citizens with the opportunity to petition for the unconstitutionality of the normative act

Country	All regulations	Acts and regulations, but there are exceptions	Acts only
Czech Republic	V		
Slovakia	V		
Poland	V		
Hungary		V (Limiting the powers of the constitutional court in relation to fiscal acts)	
Russia		V (The Constitutional Court does not decide on acts of ministries and local self-government bodies)	
Ukraine			V

All normative acts can be the subject of a constitutional complaint in countries where the right to a full constitutional complaint has been established: Slovenia and the Czech Republic,

as well as in Poland, where the right to a normative constitutional complaint has been established. In Russia, Hungary and Ukraine, the right of citizens to a normative constitutional complaint is established, but the subject of this complaint is limited. In Russia there is a list of regulations that can be the subject of a complaint, in Ukraine only acts can be the subject of a complaint. In Hungary, the constitutional court is limited to appeal against fiscal acts.

#### 4. Results

Thus, our analysis showed differences in the countries of Eastern Europe in the right to a constitutional complaint, as well as in the subject to appeal.

The first group includes countries that establish the right of citizens to a full constitutional complaint, which includes the right to appeal an administrative act, a court decision and a normative act in a constitutional court (Czech Republic, Slovakia).

The second group includes countries that establish the right of citizens to file a normative constitutional complaint, which includes the right to appeal to the constitutional court against any normative act applied in a specific case of the applicant (Poland).

The third group includes countries that establish the right of citizens to file a normative constitutional complaint, which includes the right to appeal in a constitutional court against a certain list of normative acts applied in a specific case.

The fourth group includes countries that do not provide for the right of citizens to a constitutional complaint (Belarus, Bulgaria, Moldova, Romania).

#### 5. Conclusion

On the one hand, there is a worldwide pattern of expanding human rights. Based on this, we can assume that a full constitutional complaint can become a reality in more and more countries in Europe. On the other hand, the establishment of the right of citizens to a full constitutional complaint entails the workload of the constitutional courts, and can reduce the effectiveness of constitutional justice. It is premature to state that there is a tendency to establish a model of full constitutional complaint in all Eastern European countries. However, governments may consider the possibility of expanding the rights of citizens in the framework of constitutional proceedings, using the experience of other countries. We believe that the right to a full constitutional complaint may nevertheless become a common model in European countries.

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