

# Access to constitutional complaint procedures: A real chance? Remarks on the availability of legal aid in constitutional court procedures in Austria, Germany and Hungary

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### ABSTRACT

In a recent decision, the European Court of Human Rights concluded that the constitutional complaint before the Hungarian Constitutional Court can be seen as an effective domestic remedy. This decision shows the growing role of constitutional complaint procedures even in the international system of human rights protection; therefore, it is worth examining how national laws ensure efficient access to such procedures. The current paper aims to analyse a specific aspect of this complex problem, namely, the question of legal aid in constitutional court proceedings – particularly constitutional complaints procedures – in Germany, Austria and Hungary. As a general starting point, it is intended to derive the need for legal aid from the national constitutions, followed by an analysis on the availability of legal aid schemes for constitutional complaint procedures and their conditions. The examination is based on the national legal provisions and case-law, as well as the relevant secondary literature. This comparative study can enable some conclusions to be drawn on the question of how constitutional complaints can become more efficient tools in the protection of fundamental rights for those in need, as well.

### KEYWORDS

legal aid, access to justice, constitutional complaint, fair trial, procedural law

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## 1. INTRODUCTION

In a recent decision,<sup>1</sup> the European Court of Human Rights (hereinafter: ECtHR) concluded that the constitutional complaint before of the Hungarian Constitutional Court (hereinafter: HCC) can be seen as an effective domestic remedy that shall be exhausted before initiating a procedure at the Strasbourg court, as required by Article 35 of the European Convention on Human Rights (hereinafter: the Convention). This decision draws attention to the question of efficient access to such proceedings. Specifically, if constitutional court proceedings, primarily constitutional complaints, offer effective legal remedy in cases concerning the protection of human rights, the access to such procedures cannot remain illusory. In the well-known *Airey v Ireland* case,<sup>2</sup> the ECtHR stated that the obligation to secure an effective right of access to the courts falls into the category of duty on the part of the State. When examining how national laws ensure efficient access to constitutional court procedures, several factors shall be taken into account: court fees and the need for legal representation are only part of the problem. Due consideration shall also be given to the specificities of the constitutional court procedures, including the requirements of admitting a case to decision. The current paper aims to give an overview on the question of legal aid in constitutional court proceedings – particularly constitutional complaints procedures – in three selected countries. While the German model of constitutional complaints can be seen as an established benchmark, Austria and Hungary have realised significant (although not identical) amendments in their systems in the last decade.<sup>3</sup> Therefore, comparing them – due to the difference in progress – can give valuable insights into the interpretation of this institution, as well as the possibilities for development. Furthermore, from the Hungarian point of view, the extensive reference to Austria and Germany in the regulation and case-law of constitutional court proceedings<sup>4</sup> also makes it worth analysing the three countries together. As a general starting point, it is intended to derive the need for legal aid from the national constitutions, followed by an analysis of the availability of legal aid schemes for constitutional complaint procedures and their accompanying conditions. The comparison is based on three major questions: a) What is the scope of legal aid available in the constitutional court procedures, taking the difficulties of access to such proceedings into account? b) What are the general conditions for granting legal aid in constitutional court procedures? c) What form do the specificities of constitutional court proceedings take when assessing the availability of legal aid? As the paper offers remarks on the theoretical background and normative environment, and

<sup>1</sup>*Szalontay v Hungary* App no 71327/13 (ECtHR, 12 March 2019).

<sup>2</sup>*Airey v Ireland* (1980) 2 EHRR 305.

<sup>3</sup>The system of constitutional complaints in Hungary was transformed in 2011 by the introduction of the so-called German-type constitutional complaint, and, consequently, the addition of a new approach to constitutional complaint procedures. Due to the introduction of a new kind of legal protection in 2013 in Austria, constitutional complaint against statutory provisions applied by ordinary courts in civil and criminal law proceedings became possible, thus strengthening the role of the constitutional complaint in individual cases. [Stumpf \(2017\)](#) 239; [Lachmayer and Siess-Scherz \(2017\)](#); [Lachmayer \(2017\)](#); [Kelemen and Steuer \(2019\)](#); [Gárdos-Orosz \(2019\)](#).

<sup>4</sup>E.g. the reasoning of the Constitutional Court Act, available at [link 1](#). Background material to the Fourth Amendment of the Fundamental Law available at [link 2](#). Decisions on the interpretation of the Fundamental Law, e.g. Decision 2/2019. (III. 5.) AB [21], 22/2016. (XII. 5.) AB [32]. Further decisions of the HCC, e.g. 3/2020. (I. 3.) AB, 26/2020. (XII. 2.) AB.



complements these with explanations from the related jurisprudence<sup>5</sup> in three different legal systems, the analysis can contribute to a more comprehensive understanding of the institution of legal aid in constitutional court proceedings. Due to the growing role of constitutional complaint procedures even in the international system of human rights protection, this comparative study can give useful insights into the possible solutions<sup>6</sup> and enable some conclusions to be drawn on the question of how constitutional complaints can also be more efficient tools in the protection of fundamental rights for the disadvantaged.

## 2. CONSTITUTIONAL BACKGROUND

Although Article 47 Paragraph (3) of the Charter of Fundamental Rights of the European Union<sup>7</sup> explicitly addresses the question of access to justice, a specific provision of the national constitutions in the examined states cannot be found on this topic. Therefore, only an indirect argumentation, and a deductive approach can help to position the institution of legal aid in the constitutional system of the examined countries. This theoretical background will, in turn, serve as point of reference when evaluating the efficiency of national solutions.

A possible starting point could be the right to a fair trial as stipulated in Article 103 of the German Grundgesetz (hereinafter: GG), Article 6 of the Convention<sup>8</sup> and Article XXVIII of the Fundamental Law of Hungary. The question is how to establish a link between legal aid and fair trial. A possible point of reference could be the principle of equality of arms, which 'together with, among others, the principle *audi alteram partem*, is no more than a corollary of the very concept of a fair hearing (. . .)'.<sup>9</sup> According to ECtHR it shall ensure "a fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents.<sup>10</sup> Or, more briefly: "Equality of arms" and other considerations of fairness therefore also

<sup>5</sup>The publicly available data on cases related to legal aid in constitutional court proceedings do not make a more detailed analysis of individual applications possible. Therefore, it is rather intended to give further insights into the interpretation of the relevant legal environment by adding remarks from the respective jurisprudence.

<sup>6</sup>One type of interest pertaining to knowledge and explanation in comparative law is associated with the traditional comparison *de lege lata* and/or *de lege ferenda*. Pursuant to this comparison are searches for models (both conceptual and substantial) for the interpretation of current law, or for the formulation and implementation of legal policy. In today's complex society the lawmaker is often faced with difficult problems. Instead of guessing possible solutions and risking less appropriate results, a lawmaker can draw on the enormous wealth of legal experience by the study of foreign laws.' Mousourakis (2013) 220.

<sup>7</sup>'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.' Charter for Fundamental Rights of the European Union [2012] OJ C 326/391.

<sup>8</sup>The Austrian Constitutional Court derives this right from the Convention. [Link 3](#). The Convention enjoys the same status as the Austrian Constitution; therefore, the rights guaranteed therein are constitutionally protected rights. VfGH, App no U466/11 ua (14. March 2012), para 5.3.

<sup>9</sup>European Court of Justice (hereinafter: ECJ), Case C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA*. [ECLI:EU:C:2014:2099] para 49.

<sup>10</sup>*Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016) § 119. Similarly: *Dombo Beheer B.V. v the Netherlands* (1994) 18 EHRR 213 § 33.



militate in favour of a free and even forceful exchange of argument between the parties.<sup>11</sup> In a constitutional court procedure, however, neither the concept of ‘exchange of argument’ nor that of ‘disadvantage vis-à-vis the opponents’ is applicable, as the substance of the proceedings is generally related to a theoretical question of fundamental rights, the functioning of institutions of the state or the situation of the state in the international community. Therefore, the requirement of equality of arms itself does not seem to be an adequate point of reference.

Another approach connects the right to be heard with a certain aspect of social support<sup>12</sup> as well as the general principle of equality: in the absence of legal aid a person in financial need would not be in the same position to bring a case to court as a person not hindered by financial circumstances.<sup>13</sup> In the German constitutional law and in the case-law of the German Federal Constitutional Court (Bundesverfassungsgericht, hereinafter: BVerfG), Article 20 Paragraph (1) GG (principle of the social state), Article 3 Paragraph (1) GG (general principle of equality) and Article 20 Paragraph (3) GG (principle of a democratic state governed by law) form the legal framework of this argumentation. Due to the general nature of this approach, it is considered to be applicable to constitutional court proceedings as well.<sup>14</sup>

The HCC used a similar approach in its leading Decision 42/2012. (XII. 20.) AB. It stressed that in the case of compulsory legal representation, the lack of legal aid in constitutional court procedures violates the general principle of equality as foreseen in Article XV Paragraphs (1) and (2) of the Fundamental Law. In another decision from 2008<sup>15</sup> [Decision 685/B/2001 AB],

<sup>11</sup>*Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002) § 49.

<sup>12</sup>Certain authors argue that legal aid would be a certain form of social support and therefore position this legal institution in the field of social law. This approach can be traced back to a decision of the BVerfG, which stated that as the judge decides on a claim for legal aid, he grants or rejects a social benefit. *Albers* (1987) 283; *Adolphsen* (2015) 43; BVerfG, BVerfGE 35, 348, para 20.

<sup>13</sup>*Schoreit, Groß and Dehn* (2018) 4.

<sup>14</sup>*Umbach, Clemens and Dollinger* (2005) 631–32; see further: *Barczak* (2018); BVerfG, no 2 BvR 2726/17 (4 December 2018), para 11; BVerfG, no 1 BvR 2440/16 (9 November 2017), paras 16–20.

<sup>15</sup>According to Point 5 of the Closing and Miscellaneous Provisions of the Fundamental Law, ‘[t]he decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions.’ According to the Government’s position, the aim of this provision was the following: ‘By way of repealing the rulings of the Constitutional Court delivered before the entry into force of the Fundamental Law, the National Assembly made it clear that the decisions adopted by the Constitutional Court on the basis of the former Constitution did not bind the Constitutional Court in its following decisions. This does not preclude, however, that the Constitutional Court may come to the same conclusions as before, nor does this provision prevent the Constitutional Court from referring to its earlier decisions.’ Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12 September 2018. [Link 4](#). As the HCC ruled in its Decision 13/2013. (VI. 17.) AB, Reasoning [32] – ‘the Constitutional Court may use the arguments, legal principles and constitutional correlations developed and formulated in its previous decisions in the context of any constitutional issues to be assessed in future cases if, based on the content agreement of the given provision of the Fundamental Law with that of the Constitution and contextual agreement regarding the whole of the Fundamental Law – with regard to the interpretative rules of the Fundamental Law and in the light of the specific case –, there is no obstacle to the applicability of the findings and there is a need for the integration thereof into the reasoning of its decision to be adopted.’ As the wording of Article XXVIII of the Fundamental Law does not reflect a different approach from Article 57 of the former Constitution, the case-law elaborated by the HCC under the former Constitution can be relied on even after the entry into force of the Fundamental Law {confirmed, for example, in Decision 21/2014. (VII. 15.) AB, Reasoning [53]; Decision 7/2013. (III. 1.) AB, Reasoning [24]}.



the HCC concluded that the right to efficient access to justice is not hindered by the compulsory legal representation, provided legal aid is available for those in need. In this way, the decision seems to confirm that legal aid should be interpreted as an institution safeguarding equal and efficient chances of bringing a case to court.

The Austrian constitutional court (Verfassungsgerichtshof, hereinafter: VfGH) came to a similar conclusion as it ruled that the simple exclusion of legal aid in administrative court procedures or the *per se* exclusion of legal persons from legal aid amounts to a violation of Article 6 of the ECHR and is therefore unconstitutional.<sup>16</sup> Thus, the legislator cannot and should not exclude the possibility that certain groups of litigants can be considered as being in need in relation to their chances of bringing their case to court: the provisions on legal aid serve to enforce human rights even in the case of a lack of income and wealth.

The common denominator of the statements formed by the constitutional courts of the examined states is that the nature of legal aid is primarily to compensate financial need, the lack of legal knowledge etc. in court proceedings; briefly, to ensure access to justice. Therefore, the efficient enforcement of judiciary rights and social need form the framework of interpretation which shall be taken into account when evaluating the institution supporting the party in the representation of his interests before the court.<sup>17</sup> From this approach it follows that efficient legal aid shall also be accessible in constitutional court procedures, primarily in constitutional complaint procedures, as these procedures aim directly at the protection of fundamental rights related to judicial decisions.<sup>18</sup>

### 3. THE SCOPE OF LEGAL AID IN CONSTITUTIONAL COURT PROCEDURES

When defining the scope of necessary legal aid, the characteristics of constitutional court procedures should be taken into account. The first and most evident element is the costs of procedures in the narrow sense; i.e. the court fees. According to Section 34 of the German Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz; hereinafter: BVerfGG<sup>19</sup>), proceedings before the BVerfG shall be free of charge. Similarly, the Hungarian Act CLI of 2011 on the Constitutional Court (hereinafter: CC Act)<sup>20</sup> stipulates in its Section 54 Paragraph (1) that proceedings of the Constitutional Court are free of charge. In Austria, however, according to Section 17a of the Constitutional Court Act (Verfassungsgerichtshofgesetz; hereinafter: VfGG),<sup>21</sup> a filing fee is payable for requests at the VfGH, which

<sup>16</sup>VfGH, no G7/2015 (25 June 2015); VfGH, no G26/10 ua (5 October 2011); VfGH, no B301/06 (1 March 2007); VfGH, no B299/74 (13 June 1975).

<sup>17</sup>Further details on this question of interpretation in Váradi (2014).

<sup>18</sup>This conclusion is in line with the ECtHR case-law, which shows that basic safeguards of a fair trial and certain requirements derived thereof should be equally applicable to constitutional court procedures. *Milatová and Others v the Czech Republic*, App no 61811/00 (ECtHR, 21 June 2005) §§ 58–61; *Gaspari v Slovenia*, App no 21055/03 (ECtHR, 21 July 2009) §§ 50–53. *Ruiz-Mateos v Spain*, (1993) 16 EHRR 505. §§ 59–60.; *Kühler v Germany*, App no 32715/06, 13 January 2011. §§ 47–48.

<sup>19</sup>The text of the BVerfGG in English is available at [link 5](#).

<sup>20</sup>The text of the CC Act in English is available at [link 6](#).

<sup>21</sup>The text of the VfGG in English is available at [link 7](#).



amounts to € 240. Thus, the court fees would make a clearly defined system of legal aid only necessary in Austria.

Similar conclusions follow from the examination of compulsory legal representation. In Germany, there is no obligation of legal representation [cf. Section 22 BVerfGG]. In Hungary, the CC Act contained a provision on compulsory legal representation [Section 51 Paragraph (2)–(3) CC Act], but this was repealed in 2013. In Austria, according to Section 17 Paragraph (2) VfGG, legal representation is compulsory in constitutional complaint procedures; applications shall be prepared and filed by a lawyer holding a power of attorney.

While the necessity of legal aid clearly follows from the provisions of the VfGG read together with the aim of legal aid in a strict sense (enabling equal access to justice for those in need), in the case of Germany and Hungary one could argue that there is no direct need to grant legal aid in the constitutional court proceedings: due to the lack of court fees and compulsory legal representation, no direct costs occur. Due to the complexity of constitutional court proceedings, however, the lack of legal knowledge can cause a substantial disadvantage: the requirements posed by the BVerfG and the HCC in the case of constitutional complaints are very nuanced, and are – at least in part – not directly derivable from the wording of the respective acts.<sup>22</sup> Therefore, the interpretation elaborated in the case-law is crucial, especially with regards to criteria, such as, for example,<sup>23</sup> that the complainant must be affected,<sup>24</sup> the available legal remedies must have been exhausted<sup>25</sup> or the complaint must address a question on

<sup>22</sup>Umbach, Clemens and Dollinger (2005) 632; Bitskey and Török (2015).

<sup>23</sup>It is not the aim of the current paper to analyse all conditions of a constitutional complaint in detail. The following examples only aim to demonstrate the complexity of criteria in order to underline the need for specialized and good quality legal representation in such procedures.

<sup>24</sup>The HCC elaborated its understanding based on the case-law of the BVerfG on the so-called ‘Betroffenheitstrias’ [e.g. BVerfG, no 2 BvR 2292/13 (15 July 2015), paras 55–64]. The complainant shall be considered to be affected by the norm or legal decision, if a direct, actual and personal involvement can be confirmed {Decision 3/2019. (III. 7.) AB, Reasoning [30]}. The complainant is personally affected, if the violation concerns his own fundamental rights. The direct connection between the investigated norm or decision and the violation of fundamental rights is also a basic precondition. The complainant is actually affected, if the violation of fundamental rights exists at the time of submission of the complaint {Order 3134/2017. (VI. 8.) AB, Reasoning [17]}. These criteria are evaluated on a case-by-case basis.

<sup>25</sup>According to the case-law of BVerfG, the concept of ‘all remedies’ (that shall be exhausted) includes all possibilities of turning to a court provided for by the relevant legal norms. This condition has not been complied with, if the complainant failed to lodge a remedy on time, formulate his application in a sufficiently clear manner, or if his application was inadmissible. BVerfG, no 1 BvR 2136/14 (10 October 2016), para 10; BVerfG, no 2 BvR 2124/01 (9 January 2002), para 4; BVerfG, no 1 BvR 206/08 (24 April 2008), para 5; BVerfG, no 1 BvR 2606/04 (21 August 2006), para 23. For the question of admissibility in the procedures of BVerfG in detail, see: Benda, Klein and Klein (2012). The case-law of HCC also refers to the fact that the accessible legal remedies must be actually exhausted. Therefore, the applicant shall address the violation of rights he invokes in the constitutional court procedure, and also in the legal remedy procedure before ordinary courts {Order 3327/2018. (X. 16.) AB, Reasoning [25]}. The requirement of an admissible remedy in the preceding procedures is also formulated by the HCC {Order 3321/2018. (X. 16.) AB, reasoning [11]}.



constitutional law issues of fundamental importance.<sup>26</sup> Due to the abstract nature of constitutional complaint procedures, the compound of the normative legal provisions and the attached case-law, there is a realistic chance that a party not supported by a lawyer<sup>27</sup> cannot present his case in a comprehensive, clearly understandable manner which also includes proper legal arguments. Following from the more general understanding of legal aid (namely, that it serves the enforcement of human rights even in the case of a lack of income and wealth), it should also be available in cases where the lack of legal knowledge and affordable support by a lawyer, as well as the specificities of the procedure, would hinder the person in need in obtaining a decision on a question related to his/her fundamental rights.

#### 4. GENERAL CONDITIONS OF LEGAL AID IN CONSTITUTIONAL COURT PROCEDURES

The legal framework of granting legal aid is the most evident in Austria. Section 35 of the Austrian VfGG clearly stipulates that unless otherwise specified in this Act, the Code of Civil Procedure (hereinafter: ACCP) shall apply accordingly. Therefore, legal aid may be granted pursuant to Section 63 of the ACCP. From this it follows that legal aid will be granted to a party who is unable to pay the costs of conducting the proceedings without impairing his/her necessary maintenance, and the intended legal proceedings or the legal defence do not appear to be manifestly malicious or futile. The litigation is to be regarded as malicious if a party not claiming legal aid with a reasonable assessment of all the circumstances of the case, especially the prospects for the collection of the claim, would refrain from litigation or would assert the claim only partly. It is the manifestly malicious or futile nature of the complaint that shall be

<sup>26</sup>According to Section 29 of the CC Act, the Constitutional Court declares the constitutional complaint admissible if a conflict with the Fundamental Law significantly affects the judicial decision or the case raises constitutional law issues of fundamental importance. The lack of sufficiently coherent constitutional law reasoning leads to the inadmissibility of the complaint [Decision 3080/2019. (IV. 17.) AB, Reasoning [27]]. The HCC does not carry out a substantial examination if the complaint only aims at the supervision of the evidentiary procedure [Decision 3080/2019. (IV. 17.) AB, Reasoning [30]; Order 3061/2016. (III. 22.) AB, Reasoning [31]-[33]] or the interpretation of questions affecting a special field of expertise [Order 3038/2019. (II. 20.) AB, Reasoning [17]]. A similar interpretation can be derived from the case-law of the BVerfG in relation to Section 90 BVerfGG, which argues, for example, that the question has no fundamental constitutional significance if it has been clarified in the constitutional case law or it does not raise controversies in the relevant legal literature. BVerfG, no 1 BvR 1693/92 (8 February 1994), para 11.

<sup>27</sup>A special problem stemming from 'Betroffenheitstrias' is related to the role of unions. '[I]n the case of certain sector specific, code type laws (for example, laws and regulations concerning public education) it has been an ordinary occurrence that advocacy groups and trade unions submitted constitutional complaints with regard to such laws or regulations which did not affect their rights personally, only the rights of certain employees or the rights of practitioners of a given profession. In this case, however, the Constitutional Court held that only individual, specifically involved persons can submit the complaint, the union for example is not entitled to do so, as it is not directly involved.' Gárdos-Orosz (2012) 313. Similarly: Order 3123/2015. (VII. 9.) AB, Reasoning [14]; Order 3033/2014. (III. 3.) AB, Reasoning [19]]. This interpretation also appears in the case-law of the BVerfG: BVerfG, no 1 BvR 1080/01 (29 May 2006), para 20. Pieroth and Schlink (2011) 310. It has as a consequence that unions or similar organizations cannot offer formal assistance in constitutional complaint procedures and thus support the efficient access of their members who need free and professional legal advice.



interpreted with regards to the specificities of the constitutional complaints procedure (see below). Otherwise the general conditions of legal aid as stipulated in the ACCP apply.

The regulatory background of legal aid in the constitutional complaints procedures of the BVerfG is more complex. The BVerfGG does not provide for detailed provisions regarding access to justice. Nevertheless, based on the above mentioned argumentation – including the principles of rule of law and equality before the law – the BVerfG applies the general rules of legal aid provided for in the code on civil procedure (Zivilprozessordnung, hereinafter: ZPO)<sup>28</sup> to the constitutional court procedure.<sup>29</sup> § 114 Paragraph (1) ZPO defines legal aid through the following general clause: ‘[a]ny parties who, due to their personal and economic circumstances, are unable to pay the costs of litigation, or are able to so pay them only in part or only as instalments, will be granted assistance with the court costs upon filing a corresponding application, provided that the action they intend to bring or their defence against an action that has been brought against them has sufficient prospects of success and does not seem frivolous’. This definition includes the two major factors, which can be seen as preconditions set for granting legal aid: the evaluation of the factors related to the applicant’s personal and financial status (the so-called ‘means test’) and the consideration of the features of the legal matter in dispute, especially its prospects of success (the so-called ‘merits test’).<sup>30</sup> When evaluating the overall financial situation of the applicant (as an inevitable precondition of a successful claim for legal aid),<sup>31</sup> the BVerfG applies the standards defined in § 117 Paragraph (2)–(3) ZPO.<sup>32</sup> As far as the interpretation of the substantial elements is concerned, a more specific interpretation applies (as described below), taking the specificities of the procedure into account.

The relevant legislative framework in Hungary is similar to the German model (proceedings are free of charge, legal representation is not obligatory, the CC Act does not refer to legal aid).<sup>33</sup> Section 54 Paragraph (1) of the CC Act clearly stipulates that the petitioner shall bear his or her own costs incurred in the course of the constitutional court proceedings. This means – *a contrario* – that different forms of legal aid, such as an assigned attorney are not available in these procedures. The Hungarian Act on Civil Procedure does not form a general background norm of the CC Act (only certain provisions on language use and evidence are applied accordingly); therefore the general provisions on cost exemption do not apply. Contrary to the case-law of the BVerfG, an extensive interpretation of the legal aid rules does not appear in the

<sup>28</sup>The text of the ZPO in English is available at [link 8](#).

<sup>29</sup>BVerfG, no 2 BvR 1819/19 (2 March 2020) para 3; BVerfG, no 2 BvR 1754/14 (11 August 2016), para 2; BVerfG, no 2 BvR 62/18 (4 July 2018) para 1.

<sup>30</sup>For a detailed analysis of means test and merits test, see [Váradi \(2016\)](#) 461–77.

<sup>31</sup>BVerfG, no 1 BvR 1020/17 (8 November 2018); BVerfG, no 1 BvR 1746/16 (27 October 2017), para 3.

<sup>32</sup>BVerfG, no 2 BvR 1588/02 (21 October 2003).

<sup>33</sup>The evolution of these rules is also worth mentioning. According to the adopted text of Section 51 Paragraph (2) of the CC Act, legal representation was mandatory in constitutional complaint procedures. At the same time, however, Section 3 Paragraph (3) Point (c) of the Act on Legal Aid contained a clause according to which legal aid was not available for constitutional complaint procedures. The HCC ruled in its decision 42/2012. (XII. 20.) that the exclusion of legal aid read together with the rule on mandatory legal representation was contrary to the principle of non-discrimination and set aside the provision in the Act on Legal Aid. Interestingly, some months later, the provision on compulsory legal representation in constitutional complaint procedures was repealed by Act CXXXI of 2013.



jurisprudence of the HCC. The information material<sup>34</sup> provided by the HCC shows, however, that extrajudicial legal advice – approved by the competent territorial Government office as stipulated by the Act LXXX of 2003 on legal aid – might be available for constitutional complaint procedures. The support of legal aid providers (legal helpers), who offer extrajudicial legal advice, is more tailored to general civil, criminal and administrative issues. The complexity of constitutional complaint procedures, as well as the specific preconditions of a successful complaint would make a certain specialization necessary so that the legal aid provider can support the complainant more efficiently. Nevertheless, even this kind of support might be considered as a form of promotion of access to justice, because professional legal advice can considerably improve the chances of an admissible complaint.

## 5. SPECIFIC FEATURES OF LEGAL AID IN CONSTITUTIONAL COURT PROCEDURES

The analysis above shows that, concerning the analysis of need (the means test), the general civil procedural rules seem to apply in the constitutional complaints procedures: in Austria by virtue of a specific legal provision, in Germany through interpretation and in Hungary based on a separate law. Next, the question arises of how the constitutional courts interpret the rather subjective conditions of legal aid (merits test) in relation to the specificities of the proceedings.

According to the case-law of the VfGH, 'litigation is manifestly without prospects of success in cases where this is apparent even without consideration of the material points; for example, if a complaint were to be raised after expiry of a relevant time limit; or if an appeal would not challenge a highest-instance administrative decision; or if the Constitutional Court could be expected to refuse to take up the case'.<sup>35</sup> Similarly, there is a manifest prospect of a lack of success if the constitutional court had already decided on the merits of the case<sup>36</sup> or if the contested decision does not qualify as a final decision on the merits of the case.<sup>37</sup> In certain cases, the time of application and the manifestly unreasonable nature of the claim are interrelated. As the VfGH rejected a claim against the election procedure and the application for legal aid included therein, the short reasoning points out that the applicant wished to challenge a future election procedure. Therefore, the application was not only premature but also lacked the possibility of remedying a violation of a constitutional law nature.<sup>38</sup> The relevant Austrian law does not contain explicit provisions on abusive complaints or any sanctions attached to them. Therefore, if the applicant files a motion with the same form, the VfGH – referring to Section 86a ACCP – calls the complainant's attention to the fact that similar pleadings will be attached to the documents of the case without any formal decision.<sup>39</sup> These conclusions show that – in

<sup>34</sup>HCC, *General information for constitutional complaint procedures*. [Link 9](#).

<sup>35</sup>VfGH, *Legal Aid: Details*. [Link 10](#).

<sup>36</sup>VfGH, no E1442/2018 (10 April 2019).

<sup>37</sup>VfGH, no G139/2018 ua (12 June 2018).

<sup>38</sup>VfGH, no WI2/2019 (22 May 2019).

<sup>39</sup>VfGH, no G17/2018-17 ua (24 September 2018).



accordance with the explicit reference to the ZPO in VfGG – the conditions of legal aid are interpreted in line with the general civil procedural rules; also with regards to the merits of the case.

As the only possible form of legal aid available in connection with constitutional complaints in Hungary is approved under a separate law, the case-law of the HCC does not extend to legal aid in constitutional complaint procedures. It carries out neither means, nor merits tests.<sup>40</sup> Therefore, in the case of frivolous claims only a procedural fine may be imposed by the HCC.<sup>41</sup> It should be noted that from the case-law of the HCC no specific example can be derived<sup>42</sup> in which the court would have used this possibility. However, a concurring reasoning of judge Mária Szívós might give some guidance in the interpretation of ‘exercising the right of petition in an abusive manner’. In the given case<sup>43</sup> she argued that the complainant did not take advantage of existing legal solutions to reach his aim, but relied on formal remedies in order to bring his case before the Constitutional Court. This approach suggests that a more substantial analysis of the case, including an assessment of the petitioner’s attitude would also be possible in defining the abusive nature of the complaint. On the one hand, such an approach could be a point of orientation in a legal aid scheme – if it were available before the HCC –, as it would limit legal aid to those cases where the intervention of the constitutional court is definitely needed to ensure the protection of rights. On the other hand, such an assessment should not exclude the possibility of examining complex questions of constitutional significance, as – depending on the subject – these procedures also play a significant role in safeguarding the constitutionality of the legal system.

Concerning the merits test in the proceedings of the BVerfG, a very specific condition can be derived from the case-law: the BVerfG grants legal aid – practically an assigned attorney – if the complainant is not in a position to represent himself.<sup>44</sup> On the one hand, in a concrete case, the BVerfG argued, when rejecting a claim for legal aid, that from the wording of the pleading itself it could be perceived that the applicant was able to present a coherent argumentation in relation to his situation and legal standpoint.<sup>45</sup> On the other hand, however, in another order it argued that it is to be expected that the applicant include substantial pieces of information regarding the merits of the case even in the legal aid procedure.<sup>46</sup> This controversy makes it at least difficult for the complainant to anticipate what kinds of details are needed for a successful application for legal aid.

A similar problem arises in connection with the next condition to be analysed when deciding on legal aid; namely the court assesses whether the claim has a sufficient chance of success.<sup>47</sup>

<sup>40</sup>These tests are carried out by the administrative authority granting legal aid.

<sup>41</sup>Section 54 Paragraph (2) CC Act stipulates that the panel of the single judge adjudicating the case ‘may impose a procedural fine on the petitioner and may order him or her to pay the extra costs if the petitioner exercises the right to petition in an abusive manner; similar measures may be taken against the petitioner or other persons participating in the proceedings whose willful conduct delays or hinders the termination of the Constitutional Court proceedings.’

<sup>42</sup>Based on the analysis of 133 decisions of the HCC in constitutional complaint procedures terminated without decision on the merits of the case.

<sup>43</sup>Decision 6/2018. (VI. 27.) AB, concurring reasoning of Dr. Mária Szívós, [78]–[80].

<sup>44</sup>BVerfG, no 2 BvR 2258/09 (9 July 2010), para 6; BVerfG, no 1 BvR 2014/16 (2 December 2016), para. 2; BVerfG, no 2 BvR 1754/14 (11 August 2016), para 2; BVerfG, no 2 BvR 336/16 (9 June 2017), para 2.

<sup>45</sup>BVerfG, no 2 BvR 932/17 (11 October 2017), para 3.

<sup>46</sup>BVerfG, no 1 BvR 2897/16 (2 February 2017), para 2.

<sup>47</sup>Burkiczak, Dollinger and Schorkopf (2015) 709.



Using this paradigm, the BVerfG rules to a certain extent on the substance of the case.<sup>48</sup> Some, rather formal grounds can be derived from the case-law, which result in the rejection of the application. The constitutional complaint does not have a sufficient chance of success – according to the case-law of the BVerfG – if, for example, the complainant has passed away after filing the complaint, as this procedure is aimed at protecting the individual's personal rights,<sup>49</sup> if the complainant challenges the result of the appreciation by the court (not the limits of the margin of appreciation),<sup>50</sup> or if the complaint has not been filed within the statutory time-frame.<sup>51</sup> Nevertheless, the BVerfG usually does not give further details on the grounds of rejection, simply stating that the intended enforcement of rights does not seem to have sufficient chance of success. A possible understanding could be that the details provided by the complainant, the need for legal aid and the chances of success should be analysed together with the complexity of the legal problem in question.<sup>52</sup>

Finally, the general clause of § 114 ZPO includes the examination of a negative condition: the litigation must not seem to be frivolous. In this regard, the situation seems to be easier in constitutional court proceedings, as Section 34 Paragraph (2) of the BVerfGG contains a separate provision on abusive complaints: '[t]he Federal Constitutional Court may charge a fee of up to EUR 2,600 if the lodging of a constitutional complaint or of a complaint pursuant to Article 41 para. 2 of the Basic Law or the application for a preliminary injunction (section 32) constitutes an abuse of rights'.<sup>53</sup> Although these two concepts are not connected directly, their strong correlation can be derived from the structure and argumentation of an order<sup>54</sup> from 2018, in which BVerfG rejected the claim for legal aid and declared the complaint inadmissible because it failed to comply with the basic criteria of the complaint. At the same time the order referred to the consequences of an abusive complaint for the future, which shows that the repeated lodging of a manifestly-ill-founded complaint and/or claim for legal aid might be seen as an abuse of rights. Therefore, there is a clear normative basis and a relevant case-law that can be a *sui generis* reference point in determining the frivolous nature of a claim for legal aid.

## 6. SUMMARY

In summary, the three countries examined show different approaches as far as the accessibility of legal aid in constitutional court procedures is concerned. In Hungary, the procedure is free of charge, legal representation is not compulsory and in such proceedings extrajudicial legal advice

<sup>48</sup>In this way, there might be the presumption that the court might make a prejudice on the claim before the final decision. [Lissner, Dietrich, Eilzer, Kessel and Germann \(2010\)](#) 225. According to the literature, it is rather atypical that the BVerfG grants legal aid, but at the end of the day does not decide on the merits of the case. [Burkiczak, Dollinger and Schorkopf \(2015\)](#) 709.

<sup>49</sup>BVerfG, no 2 BvR 62/18 (4 July 2018), para 2.

<sup>50</sup>BVerfG, no 1 BvR 3049/13 (8 October 2015), para 2.

<sup>51</sup>BVerfG, no 2 BvR 106/00 (7 February 2000).

<sup>52</sup>This conclusion is also in accordance with the tendency to grant legal aid in complex legal procedures: [Barczak \(2018\)](#) 558.

<sup>53</sup>Translation retrieved from the English version of the BVerfGG (see above).

<sup>54</sup>BVerfG, no 2 BvR 415/18 (12 April 2018).



might promote the submission of an admissible complaint. In Germany, the procedure is free of charge, legal representation is not compulsory, but – in the absence of an explicit legal provision in the BVerfGG – the case-law of the BVerfG derives the possibility of legal aid from the general rules of civil procedure, including a specific, narrow interpretation of conditions. Finally, in Austria, the petitions to the Constitutional Court have to be filed by a lawyer and are subject to court fees; however, the VfGG itself stipulates the possibility of legal aid with reference to the general rules of civil procedure.

When evaluating how efficiently these solutions can facilitate access to constitutional complaint procedures, the following should be mentioned. As the preconditions for admission of constitutional complaints elaborated in legal norms and in the case-law are complex, the role of legal aid is not only related to financial need but to the lack of legal knowledge. While the lack of mandatory legal representation and procedural fees ensures the theoretical possibility that everyone can turn to the respective constitutional court, it does not react to the difficulties of formulating and representing the legal problem in these complex procedures. Legal support by a qualified lawyer with special expertise in the field of constitutional court case-law and argumentation can substantially promote the preparation of an admissible claim in those procedures. Instead of the automatic reference to the general rules of legal aid in civil procedure, the appropriate application of these norms (with due regard to the specificities of constitutional court proceedings) could contribute to a more efficient access to constitutional complaints.

Rules relating to the financial situation of the applicant and a well-elaborated paradigm in connection with the merits of the case can ensure a balance between the aim of ensuring a proper protection of fundamental rights and the constitutionality of the legal system, and the observance of the capacities of the state budget (so that it is not overstrained by manifestly unfounded applications).

This summary can be a first step in understanding the role of legal aid in constitutional court proceedings as well as its interpretation in the case-law of the European constitutional courts. The elaboration of a common theoretical framework for equal access to constitutional complaint procedures would contribute to a more meaningful and systemic protection of fundamental rights and constitutional values. At the same time it could support the fair settlement of alleged injustice or violation of rights, as ‘the “ends of justice” should not only be increased opportunity for the poor but also increased stability for society.’<sup>55</sup>

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