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CONSTITUTIONAL COMPLAINT IN UKRAINE AS A REMEDY TO BE EXHAUSTED UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

These theses consider the potential of the constitutional complaint in Ukraine to be an effective legal remedy.

Key words*: constitutional complaint; Constitutional Court of Ukraine; European Court of Human Rights case law*.

The practical impact of introduction of a constitutional complaint – a new secondary and exclusive legal remedy for constitutional rights and freedoms of a person in Ukraine – under the constitutional reform of the legal system in 2016 is only just becoming analysed by the expert community [1-2]. This is primarily due to the simple, though unacceptable, fact that the Constitutional Court of Ukraine has managed to pass a single decision in a case on a constitutional complaint almost three years after the amendments to the Constitution of Ukraine came into force [3].

At the same time, among the variety of issues that need to be analysed, there is at least one which Ukrainian lawyers have *a priori* addressed in overly optimistic manner despite its obvious complexity. This is about the ability of a constitutional complaint to be an effective legal remedy, which must be resorted to prior to appealing to the European Court of Human Rights.

When considering these standpoints [4-5], it should be noted first and foremost that they reflected conceptual views on the expected legislative regulation of conditions, procedure and impact of exercising the right to file a constitutional complaint in Ukraine. At the same time, it was about speculations that had the nature of *de lege ferenda* and *de sententia ferenda*, accordingly, even after adoption of the relevant amendments to the Constitution of Ukraine.

Possibly because of momentum, after adoption and entry into force of the Law of Ukraine «On the Constitutional Court of Ukraine», some authors stated that

If the constitutional complaint is used at full capacity, it will surely reduce the number of applications filed to the ECtHR, substantially strengthening the national judicial system and improving human rights protection [6].

The latter statement is premature and erroneous since, first of all, the Law of Ukraine «On the Constitutional Court of Ukraine» does not *de lege lata* contain and cannot contain provisions that would give undeniable grounds for this. In order to determine whether the constitutional complaint model introduced in Ukraine provides for acceleratory and compensatory aspects of the protection of the constitutional defined rights and freedoms, which is critical for its identification as a national «filter» on the way to the European

Court of Human Rights according to the Venice Commission [7, §92], it is clearly not enough to analyse only provisions of the special Law. Other related provisions of the national legislation, in particular, procedural legislation, and, to a certain extent, the relevant law enforcement practices should be analysed as well. This systematic approach is applied by the European Court of Human Rights in determining the effectiveness of a remedy in case of doubt [8, §157; 9, §98].

It is essential that the remedy before the constitutional court guarantee effective decision making [10, P. 49]. Where a court finds itself unable to reach a decision, whether because of a lack of safeguards against deadlock or their failure, the consequence is to «[restrict] the essence of [the] right of access to a court… [and to deprive] an applicant of an effective right to have his constitutional appeal finally determined» [11, §119-123].

In this context, the current practice of the Constitutional Court of Ukraine regarding considering constitutional complaints can hardly be interpreted as proof of its practical effectiveness. In particular, practical implementation of the acceleratory aspect of protection of the rights and freedoms of a person of the constitutional complaint model introduced in Ukraine proves that it is currently a matter of extraordinary exception, since the Constitutional Court of Ukraine has used measures to secure a constitutional complaint only once so far [12].

Given the failure of Ukraine to perform its positive obligation to legislatively regulate the conditions and procedure for reimbursement of damage caused by unconstitutional acts and actions as well as very controversial judicial practice due to this fact, an assessment of the effectiveness of the compensatory aspect is an even bigger challenge [13].

This does not mean, however, that where a constitutional court is empowered only to find a violation and nullify the impugned act, the constitutional complaint procedure is inevitably ineffective as a remedy under Article 13 of the Convention. A «two-step» approach, whereby the complainant may request that the procedure in his/her case before the lower court be reopened or otherwise revised in accordance with the principles set out in the constitutional court judgment finding a violation, may constitute an effective remedy [10, P. 50].

Based on the above, it can be concluded that only the law enforcement practice of Ukrainian courts regarding the revision of court cases, in which unconstitutional laws of Ukraine were applied, can provide convincing arguments as to the remedial effectiveness of the constitutional complaint.

But even for any given country a constitutional complaint may be an effective remedy for some Convention violations, whereas according to the Strasbourg Court's case-law, it may not be effective for other violations. In particular, a distinction has to be made between cases of alleged excessive length of proceedings and violations of «other» human rights [7, §88].

At the same time, it should be borne in mind that only the European Court of Human Rights has the authority to give a final assessment of effectiveness of the constitutional complaint in the context of a particular case, which will undoubtedly have far-reaching consequences. At least, it was the meaning of

the judgement of the European Court of Human Rights in *Uzun v. Turkey* [14] in a similar case.

That is why it is only the European Court of Human Rights which (after examining closely the accessibility of the remedy, the modalities for its exercise, the remedial powers of the Constitutional Court of Ukraine, and the legal effects of its decisions) could give a final assessment.

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LAWFULNESS AS THE MAIN REQUIREMENT FOR PROPERTY RIGHTS INTERFERENCE IN CRIMINAL PROCEEDINGS: LEGAL POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS

The article is devoted to the research of the legal position of the European Court of Human Rights regarding the definition of the content of lawfulness as the main requirement for interference in the property rights to the material objects, seized as material evidences in criminal proceedings.

Key words: *lawfulness, interference in the property rights, criminal proceedings, material evidences, European Court of Human Rights.*

The results of the research of the practice of the ECHR indicate that the conditions of lawfulness for interference in the property rights, to which the Court makes an assessment, are: 1) the compliance of the requirement of lawfulness; 2) the existence of a general (public) interest, which interfered the interference in the property rights; 3) the ensuring a fair balance between the requirements of general (public) interest and the protection of property rights.

The compliance of the requirement of lawfulness implies that interference in the property rights, including in connection with the implementation of criminal proceedings, must be prescribed by law and not be arbitrary. In the practice of ECHR, lawfulness is defined as the main requirement for interference in the property rights. Thus, the Court has repeatedly emphasized that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (§ 58 of judgment from 25.03.1999 in the case of Iatridis v. Greece, § 167 of judgment from 23.01.2014 in the case of «East/West Alliance Limited» v. Ukraine) [1; 2].

In accordance with the legal position of the ECHR, the decision of the issue of the lawfulness of state's interference in the property rights is preceded by the decision of the issue of ensuring a fair balance between the requirements