INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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COMPARATIVE ANALYSIS OF THE APPLICATION TO THE EUROPEAN COURT OF HUMAN RIGHTS AND THE CONSTITUTIONAL COMPLAINT TO THE POLISH CONSTITUTIONAL COURT

This article is devoted to the comparative analysis of the application to the European Court of Human Rights and the constitutional complaint to the Polish Constitutional Court. The author examines similarities and differences of these legal tools of human rights protection.

The main question of the article is whether the constitutional complaint to the Polish Constitutional Court is an effective remedy within the meaning of article 13 of the European Convention on Human Rights and whether the non-exhaustion of the constitutional complaint as domestic remedy leads to inadmissibility of individual application to ECHR.

Key words: the constitutional complaint, the application to the European Court of Human Rights, the European Convention on Human Rights, the constitutional court, an effective remedy, the control benchmark, the European Convention standards, the admissibility criteria.

Introduction

In the legal orders of Poland, as well as in the absolute majority of European states, there are two systems of human rights' protection. The internal (domestic) system – based on the constitutional complaint to the Polish Constitutional Court and external (international) system – based on the application to the European Court of Human Rights (hereinafter ECHR). Constitutional complaint and application to the ECHR have a lot in common substantially and formally and affect each other. Although such dual system of human rights' protection is intended to protect them better, there is also a risk of legal differences in the judgments of Constitutional Court and ECHR. Therefore, the main issues of this paper are: 1) constitutional complaint to the Constitutional Court through the requirements of the European Convention on Human Rights (hereinafter Convention); 2) the importance of the Convention for the recognition of the constitutional complaint by the organ of constitutional control; 3) objective and subjective scope of both means and their admissibility criteria.

1. The constitutional complaint as a remedy for the protection of the rights of individual in the light of European Convention on Human Rights requirements

1.1. The constitutional complaint as an effective remedy under art. 13 of the Convention

Analyzing the constitutional complaint in light of the Convention's requirements, first of all, it should be assessed whether the constitutional complaint is an effective remedy within the meaning of art.13 of the Convention, and as a consequence, whether the constitutional complaint should be used by the applicant before bringing an application to ECHR.

According to art.13 „everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"[1]. In the jurisprudence of ECHR, an effective remedy is a remedy that may result in a substantive decision on the complaint, as well as in an adequate compensation for any violations found. The applicant is not obliged to reach for a remedy, the effectiveness of which is only illusory and apparent[2]. There are different doctrinal views on this issue. The dominated position is that the constitutional complaint is an effective remedy. Such position is usually supported by further

[1] *European Convention on Human Rights* (adopted 4 November 1950, enter into force 3 September 1953) art 13. <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2016, January, 25).

[2] Jarosz-Żukowska, Sylwia (2014). Prawo do skargi konstytucyjnej – stan obecny i postulaty de lege ferenda. *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym.* Wrocław, 849.

arguments.

Firstly, A. Bajańczyk, B. Szmulik, and L. Bagińska conducted a comparative analysis of the overlapping rights and freedoms envisaged by Polish Constitution from 1997[1] and the Convention[2]. The latter shows that majority of the rights and freedoms guaranteed by Convention and its additional protocols are also enshrined in the text of the Constitution[3]. The analysis shows that the rights and freedoms in the Constitution frequently are literally identical (or slightly modified) with the Convention' provisions. Therefore, A. Bojanczyk believes that the constitutional complaint is an effective domestic remedy within the meaning of art. 13 and provides protection for most substantive provisions of the Convention regarding the compliance of Polish law with the Convention.

The constitutional complaint is not a classic remedy. But it does not mean that it cannot be qualified as an effective legal mean within the meaning of art.13 of the Convention, which speaks about "effective remedy". A. Bojańczyk argues that we should not interpret conventional provisions formalistically, and claims that official Polish translation of the term "remedy" is incorrect"[4].

In original English text[5] art.13 is formulated as follows: „Everyone […] shall have an effective remedy" – „remedy" is much wider term than its Polish translation (it is translated as „środek odwoławczy", that may be explained as "mean for appeal"). The term „remedy" includes, basically, every legal mean that can be used to prevent or repair damage, or to enforce the compliance with the law[6]. When there is a violation of human rights and freedoms enshrined in the Convention, constitutional complaint is, with no doubt, such a legal mean, such a remedy as provided in art.13 of the Convention. This view corresponds with the principle of subsidiarity, one of the basic principles of the ECHR's system[7].

Secondly, such position is confirmed by the existing ECHR case law, especially concerning Germany, where the constitutional complaint is a remedy for protection of human rights and freedoms guaranteed by the Convention. For instance, already in *Klass and others v. Germany* (1978)[8] ECHR decided that "the applicants themselves enjoyed "an effective remedy", within the meaning of Article 13, so far as they challenged before the Federal Constitutional Court the conformity of the relevant legislation with their right to respect for correspondence and with their right of access to the courts. The Federal Constitutional Court examined the applicants' complaints with reference not to the Convention but solely to the Basic Law. It should be noted, however, that the rights invoked by the applicants before the Constitutional Court are substantially the same as those whose violation was alleged before the Convention institutions"[9].

European Commission of Human Rights took a similar position (Decision of the European Commission of Human Rights in Ap. 9324/81 from 8.12.1981[10]) and decided that the applicant had a right to bring the constitutional complaint before the Federal Constitutional Court. Although it is not possible to refer to the Convention before that Court, established exclusively to examine alleged violations of human rights guaranteed by the Basic Law of the Federal Republic of Germany, it should be noted, however, that the guarantees provided either by the Convention or by the Basic Law are mainly identical.

Thirdly, the compatibility of substantive provisions concerning basic human rights enshrined in the

[1] Art 30. – art 76, *The Constitution of the Republic of Poland* (adopted 2 April 1997, enter into force 17 October 1997) (Sejm). *Official web-page of the Constitutional Court of Poland.* <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/> (2016, January, 25).

[2] Bojańczyk, A. (1999). Skarga indywidualna do Europejskiego Trybunału Praw Człowieka: przed, czy po wyczerpaniu drogi krajowej skargi konstytucyjnej. *Palestra 1999/7-8,* 75-85; Szmulik, Bogumił (2006). *Skarga konstytucyjna na tle porównawczym*, Warszawa, 315; Bagińska, Lidia (2010). *Skarga konstytucyjna*. Warszawa, 217.

[3] Bojańczyk, A. (1999). Skarga indywidualna do Europejskiego Trybunału Praw Człowieka: przed czy po wyczerpaniu drogi krajowej skargi konstytucyjnej. *Palestra 1999/7-8,* 75.

[4] Bojańczyk, A. (1999). Skarga indywidualna do Europejskiego Trybunału Praw Człowieka: przed czy po wyczerpaniu drogi krajowej skargi konstytucyjnej. *Palestra 1999/7-8,* 76.

[5] Art 13, *European Convention on Human Rights* (adopted 4 November 1950, enter into force 3 September 1953). <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2016, January, 25).

[6] The Oxford English Dictionary: […] 2.a. A means of counteracting or removing an outward evil of any kind; reparation, redress, relief. (w:) Simpson, J.A., Weiner, E. S. C. (prep.). (1989). The Oxford English Dictionary. Second Edition. *Volume XIII "Quemadero-Roaver".* Clarendon Press. Oxford, 426-427.

[7] Nowicki, M.A. (1992). *Wokół Konwencji Europejskiej.* Warszawa, 100.

[8] *Klass and others v. Federal Republic of Germany,* 6 September 1978, §66-67, Series A no. 28.

[9] *Klass and others v. Federal Republic of Germany,* 6 September 1978, §66-67, Series A no. 28/

[10] *Adm. Com. Ap*. 9324/81, Commission decision of 8 December 1981, unpublished.

Basic Law of the Federal Republic of Germany and the Convention, and the possibility to protect those rights with constitutional complaints, allowed ECHR to recognize "constitutional complaint" as an "effective remedy" within the meaning of art.13 of the Convention. Since the Polish constitutional complaint essentially corresponds to the German model (because it is also limited to the rights and freedoms guaranteed by the Constitution), we can presume that the position of ECHR concerning the German constitutional complaint as an "effective remedy" would be also transferred on the Polish constitutional complaint.

Such position can be supported by the overview of the ECHR case law concerning the "admissibility criteria" established in art.35 (1) of the Convention[1]. The characteristic of "effective remedy", as well as the general legal remedy for human rights and freedoms' protection, should be attributed to complaints with a broad objective scope, as it is in Germany or Spain[2].

The view of B. Szmulik is worth mentioning. He believes that the abovementioned position could bring to a mistaken claim that in the case of Poland non-exhaustion of the constitutional complaint as domestic remedy – in a situation of the identity of human rights guaranteed by Polish Constitution and the Convention – leads to inadmissibility of individual application to ECHR[3].

However, if we take into account all doctrinal views based on ECHR' case law (*Brudnicka and others v. Poland* [№54723/00][4] or *Szot-Medyńska and others v. Poland* [№47414/99][5]), this issue will not be so obvious. There is no clear and simple position in these judgments concerning the duty of the applicant to exhaust the constitutional complaint possibility before applying to ECHR. But the Court formulated conditions necessary for a constitutional complaint to be qualified as a mandatory "domestic remedy" within the meaning of art.35 (1):

a) There must be a circumstance in which the domestic legal provision is allegedly incompatible with not only the Constitution but also with the Convention. Therefore, there may be a situation when the right or freedom is protected by the Constitution but is beyond the limits of the Convention;

b) The violation of the Convention must result from the application of a legal provision that was the legal basis of individual judgment (Brudnicka and others v. Poland)[6]. Thus, in such situations when the questioned provision is not a basis for the final judgment (for example, a composition of a court), the exhaustion of constitutional complaint possibility before application to ECHR is not necessary. If the challenged provision was not a basis for the final judgment, but only for a preliminary settlement or an injunction, the constitutional complaint cannot be recognized as an "effective remedy"[7];

c) There must be a possibility for the resumption of the proceedings, which means that bringing the constitutional complaint before applying to ECHR is not mandatory if there is no possibility for the resumption of the proceedings[8].

1.2. The examination of the constitutional complaint and the European Convention standards

The problems of an assessment of the proceedings before the Constitutional Court and, inter alia, an examination of the constitutional complaint for the compliance with the standards of the Convention are controversial[9]. ECHR delivered few decisions concerning the compliance of the proceedings before constitutional courts with the standards of the Convention: *Bock v. Germany*, *Kraska v. Switzerland*, *Ruiz-Mateos v. Spain* and *Sussmann v. Germany*[10].

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[1] Art 35, *European Convention on Human Rights* (adopted 4 November 1950, enter into force 3 September 1953). <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2016, January, 25); Bojańczyk, A. (1999). Skarga indywidualna do Europejskiego Trybunału Praw Człowieka: przed, czy po wyczerpaniu drogi krajowej skargi konstytucyjnej. *Palestra 1999/7-8,* 79.

[2] See the position of ECHR in *X v. Germany* (7.10.1980 nr 8499/79), *Castells v. Hiszpania* (23.4.1992 nr 11798/85).

[3] Szmulik, Bogumił (2006). *Skarga konstytucyjna na tle porównawczym.* Warszawa, 315.

[4] *Brudnicka and others v. Poland* (art.6), 3 March 2005, no.54723/00.

[5] *Szot-Medyńska and others v. Poland*, 9 October 2003, no. 47414/99.

[6] *Brudnicka and others v. Poland* (art.6), 3 March 2005, no.54723/00.

[7] Jarosz-Żukowska, Sylwia (2014). *Prawo do skargi konstytucyjnej – stan obecny i postulaty de lege ferenda. Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*. Wrocław, 849.

[8] Szmulik, Bogumił (2006). *Skarga konstytucyjna na tle porównawczym.* Warszawa, 301.

[9] Bisztyga, Andrzej (2000). Polska skarga konstytucyjna a skarga do Europejskiego Trybunału Praw Człowieka. *Przegląd Prawa i Administracji*, 2000/44, 225; Wiśniewski, Adam (2004). Polska skarga konstytucyjna a Europejska Konwencja Praw Człowieka. *Gdańskie Studia Prawnicze, 2004/12,* 311.

[10] *Bock v. Germany*, 29 March 1989, § 37, Series A No. 150; *Kraska v. Switzerland*, 19 April 1993, series A No. 254-B; *Ruiz-Mateos v. Spain,* 23 June 1993, Series A No. 262; *Süssmann v. Germany*, 16 September 1996, § 39 no.

We can see from these decisions that proceedings before the constitutional courts can be assessed by ECHR for the compliance with art.6 of the Convention (right to a fair trial, or more precisely, to receive a judgment within a reasonable time). In the proceedings before a constitutional court, the art.6 (1) guarantees should be secured, if the result of the proceedings is decisive for civil rights and obligations[1]. It would be enough even if the decision of a constitutional court will be indirectly relevant for civil rights and obligations. But when we deal with the question of a „reasonable time", ECHR evaluates if the delivered decision of a constitutional court could influence the result of proceedings before general courts[2].

Adam Wiśniewski believes that, taking into account the model of Polish constitutional complaint, its, on the one hand, close connection with protected by the Constitution human rights and freedoms and, on the other hand, its connection with a particular judgment delivered in a particular case, we should acknowledge that the result of the proceedings before the Polish Constitutional Court would generally have decisive importance for the rights and freedoms of a plaintiff. The Constitutional Court' judgment is a basis for the resumption of the proceedings both in criminal and civil cases. Thus, the decision of the Constitutional Court has an influence on the result of the proceedings before general courts[3].

ECHR recognized that it has the right to control the lawfulness of the proceedings before constitutional courts, despite the objections from some member-state governments (e.g., German and Spanish) that because of its nature, structure, and jurisdiction constitutional courts are not covered by art.6 (1) of the Convention[4]. ECHR acknowledged that it fully realizes the specific role and status of constitutional courts, established to guarantee the supreme and primary power of a constitution, and, in countries where the institute of the constitutional complaint exists, provide additional protection for human rights and freedoms enshrined in a constitution[5].

Despite the strong position in ECHR' case law, there are still some controversial views in doctrine. R. Bernhardt argues that the problem of the application of art. 6 (1) to the proceedings before the Constitutional Court is not solved because these proceedings concern only the compliance of particular legislation with the Constitution; it is not designed to rule about civil rights and obligations[6].

Analyzing an existing ECHR' case law, we can make a conclusion that the application of art.6 (1) of the Convention to the proceedings before constitutional courts concerned mainly the issues of excessive length of proceedings. But ECHR has also decided on other legal aspects of the right to fair trial. For instance, in the above-mentioned case, *Ruiz-Mateos v. Spain* plaintiff claimed, besides an excessive length of proceedings, also a lack of possibility to challenge the impartiality of two Constitutional Court judges (this claim was recognized as legitimate by the European Commission of Human Rights) and a violation of the rights for defense. ECHR accepted the plea of the applicants that impossibility to respond to the letter of the State Council containing Council's position on the constitutionality of the contested act constituted a violation of art.6 (1) of the Convention[7].

Therefore, procedural violations during the examination of the constitutional complaint may constitute a violation of art.6 (1) of the Convention. But this problem should be analyzed with regard to the subject of the particular case and all its other circumstances, in order to maintain the primary goal of both: the constitutional complaint and ECHR application – the protection of human rights and freedoms.

2. The role of the Convention in the examination of constitutional complaints by the Constitutional Court.

2.1. The control benchmark.

To resolve an issue of the role of the Convention in the examination of constitutional complaints an empirical analysis of constitutional complaints accepted by the Constitutional Court is necessary. Such analysis shows that a plaintiff frequently addresses the Convention as the control benchmark that should be

20024/92, RJD 1996

[1] *Süssmann v. Germany*, 16 September 1996, § 41, no. 20024/92, RJD 1996; *Probstmeier v. Germany*, 1 July 1997, §48 no. 20950/92

[2] *Süssmann v. Germany*, 16 September 1996, §61 i 65, no. 20024/92, RJD 1996

[3] Wiśniewski, Adam (2004). Polska skarga konstytucyjna a Europejska Konwencja Praw Człowieka*. Gdańskie Studia Prawnicze, 2004/12,* 311.

[4] *Ruiz-Mateos v. Spain,* 23 June 1993, Series A No. 262; *Buchloz v. Germany*, 6 May 1981, A. 42

[5] *Süssmann v. Germany*, 16 September 1996, § 39 no. 20024/92, RJD 1996

[6] Nowicki, M.A. (1996). Kamienie milowe, Orzecznictwo Europejskiego Trybunału Praw Człowieka*. Ośrodek Informacji i Dokumentacji Rady Europy/Centrum Europejskie Uniwersytetu Warszawskiego.* Warszawa, 201.

[7] *Ruiz-Mateos v. Spain,* 23 June 1993, §59, 65. Series A No. 262.

taken into account by the Constitutional Court in the examination of the complaint[1].

An issue of the control benchmark was unequivocally resolved by the Constitutional Court. In its reasoning (case Ts 58/99 from 3.02.2000) the Court argued: "The art.14 of the ECHR, which is addressed by the claimant, is identical to the prohibition of discrimination principle established in art.32 (2) of the Constitution. Therefore, we should emphasize that we cannot accept as the control benchmark a treaty ratified by Poland regardless of the rights it can provide for the claimant"[2]. In another decision (case SK 11/2001 from 6.02.2002) the Court stated: "In order to clarify the issue of the control benchmark the Court emphasizes that the violation of the Convention can not constitute a basis for the constitutional complaint"[3].

It is clear from the jurisprudence of the Constitutional Court that the constitutional complaint meant to protect only rights and freedoms prescribed by the Constitution. As Z. Czeszejko-Sochacki[4] mentions, such model preserves the principle of the supremacy of the Constitution established in art.8 (1) of the basic law[5].

It is worth mentioning that in doctrine there are views opposing to the Constitutional Court' position. J. Trziciński tends to believe that the constitutional complaint in which the claimant argues, without addressing the Constitution, that his rights and freedoms guaranteed by the Convention were violated should be accepted and examined by the Constitutional Court. However, such violated right of freedom at the same time should be protected by the Constitution as well, which that claimant without addressing the specific provision of the Constitution, at the same time addressed the essence of protected right or freedom[6].

However, on an international scale, we can observe the new direction of constitutional control because some states recognize treaties as the control benchmark[7]. The reason of this tendency is the strengthening of the role of the Convention in Europe. It could also be explained by the differences in legal orders of different states. For example, according to the Austrian law, the Constitution does not include a complete list of basic human rights. The protection of human rights is regulated in Federal Constitutional Law from 1920, in ECHR and additional protocols (they have constitutional status in Austria), in other treaties (e.g., the Convention on the Elimination of all Forms of Discrimination Against Women etc.), in the laws with constitutional status (e.g., Personal Data Protection law) and in ordinary legislation[8].

Turkey is another example. In 2004, the Constitutional Court of Turkey proposed to cover by constitutional complaints the rights protected by the Convention in order to create a domestic filter for the applications to ECHR. In September 2010, this proposal was upheld by national referendum and according to art.148 of the Constitution of Turkey, everyone has rights for a constitutional complaint if his rights protected by the Convention were violated[9].

In Polish doctrine dominates a position that there are no obstacles for claimants to address ratified treaties besides the Constitution, in order to strengthen his argumentation. Ratified treaties might be appointed alternatively to demonstrate the similar normative content of the rights prescribed in the Constitution and in appointed treaty[10]. J. Trzciński similarly argues that ratified treaties, if they provide

[1] *Sprawy o sygn*. Ts 101/98, Ts. 12/99, Ts 58/99, SK 10/00.
[2] *Sprawa o sygn*. Ts 58/99.
[3] *Wyrok Trybunału Konstytucyjnego z dnia 6 lutego 2002 r*. SK 11/2001, OTK ZU 2002/1A poz. 2.
[4] Czeszejko-Sochacki, Z. (1998). Skarga konstyucyjna w prawie polskim. *Przegląd Sejmowy, 1 (24)/98*, 36.
[5] *The Constitution of the Republic of Poland*, (adopted 2 April 1997, enter into force 17 October 1997) art 8. (Sejm) *Official web-page of the Constitutional Court of Poland.* <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/> (2016, January, 25).
[6] Trzciński, J. (2000). Zakres podmiotowy i podstawa skargi konstytucyjnej. *Skarga konstytucyjna*. Warszawa.
[7] Пацолай, П. (2010). О европейских подходах к доступу к конституционному правосудию. *Теоретические и практические аспекты, связаные с индивидуальной конституционной жалобой в европейской модели конституционного правовудия.* Сборник материалов межд. конф. 13-14 мая 2010 г. Минск, 29-37.
[8] Біерляйн, Б. (2011). Конституційно-правовий захист основоположних прав: можливості та межі індивідуального доступу. *Захист прав людини органами конституційної юстиції: можливості і проблеми індивідуального доступу.* Київ. Логос, 90-99.
[9] Гультай, М. (2013). *Конституційна скарга у механізмі доступу до конституційного правосуддя.* Харків. Право, 424.
[10] Tuleja, P., Crzybowski, M. (2005). Skarga konstytucyjna jako środek ochrony praw jednostki w polskim systemie prawa. *Sądy i trybunały w Konstytucji i praktyce*. Warszawa, 111.

guarantees for human rights, may additionally constitute a basis for the constitutional complaint[1].

Therefore, there are no doubts that the Convention plays an important role in the proceeding before the Constitutional Court, provisions of the Convention serve to strengthen the arguments of claimants and are used for the interpretation of particular provisions of the Constitution concerning human rights and freedoms. In some states (Austria, Turkey) provisions of the Convention may be used as independent control benchmarks in the examinations of constitutional complaints by constitutional courts.

2.2. The possibility to challenge international agreements by constitutional complaints.

The Polish model of a constitutional complaint, established in art.79 (1) of the Constitution does not allow challenging international agreements[2]. The Constitutional Court in its case-law took the same position. However, there are some disputes in doctrine regarding the possibility to include treaties to the list of legal sources that might be challenged by constitutional complaints[3]. J. Repel believes that constitutional provisions do not exclude the possibility to challenge ratified treaties by constitutional complaints[4]. Supporters of this opinion argue that in such situation an alleged violation of human rights or freedoms must relate to the treaty directly, not the legislation it was ratified by[5].

An exclusion of international agreements from the objective scope of constitutional complaint creates a clear gap in the protection of human rights and freedoms from their violations by public administration. J. Repel states that direct application of international agreements (treaties) is possible, inter alia, in the form of using their provisions as a basis for the courts or public administration decisions. He also adds that treaty's provisions could be not completely coherent with Polish constitutional provisions[6]. On the contrary, Z. Czeszejko-Sochacki and S. Jaworski argue that international agreements could not be the matter of the constitutional complaint[7].

The supporters of the possibility to challenge international agreements with constitutional complaints can theoretically imagine a situation of challenging the Convention before the Constitutional Court, but according to the Polish model of the constitutional complaint, it is impossible.

3. Selected comparative criteria of the constitutional complaint and 'Strasburg' application.

3.1. Subjective and objective scope.

The object of the constitutional complaint can be an only law or other normative act released in foreseen in the Constitution form[8]. Whereas the object of application to ECHR ('Strasburg' application) is wider and includes actions and/or omissions of public administration. Moreover, according to the Convention, while bringing an application concerning a legal act allegedly inconsistent with the Convention it is enough to show that the applicant can become a victim of a violation of the Convention in any moment[9]. It is not necessary to have an individual decision concerning rights or freedoms of an applicant based on the act allegedly inconsistent with the Convention, as it should be in the case of the constitutional complaint.

A comparison of the subjective scopes of both constitutional complaint and individual application is complex. Polish constitutional complaint serves only to the subjects that are under Polish jurisdiction. An application to ECHR is designed to the subject that claims to be a victim of a violation of the Convention by a member-state[10]. In both complaints, an issue of citizenship of an applicant is not important and has no influence on the admissibility of a complaint. At the same time, none of the complaints has *actio popularis* character. Both complaints would be rejected as inadmissible if they are brought to a court in the name of

[1] Trzciński, J. (2000). Zakres podmiotowy i podstawa skargi konstytucyjnej. *Skarga konstytucyjna*. Warszawa.
[2] Grzybowski, M. (2006). Prawo międzynarodowe i wspólnotowe jako wzorzec i przedmiot kontroli norm. Zubik Księga, M. (red.) (2006). *XX-lecia orzecznictwa Trybunału Konstyucyjnego*. Warszawa, 340.
[3] Jamroż, L. (2011). *Skarga konstytucyjna, wstępne rozpoznanie*. Białystok, 259.
[4] See also Masternak-Kubiak, M. (1997). *Przestrzeganie prawa międzynarodowego w świetle Konstytucji RP*, Kraków, 316.
[5] Repel, J. (2000). *Przedmiotowy zakres skargi konstytucyjnej.* Trzciński, J. (red). *Skarga konstytucyjna*. Warszawa.
[6] Repel, J. (2000). *Przedmiotowy zakres skargi konstytucyjnej.* Trzciński, J. (red). *Skarga konstytucyjna*. Warszawa, 94.
[7] Czeszejko-Sochacki, Z. (1998). Skarga konstytucyjna w prawie polskim. *Przegląd Sejmowy, nr. 1.*
[8] Czeszejko-Sochacki, Z. (1998). Skarga konstytucyjna w prawie polskim. *Przegląd Sejmowy, nr. 1.* Czeszejko-Sochacki, Z. (1998). Skarga konstytucyjna w prawie polskim. *Przegląd Sejmowy, nr. 1,* 36.
[9] Nowicki, M.A. (1996). *Kamienie milowe, Orzecznictwo Europejskiego Trybunału Praw Człowieka.* Ośrodek Informacji i Dokumentacji Rady Europy. Warszawa, 28.
[10] Bisztyga, Andrzej (2000). Polska skarga konstytucyjna a skarga do Europejskiego Trybunału Praw Człowieka. *Przegląd Prawa i Administracji, 2000/44,* 225.

social interest.

The subjects who have the right to bring an application to ECHR according to art.34 of the Convention are persons, nongovernmental organizations or groups of individuals[1]. The term "nongovernmental organization" is capacious and covers all kinds of entities regardless of whether they have legal personality or not unless they belong to public administration[2]. In the case of constitutional complaint art.79 of the Constitution[3] uses the term „anybody", which covers natural persons regardless if they possess Polish citizenship and legal persons. The meaning of the term "anybody" is broad and has been interpreted in the Constitutional Court's case-law[4].

The only major difference is that an applicant can bring an application to ECHR if his rights were violated both directly and indirectly. Whereas in the case of a constitutional complaint a claimant should personally have suffered from an alleged violation[5]. Therefore, subjective scopes of both constitutional complaint and application to ECHR are close and cover individuals, groups of individuals and legal persons.

3.2. Admissibility criteria.

The common feature of both complaints is precisely defined admissibility criteria. In the case of an application to ECHR, they are regulated in art.35 of the Convention[6]; while in the case of a constitutional complaint they are regulated in art.64, art.65, art.66 of the Law "On the Constitutional Court" from 25 June 2015[7].

In this article will be analyzed only two criteria that precisely show the similarity of the legal nature of both remedies. Their common feature is the principle of subsidiarity; therefore, in both situations, the exhaustion of all remedies is demanded. There are also clear terms when these complaints should be brought (6 months from the date on which the final decision was taken – in the case of an application to ECHR[8]; and 3 months – in the case of a constitutional complaint[9]).

It is worth mentioning that the constitutional complaint could be recognized as a domestic remedy within the meaning of art.35 of the Convention[10]. As a consequence, the use of the constitutional complaint could be obligatory before bringing an application to ECHR. There is a discussion in Ukraine these days on this issue. There are opposite views on the need to implement the institute of constitutional complaint in Ukrainian legal order. And the duty to exhaust a possibility of a constitutional complaint is understood as an obstruction for the right to apply to ECHR. Therefore, this argument is often used against the implementation of a constitution complaint in Ukrainian legal system.

Conclusions

The constitutional complaint in a broad objective scope (Germany, Spain) is recognized as an effective remedy within the meaning of art.13 of the Convention. Concerning the constitutional complaint in narrow scope (among others in Poland), ECHR has formulated 3 conditions for its recognition as an

[1] Art 34, *European Convention on Human Rights* (adopted 4 November 1950, enter into force 3 September 1953). <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2016, January, 25).

[2] Nowicki, M.A. (2000). *Wokół Konwencji Europejskiej, Krótki komentarz do Europejskiej Konwencji Praw Człowieka*. Kraków, 32.

[3] Art 79, *The Constitution of the Republic of Poland*, (adopted 2 April 1997, enter into force 17 October 1997) (Sejm) *Official web-page of the Constitutional Court of Poland.* <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/> (2016, January, 25).

[4] Jamroż, L. (2011). *Skarga konstytucyjna, wstępne rozpoznanie.* Białystok, 259.

[5] Wiśniewski, Adam (2004). Polska skarga konstytucyjna a Europejska Konwencja Praw Człowieka. *Gdańskie Studia Prawnicze, 2004/12,* 311.

[6] Art 35, *European Convention on Human Rights* (adopted 4 November 1950, enter into force 3 September 1953). <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2016, January, 25).

[7] *Ustawa o Trybunale Konstytucyjnym* (adopted 25 June 2015, enter into force 30 August 2015) art. 64-66. (Sejm) *Official web-page of the Constitutional Court of Poland.* <http://trybunal.gov.pl/o-trybunale/akty-normatywne/ustawa-o-trybunale-konstytucyjnym/> (2016, January, 25).

[8] *European Convention on Human Rights* (adopted 4 November 1950, enter into force 3 September 1953). <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2016, January, 25).

[9] Art. 64, *Ustawa o Trybunale Konstytucyjnym* (adopted 25 June 2015, enter into force 30 August 2015) (Sejm) *Official web-page of the Constitutional Court of Poland.* <http://trybunal.gov.pl/o-trybunale/akty-normatywne/ustawa-o-trybunale-konstytucyjnym/>(2016, January, 25).

[10] Art 35, *European Convention on Human Rights* (adopted 4 November 1950, enter into force 3 September 1953). <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2016, January, 25).

effective remedy.

Firstly, the domestic legal norm must be allegedly inconsistent with both the Constitution and the Convention at the same time.

Secondly, the violation of a human right protected by the Convention must arise from the use of the domestic legal norm on which the final domestic judgment was based.

Thirdly, there must be a possibility for the resumption of the proceedings if Constitutional Court decides that there is a violation of the Constitution.

According to the ECHR judgments, conventional standards should apply to the proceedings before the Constitutional Court. ECHR judgments cannot be the control benchmark for constitutional complaint proceedings, but invocation to its decisions can be used as an additional argument. The comparison of subjective and objective scopes of both complaints and their admissibility criteria shows the great similarity of their legal natures, but at the same time helps to discover some differences.

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