

# INDIVIDUAL COMPLAINT TO THE EUROPEAN COURT OF HUMAN RIGHTS

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## ***Abstract***

*The paper presents the institution of individual complaint as the main legal instrument in the European system of protection the human rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms before the European Court of Human Rights with the seat in Strasbourg. Firstly it describes the genesis of the Convention and presents the rights ensured in its primary text and additional Protocols. Further on it shortly discusses the functions of the Court, its membership and organization. Later it presents the formal requirements put to the individual complaint and touches upon the main principles and stages of the proceedings before the Court. At last it shows the means of executing the Court's judgments and the role the Committee of Ministers of the Council of Europe plays in it.*

## **Genesis of the Convention for the Protection of Human Rights and Fundamental Freedoms**

After the end of World War II, independently from the activities taken up by the United Nations Organization in order to create a catalogue of human rights and freedoms, there was started a process of building a regional system

of their protection in Europe. The initiative body was the Council of Europe founded in 1949.

The Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up within the Council of Europe, was opened for signature in Rome on 4 November 1950 by the representatives of the member-states of the Council of Europe (entered into force on 8 September 1953). Taking as their starting point and based on the Universal Declaration of Human Rights from 1948<sup>1</sup>, the framers of the Convention sought to pursue the aims of the Council of Europe through the maintenance and further realization of human rights and fundamental freedoms. The event was considered to be the first step “for the collective enforcement of certain rights set out in the Universal Declaration of Human Rights” as we can read it in preamble.

The original, primary text of the Convention, signed by the representatives of fifteen states, contained obligations of protecting the following human rights and freedoms: the right to life<sup>2</sup>, the freedom from torture and other inhuman or degrading treatment or punishment; the freedom from slavery and obligatory work; the right to freedom and personal security; the right to a fair hearing in a sensible term in civil and criminal matters; the right to an effective remedy of every judgment; the right to privacy and secrecy of home and correspondence; the freedom of thought, conscience and religion; the freedom of expression, along with the freedom of press; the freedom of peaceful assemblies and association, along with the right to create and join trade unions; the right to marriage and found a family<sup>3</sup>.

The Authors of the Convention were pragmatic. They decided, that the primary text should contain the rights and freedoms, which at that time seemed to be the most important and possible to factual realization in a short period by every state-signatory of the Convention. The necessity of receiving the widest possible consensus between those states as to the Convention content was also very important. Believing to the development of European Communities they were aware of the necessity to widen the catalogue of human rights an

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<sup>1</sup> *Europejska konwencja praw człowieka. Międzynarodowy pakt praw obywatelskich i politycznych*, foreword A. Bisztyga, Katowice 1992, p. 5-6; K. Machowicz, *Ochrona praw człowieka w Rzeczypospolitej Polskiej na tle standardów europejskich*, Lublin 2008, p. 17; G. Michałowska, *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej*, Warszawa 2007, p. 95.

<sup>2</sup> Z. Jędrzejewski, *Artykuł 2 ust. 2 lit. a Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności a obrona konieczna (art. 25 KK)*, [in:] *Europeizacja prawa polskiego – wybrane aspekty*, ed. T. Bieńkowska, D. Szafrąński, Warszawa 2007, p. 50.

<sup>3</sup> K. Machowicz, *Ochrona praw ...*, p. 16; G. Michałowska, *Ochrona praw ...*, p. 95; *Europejska Konwencja Praw Człowieka*, wybór i opracowanie M. A. Nowicki, Warszawa–Kraków 2007, p. 8.

freedoms. They did not want to destroy the primary text of the Convention, that is why they suggested to place the next rights in additional Protocols.

Presently there are fourteen Protocols<sup>4</sup>, which implemented either changes or additions to the primary text of the Convention, though not all of them have been ratified by all the states so far, which means that not all have already come into force.

In Protocols there can be found the following rights and freedoms: the right to the peaceful enjoyment of possessions; the right to education and freedom to choose its kind; the right to free, secret vote and to stand for election; the prohibition of detention because of impossibility of exercising agreement rights; the right to freely move on the territory of the own state; the right to leave every state, including the own one; the prohibition of collective expulsion of aliens. All these rights are included into Protocols no 1 and 4. Protocol no 6 eliminates the death penalty and Protocol no 13 forbids using it independently from the circumstances. Protocol no 12 implements the prohibition of discrimination in the enjoyment of the rights and freedoms set out in the Convention<sup>5</sup>. Protocol 11, which deals with the reform of the bodies of Convention protection, was of great importance as well<sup>6</sup>.

Only some of these rights are of an absolute character. Most of them are limited in different ways. The admissible limitations are a result of the necessity to take into account state security and public order, territorial integrity, obligation to prevent breaking order and committing crimes, health and morality protection as well as protection of descent name and rights of other people. All such limitations can be implemented only to the extent which is necessary in a democratic society. The Convention also predicts a possibility to suspend some of the rights in case of implementing martial state or an extraordinary state, determined as “other public insecurity threatening the people’s life”. Though even then one cannot be deprived of his right to life, alert the prohibition of using torture, practice slavery or implement serfdom, as well as exert criminal law with retroactive force<sup>7</sup>.

### **Functions, Membership and Organization of the European Court of Human Rights**

European system of human rights protection, the heart of which remains the Convention, is considered to be the most effective among the existing instruments of control of respecting these rights. The system is based

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<sup>4</sup> G. Michałowska, *Ochrona praw ...*, p. 170.

<sup>5</sup> *Ibidem*, p. 95.

<sup>6</sup> J. Jaskiernia, *The Parliamentary Assembly of the Council of Europe*, Warsaw 2003, p. 231; G. Michałowska, *Ochrona praw ...*, p. 166; *Europejska Konwencja ...*, p. 8.

<sup>7</sup> K. Machowicz, *Ochrona praw ...*, p. 19-20, p. 33-46.

on admissibility of complaints concerning the violation of the Convention to the specially for this aim created body – European Court of Human Rights with its seat in Strasbourg<sup>8</sup>. Within the Court jurisdiction remain all the cases connected with the interpretation and application of the Convention lodged on the basis of individual or interstate complaints<sup>9</sup>. Moreover the Court is authorized to make advisory opinions on the motion of the Committee of Ministers of the Council of Europe<sup>10</sup>.

The Court consists of a number of judges equal to the number of member States of the Council of Europe that have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (currently forty-five). The judges are chosen by the Parliamentary Assembly of the Council of Europe among the three candidates proposed by each state. They are entirely independent of their country of origin and do not represent either applicants or States<sup>11</sup>.

The Court consists of Chambers (Sections) and the Grand Chamber. It can proceed in plenary sessions. Four Chambers (sections) consider complaints in three-member Committees and panels consisting of seven judges. The Grand Chamber gives sentences in the panel of seventeen<sup>12</sup>.

The Committee of Ministers of the Council of Europe plays a very important role in the mechanism of human rights protection as well. It consists of the Ministers of Foreign Affairs and their deputies from the member-states<sup>13</sup>.

### **Proceedings before the European Court of Human Rights**

Complaint is a legal instrument which starts a procedure before the European Court of Human Rights. It can be of two types<sup>14</sup>:

- state application, which is complaint of a state or a group of states against a state on violating one of the rights guaranteed in the Convention – there have been a lot of complaints of this type lately;
- individual application, which has dominated in the practice so far; a complaint which can be submitted by an individual who has been violated directly or indirectly; nevertheless it depends on the fact

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<sup>8</sup> *Europejska Konwencja ...*, p. 8.

<sup>9</sup> K. Machowicz, *Ochrona praw ...*, p. 15; *Europejska konwencja ...*, s. 6.

<sup>10</sup> G. Michałowska, *Ochrona praw ...*, p. 166, 169.

<sup>11</sup> J. Jaskiernia, *The Parliamentary Assembly ...*, p. 232-235; G. Michałowska, *Ochrona praw ...*, p. 167.

<sup>12</sup> *Europejska Konwencja ...*, p. 9.

<sup>13</sup> *Ibidem*, s. 6.

<sup>14</sup> G. Michałowska, *Ochrona praw ...*, p. 165.

whether the country, against which the complaint is lodged, has subjected to the jurisdiction of the Convention bodies in a separately expressed declaration.

From the subject point of view the characteristic feature of the conventional rights is that everyone is entitled to them, not depending on the citizenship of the exact state. It is enough to temporarily and shortly find oneself on its territory.

Paragraph 35 of the Convention determines the conditions of admissibility of the complaint addressed to the European Court of Human Rights<sup>15</sup>. The complaint has to include:

- name, surname, age, profession and address of the complainer;
- name, surname, profession and address of his representative, if there is one;
- name of the state, against which the complaint is submitted;
- the charges which are put and the paragraphs of the Convention which according to the complainer have been broken;
- presentation of the basic facts and other arguments supporting the put charges;
- documents connected with the case, especially all court sentences and other decisions of the bodies having considered the case in the state, which the complaint deals with;
- information concerning the fact whether the case has been submitted to other international investigation procedure or sentence;
- determining in which of the two official languages – English or French – the complainer wishes to receive decision or verdict.

Not fulfilling the requirements concerning the content of complaint can cause refusing of its registration and considering by the Court.

If the complainer does not want his identity to be disclosed, he has to determine it clearly in the complaint and present supporting it arguments<sup>16</sup>, such as: state security, good of juvenile, protection of private life, etc.

Since the registration of the complaint all the documents, except those connected with negotiations on a friendly settlement, have to be publicly available, unless the President of the Chamber decides otherwise.

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<sup>15</sup> *Ibidem*, p. 168; *Europejska Konwencja ...*, p. 9-10.

<sup>16</sup> *Europejska Konwencja ...*, p. 11.

Before bringing out the complaint to the Court all the available on the domestic level remedies predicted by law for such cases like the one being the subject of the complaint have to be tried. In court cases one must appeal to the second resort court. In fact, one should also try to submit a cassation. In administrative cases one must appeal to the second instance administrative body and then submit a complaint to the administrative court. One should also try lodging an extraordinary revision to the Supreme Administration Court. Sometimes it is necessary to bring in a complaint to the Constitutional Court. The charges put in the withdrawals must be similar to the ones contained later in the complaint to the Court of Human Rights<sup>17</sup>.

It should be clear from the information presented by the complainer, that he has used all the legal remedies existing on the domestic level in order to reach the justice. Moreover lodging the complaint should take place not later than six months after the final valid sentence in the case made by the domestic bodies<sup>18</sup>. The language of the complaint can be various.

The complaint can not be a kind of *actio popularis*, separated from the exact events, directly or indirectly touching the complainer<sup>19</sup>. Besides, the victim is considered to be not only the really violated person (*actual victim*), but also the one having serious and grounded reasons to be afraid of being violated in the future (*potential victim*). It comes out of practice, that complaints are taken not only from directly violated persons (*direct victims*), but also from those who have suffered from actions inflicted on others (*indirect victims*). It concerns family members and other close persons in the first place.

The requirement, that the author of the complaint has to be the violated person, does not exclude an opportunity of lodging it by someone else. Such a situation can occur, when the violated person can not do it personally by himself. Then the members of his closest family, chaperones and exceptionally other persons can act on his behalf. Each time it requires presenting the arguments and proofs to support the fact, that the violated person was not able to lodge the complaint personally.

The date of lodging the complaint is considered to be the date of the first letter to the Court containing at least a short presentation of the subject of complaint. In some special cases there can be taken another date of lodging<sup>20</sup>.

It should be added here, that the complaint can only deal with the events, which took place after the date of coming into force of the European

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<sup>17</sup> *Ibidem*, p. 9.

<sup>18</sup> *Ibidem*, p. 9-10.

<sup>19</sup> G. Michałowska, *Ochrona praw ...*, p. 97.

<sup>20</sup> *Europejska Konwencja ...*, p. 11.

Convention in relation to the exact state.

After registering the complaint a Chamber pulls out of the judges a rapporteur responsible for conducting it till the final verdict.

Only the easiest cases will go to the Committees. They can declare the complaint inadmissible and strike it out of the registry without further examination on the condition that the decision is taken by the unanimous vote.

Such decisions are ultimate. Lack of total agreement causes the necessity of considering the case by a Chamber consisted of seven judges. The Chamber can also examine the case from the very beginning. Before making a decision on admissibility of the complaint if necessary it can turn to the Government to present the comments. Sometimes it will gather to decide on the matter of admissibility as well as the merits of the complaint.

The trials are open to the public, unless in some exceptional circumstances the Chamber decides otherwise. The public character of the trials can be excluded because of the public order reason.

After informing the Government of the complaint the President of the Chamber may acknowledge the need of the complainer to be represented by a lawyer (authorized to practice in the states of Convention and residing in one of them) or another person having proper qualifications and meeting the same requirements. These persons must possess appropriate knowledge of one of the Court's official languages. The rules of granting legal aid have not changed considerably. The Chamber President, either on the basis of a complainer's motion or on his own initiative, can decide on granting such aid since receiving written comments on complaint admissibility from the Government or after expiry of the term of submitting them, on condition of its necessity for the proper case consideration and if the complainer lacks enough funds to cover the whole or a part of the expenses. The material condition of the complainer is estimated on the basis of a special declaration certified by appropriate state authorities.

Although the official languages of the Court are English and French, the complainer may use the language of the state he comes from till the decision on admissibility of the complaint is taken. Since then its usage is allowed only by a permit of the Chamber President. The representatives of the state must use one of the official languages all the time, unless they receive a special permit to use their native language. In this case, the state has an obligation to cover translation expenses.

Once the Chamber has admitted the complaint, it may require further observations and evidence from the parties. On this stage the hearing is possible to be announced by the Chamber either on its own initiative or on the

basis of the parties' motion as well. Exceptionally the Chamber can recognize, that the trial is not necessary at all. In some cases performing investigation activities, such as hearing the witnesses, experts, etc. will be needed.

The Court Chancellor communicates with the parties for a possible friendly settlement. The negotiations are confidential. After its conclusion and verification, whether it has been completed with the respect of human rights, the case is deleted from the registry.

If it turns out, that the case considered by the Chamber creates serious problems with interpretation of the Convention and Protocols or its judgment would be contradictory to the earlier Court sentence, the Chamber may recede its jurisdiction to the Great Chamber on every stage of the proceedings. The parties have the right to object to it in a month term. Nevertheless it has to be grounded.

The Chamber gives a judgment, in which states if the Convention has been violated and in what way. It also gives a sentence as to possible compensation as well as costs and expenses. Debate on the judgment is held over the closed doors and its content remains secret. The judgments are taken by the majority of votes. Any judge who has taken part in the consideration of the case is entitled to append to the judgment a separate opinion, either concurring or dissenting, or a bare statement of dissent. The judgments are published in both official languages of the Court.

A Chamber's judgment becomes final on expiry of the three-month period or earlier if the parties announce that they have no intention of requesting a referral or after a decision of the panel rejecting a request for referral.

If the panel accepts the request, the Grand Chamber renders its decision on the case in the form of a judgment. The Grand Chamber decides by a majority vote and its judgments are final.

Within three months from delivery the judgment of the Chamber, each party, in exceptional circumstances, may request the case to be referred by the Grand Chamber. There must be raised a serious question influencing the interpretation or application of the Convention or a considerable issue of general importance, which according to the party requires examining it by the Grand Chamber. The request is considered by a Grand Chamber panel of five judges who give a judgment on the basis of the files. The Grand Chamber is composed of the President of the Court, the Section Presidents, with the exception of the Section President who presides over the Section to which the Chamber that gave judgment belongs, and another judge selected by rotation from the judges who were not members of the original Chamber. The denial



statement does not need to be grounded. If the panel approves the request, the final judgment in the case will be made by the Court's Grand Chamber.

All final judgments of the Court are binding on the respondent States concerned. The Court itself does not have any possibilities to execute the obligations contained in the judgments<sup>21</sup>. In accordance with Article 46 paragraph 2 this function belongs to the Committee of Ministers of the Council of Europe. It verifies whether States in respect of which a violation of the Convention is found have taken adequate remedial measures to comply with the specific or general obligations arising out of the Court's judgments. The Committee performs effective supervision over it, using mostly its extremely high political position, which it exercises among the member-states of the Council of Europe. It has to be underlined, that from the formal point of view enforcement of the Court judgments belongs to the state in concern.

Once the Court's final judgment has been transmitted to the Committee of Ministers, the latter invites the respondent State to inform it of the steps taken to pay any just satisfaction (compensation and/or costs and expenses) awarded as well as of any individual or general measures which may be necessary in order to comply with the State's legal obligation to abide by the judgment. In the performance of this task the Committee is assisted, in addition to its own secretariat, by a special department of the Council of Europe's Secretariat – the Department for the Execution of Judgments of the European Court of Human Rights.

Individual complaint to the European Court of Human Rights in Strasbourg has become an exceptionally effective instrument of human rights protection. Its subject extend, comprising also individuals not possessing a citizenship of one of the European states, only confirms a democratic character of this institution of human rights protection, which does not take into account individual's state belonging. Its effectiveness can be proved by the number of complaints lodged to the Court, which year by year has an increasing tendency. One of the disadvantages of the institution is a multi-year proceedings of its consideration aiming at giving the final judgment. Execution of the Court's judgments also rises certain doubts, because the Court itself possess neither its own competences nor instruments in this area. The Court's judgments are executed by the countries which are stated to have violated conventional rights. It is worth being underlined that the doubts are of a legal kind, because practice shows the mechanism fulfilling its task.

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<sup>21</sup> *Europejska konwencja ...*, s. 6.

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