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**“INDIVIDUAL CONSTITUTIONAL COMPLAINT  
TO THE CONSTITUTIONAL COURT OF UKRAINE”**

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**REPORT**

**“NORMATIVE CONSTITUTIONAL COMPLAINT IN UKRAINE  
AS A NATIONAL LEGAL REMEDY”**

by  
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*The article elaborates on some specific features of the Ukrainian model of the constitutional complaint as a tool for securing rights and freedoms, as well as on the issue of “accessibility” and “effectiveness” of the constitutional complaint in the context of exhaustion of all domestic legal remedies as an admissibility condition for applications to the European Court of Human Rights by citizens.*

**Keywords:** *constitutional complaint, human rights, domestic legal remedy, European Court of Human Rights, Council of Europe standards.*

Having gone through the difficult path of its formation and development, the Constitutional Court of Ukraine is on the way of the third decade of its activity with a firm commitment to strengthen public trust to the body of constitutional jurisdiction that ensures the supremacy of the Fundamental Law. To this end, a new Law of Ukraine “On the Constitutional Court of Ukraine” dated July 13, 2017, No. 2136-VIII (hereinafter referred to as the Law, the Law on the Constitutional Court), adopted in connection with the amendments to the Constitution of Ukraine (on justice), which came into force on September 30, 2016.<sup>1</sup> The new Law introduces, in particular, the competitive principles for selecting candidates for the position of a judge of the Constitutional Court of Ukraine (hereinafter referred to as the Court, the Constitutional Court), stipulated the construction of the legal position of the Court, determined the procedure for applying to it with a constitutional complaint and “unblocked” the functioning of this ultra-important institute of constitutional proceedings, since as of September 15, 2017, in order to implement the right to constitutional complaint to the Court, declared by the Fundamental Law, 202 constitutional complaints were received that were pending before the Court.<sup>2</sup>

V. Lemak and O. Petryshyn correctly described the state of affairs as “an unconstitutional situation with regard to constitutional complaint”, which should be promptly solved by the body of constitutional justice through judicial law-making, when the courts ensure the supremacy of the Constitution and the exercise of human rights by their own decisions.<sup>3</sup> At the same time, the authors cited the possibility of considering constitutional complaints in the absence of a special law.<sup>4</sup> Given this, the constitutional model of a constitutional complaint, foreseen by Article 151-1 of the Fundamental Law, for unknown reasons, did not indicate its intrinsic connection with the alleged violation of fundamental rights and freedoms, which stipulates the legal nature of the constitutional complaint as a national means of protecting human rights.<sup>5</sup> It is the adopted Law on the Constitutional Court, although with a certain delay, among the requirements with which a constitutional complaint must comply, that indicated “the substantiation of the allegations of unconstitutionality of the law of Ukraine (its separate provisions), and mentioned which of the human rights guaranteed by the Constitution of Ukraine, in the opinion of the subject of the right to a constitutional complaint, was violated as a result of the application of the law” (clause 6 of paragraph two of Article 55 of the Law). However, this requirement raises the need to clarify a number of important issues, among which: the role of a constitutional complaint in the context of the exhaustion of all domestic remedies as a prerequisite for appeal to the European Court of Human Rights, as well as the

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<sup>1</sup> Law of Ukraine “On Amendments to the Constitution of Ukraine (on justice)” dated June 2, 2016, No. 1401-VIII // Bulletin of the Verkhovna Rada. - 2016 - No. 28 - p. 532.

<sup>2</sup> See: Constitutional Appeals Received by the Constitutional Court of Ukraine as of September 15, 2017 [Electronic Resource]. - Access: <http://www.ccu.gov.ua/novyna/konstytuciyni-skargy-shcho-nadiyshly-dokonstytuciynogo-sudu-ukrayiny-za-stanom-na-15-0>

<sup>3</sup> V. Lemak, O. Petryshyn Constitutional complaint in Ukraine: problems of the mechanism of implementation // Bulletin of the Academy of Legal Sciences of Ukraine. - 2017 - No. 2 (89). - p. 87.

<sup>4</sup> Ibid. - pp. 83-86.

<sup>5</sup> For details see: M. Hultai Constitutional complaint in the mechanism of access to constitutional justice: [Text] monograph / M. Hultai. - X.: Law, 2013. - 424 p.

“accessibility” and “effectiveness” of the constitutional complaint in view of relevant Council of Europe standards.

First of all, it should be noted that it is the violation of human rights by legal act of state power as the basis of a constitutional complaint, combines its various models, accordingly, a constitutional complaint serves as a means of their renewal, protection and prevention of further violations. According to O. Luchterhandt, a constitutional complaint means that the fundamental rights guaranteed by the Fundamental Law are not only “loud declarations”, but are subjective rights that a person can refer directly to. An individual in this case, “having armed” only with the Constitution, makes a challenge to the state and forces it to acquit itself in court for its behaviour. From a historical point of view, this is an “incredible change both psychologically and legally”.<sup>6</sup> It is the role of the constitutional complaint as a means of protecting human rights, which is stressed in the Venice Commission's Opinion on the Draft Law on the Constitutional Court of Ukraine, adopted on December 9-10, 2016.<sup>7</sup>

With regard to the introduction of constitutional complaint, the legal community is actively discussing its ability to act as the so-called national filter for cases before the submission of relevant individual applications to the European Court of Human Rights. The ability of a person to have direct access to the body of constitutional justice authority prevents the Strasbourg Court from being overburdened. The statistics provided by this court indicate that those countries where the mechanism for submitting constitutional complaints exists have a lower number of applications to the European Court of Human Rights (in proportion to the population number) than others in which there is no such mechanism.

The role of the constitutional complaint in deciding on the admission of applications to the European Court of Human Rights in the context of effective instruments for the protection of human rights at the national level has become the subject of particular attention of the Venice Commission in its comprehensive report “On Individual Access to Constitutional Justice” (Venice, December 17-18, 2010).<sup>8</sup> The Commission declared that the mechanism of individual complaint to the Constitutional Court could become a national filter before referring cases to the European Court of Human Rights. This is consistent with paragraph 4 of the Interlaken Declaration, which provides for the subsidiary nature of conventional mechanisms.<sup>9</sup>

The Venice Commission notes that in countries where there is a specialised constitutional court functioning, an individual complaint to the constitutional control body is the logical choice of an effective legal remedy. Such a complaint, as a rule, is subsidiary at the national level and applies only after exhaustion of remedies in courts of general jurisdiction. Such an approach is envisaged by Article 150-1 of the Constitution of Ukraine, which states that a constitutional complaint may be filed in case “if all national remedies have been exhausted.” It is logical to suppose that such a complaint becomes the last national remedy to be used in order application to the European Court of Human Rights is possible. However, in order to be a national filter on the way to the Strasbourg Court in the sense of Article 35§1 of

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<sup>6</sup> O. Luchterhandt The role and independence of the constitutional court in a state governed by the rule of law [Text] / O. Luchterhandt // The Role of the Constitutional Court in the Implementation of Citizens' Constitutional Rights and Freedoms: Conf., September 22, 2009. - Minsk: Amalfeia, 2010. - p. 32-33.

<sup>7</sup> Opinion on the Draft Law on the Constitutional Court. Adopted by the Venice Commission at its 109 Plenary Session (Venice, 9-10 December 2016) [Electronic Resource]. - Access: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)034](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)034)

<sup>8</sup> Draft Study on Individual Access to Constitutional Justice on the basis of comments by Mr. G. Harutyunyan, Ms. A. Nussberger, Mr P. Paczolay. European Commission for Democracy Through Law (Venice Commission), paras 82 – 94 [Electronic Resource]. - Access: [http://www.venice.coe.int/webforms/documents/CDL-JU\(2010\)018rev-e.aspx#P165\\_13720](http://www.venice.coe.int/webforms/documents/CDL-JU(2010)018rev-e.aspx#P165_13720).

<sup>9</sup> Future of the European Court of Human Rights (Interlaken, Izmir, Brighton Declarations) [Text] // Proceedings of the Lviv Laboratory of Human and Citizen's Rights of the National Research Institute of the State. Building and Local Self-Government NAPrN of Ukraine / Ed.Board: P. Rabinovych (Head) and others. - Series II. Law Comments and Legislation. Issue 12. - Lviv: SPOLOM., 2013. - pp. 8-14.

the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “European Convention”), a national remedy under Article 13 of the European Convention must be *effective and accessible*.

The question what sort of constitutional complaint there should be in order to be considered effective is complex and the answer to it presupposes the consideration of various factors and can differ in different countries. Even within the limits of one and the same legal system, a constitutional complaint can be an effective remedy for certain violations of the European Convention and ineffective for others.<sup>10</sup> As a result of the analysis of the requirements of the European Court of Human Rights for effective domestic remedies (in particular, in cases *Kudła v. Poland* (No. 30210/96, §§ 152, 157), *Omasta v. Slovakia* (No. 40221/98 dated December 10, 2002 *Dorota Szott-Medynska v. Poland* (No. 53351/99 dated October 9, 2003, *Vekony v. Hungary* (No. 65681/13 dated January 13, 2015), the Venice Commission claims that consideration of a constitutional complaint should ensure “*Preventive remedies to prevent any further violation of rights while legal proceedings are not completed*”, as well as “*compensatory remedies*”. The court should be obliged to consider the case in the absence of any unreasonable claim for legal expenses or legal representation. As a result of the individual complaint procedure, the constitutional court should be able to give an effective indication of the immediate violation, renewal or termination of proceedings in the general court, or to consider the case itself on the merits, if there is a complaint about excessive length of proceedings. Moreover, the obligation to organise its judicial system in accordance with the requirements of Article 6§1 of the European Convention also applies to constitutional justice. This means that if the state intends to introduce the institute of individual complaint to the constitutional court, this should be done in a way that does not excessively prolong the overall duration of the proceedings. Accordingly, the Constitutional Court should have the opportunity and resources to effectively cope with the additional caseload. In addition, adequate compensation must be provided on the basis of a binding decision of the Constitutional Court in a case, equivalent to the one the applicant can obtain in the Strasbourg Court.<sup>11</sup>

It should be emphasised that the scope of the obligations of States under Article 13 of the European Convention depends on the nature of the applicant's complaint, but the remedy provided for by this article must be “effective” both in practice and under law (see, for example, *Ilhan v. Turkey* (No. 22277/93, § 97). The “effectiveness” of any remedy within the meaning of Article 13 does not depend on the certainty which it provides for a favourable result for the applicant. Even if an individual remedy does not entirely satisfy the requirements of Article 13, this goal may be reached by a set of remedies provided for by national law (see *Silver and others v. the United Kingdom* (§ 113, March 25, 1983) and many others. However, in the end, the constitutional court should have the opportunity to restore the rights violated by virtue of a binding decision in the case. Just a declarative decision on unconstitutionality is not a sufficient means of legal protection. In case if the consequences of the actions are irreversible, the constitutional court should prevent such behaviour.

In view of these requirements, the Venice Commission expressed itself in favour of a full constitutional complaint not only because it provides comprehensive protection of constitutional rights, but also “in view of the subsidiary nature of the remedy in the European Court of Human Rights and the desire to resolve human rights problems at the national level”. Such a model of a complaint, in the words of H. Harutyunyan, makes it possible to implement “human rights to constitutional justice”, since a person can appeal any act of state power which directly violates his or her fundamental rights.<sup>12</sup> At the same time, in its Opinion on the draft Law on the

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<sup>10</sup> Ibid. - §§ 87, 88.

<sup>11</sup> Ibid. - §§ 87- 94.

<sup>12</sup> H. Harutyunyan Individual Constitutional Complaint: European Trends of System Development [Text] / H. Harutyunyan // Protection of Human Rights by the Bodies of Constitutional Justice: Opportunities and Problems of Individual Access: Materials of International. Conf., Kyiv, September 16, 2011 / Constitutional Court of

Constitutional Court of Ukraine, the Venice Commission emphasised that the introduction of a "normative" model of the constitutional complaint would be the first step towards strengthening the system of human rights protection" (paragraph 34 of the Opinion).

Taking into account the above criteria, we will try to assess the model of the constitutional complaint introduced in Ukraine in terms of access to the European Court of Human Rights. First of all, an indication of the Law needs to be analysed, in which the submission of the constitutional complaint is dependent on the violation of human rights. The constitutional complaint should specify the specific provisions of the law of Ukraine, which are to be checked for compliance with the Constitution of Ukraine, and the specific provisions of the Constitution of Ukraine, the compliance to which of the law of Ukraine shall be checked (Article 55.2.5 of the Law). That is, it is about the person's ability to initiate verification of the law for compliance with *any provision of the Constitution of Ukraine*. At the same time, as it was already noted, in substantiating the allegations of unconstitutionality of the law of Ukraine (its separate provisions), the Law on the Constitutional Court requires to indicate which of the "human rights guaranteed by the Constitution of Ukraine, according to the subject of the right to constitutional complaint, was violated as a result of the application of the law".

It is obvious that compliance with this requirement (at least at the stage of the formation of the relevant case law) will cause a lot of questions, since the proposed construction is rather complicated. The Ukrainian legislator did not take a more logical path, which is used in other European countries, namely: a constitutional complaint could only concern the compliance of the law (its separate provision) with the provisions of the Constitution of Ukraine, which guarantee human rights and freedoms (here it would be possible to provide an indication to specific articles of the Constitution of Ukraine or to indicate the rights and freedoms guaranteed by its Chapter II).

For example, it follows from Article 79 of the Constitution of the Republic of Poland that the grounds for a constitutional complaint are violations of the constitutional rights and freedoms. Most of these rights are set forth in Chapter II "The Freedoms, Rights and Obligations of Persons and Citizens" of the Constitution of the Republic of Poland, but a constitutional complaint may concern the rights, freedoms or duties contained in other chapters of the Fundamental Law. However, the Constitutional Tribunal of the Republic of Poland stated in its decisions: "the norms defining the general principles of the constitutional system, as well as the norms addressed to the legislator... cannot be the basis for a constitutional complaint ... The preamble of the Constitution does not contain norms defining rights and freedoms ..."<sup>13</sup>

Within the proposed structure, the key question is whether the Constitutional Court of Ukraine, when assessing the admissibility of a constitutional complaint and substantiation of the position by the subject of the right to a constitutional complaint, *should establish a violation* of the human right guaranteed by the Constitution of Ukraine as a result of the application of the law? If so, then the Court must deviate from the established role of the "court of law" and assess the facts on the merits. At the same time, it is extremely important to limit itself to examining exclusively the issue of violation of the rights guaranteed by the Constitution of Ukraine and not resorting to an assessment of the correctness of application of the law by courts of general jurisdiction. Indeed, as H. Harutyunyan rightly states, the constitutional court should consider only "constitutional issues", although their detection may be complicated, for example, regarding the right to a fair trial, since any procedural violation of ordinary courts may

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Ukraine; responsible Ed. A. Holovin. - K.: Logos, 2011. - pp. 69-70.

<sup>13</sup> A.Vashkevich Institute of constitutional complaint in the Republic of Poland: organisational and legal problems of consideration [Text] / A. Vashkevich // Theoretical and practical aspects connected with individual constitutional complaint in the European model of constitutional justice: International scientific practice. conf. (May 13-14, 2010). - Minsk: 2010. - p. 98.

be considered a violation of the right to a fair trial, protected by Article 6 of the European Convention.<sup>14</sup> In the Opinion of the Venice Commission in providing the example of the Federal Republic of Germany also stresses that "the Constitutional Court applies the Constitution as "a measure" of control and does not decide on the correct application of the law in other respects. As a result, the Constitutional Court exercises subsidiary, specific constitutional control and does not act as "the 4th instance" (paragraph 38 of the Opinion).

The next issue that will arise in connection with the application of the relevant legislative requirement regarding constitutional complaint is the wide scope and content of human rights and freedoms guaranteed by the Constitution of Ukraine, which also covers social and economic rights. At the same time, the Ukrainian legislator did not take into account the experience of the leading European countries, which ensure, with the help of the institute of constitutional complaint, only the so-called negative rights that have the constitutional effect, whereas a group of human rights having a programmatic character (primarily social rights, sometimes referred to as "social intentions", or "social goals"), is not given legal means for their protection. Violations of such rights (in particular, total or partial failure to ensure them) are not recognised as grounds for filing a constitutional complaint.

This approach is based on the liberal theory of human rights, which proceeds from the fact that socio-economic rights are declarative and depend on the degree of development and available resources of a particular state, the implementation of its social functions. According to V. Seriohin, within the "western" approach, such rights are proclaimed, but cannot be protected by court procedure. The state undertakes to promote the realisation of these rights, but taking into account the realities of socio-economic life does not guarantee them to all.<sup>15</sup> It should be added that these rights are guaranteed by the state only to the extent that they are a prerequisite for the implementation of civil and political rights and freedoms (for example, implementation of the right to a clean environment is an element of the protection of the right to life).

The Supreme Court of Switzerland, in its turn, applies the concept of "the rights relevant to the Constitution" based on the programmatic provisions of the Swiss Constitution on the socially oriented state activities, care and assistance to social groups which need the support from the state, especially the most vulnerable (physically disadvantaged, elderly, children left without parental care, etc.). These rights are predominantly social and economic rights, with regard to which the Supreme Court of Switzerland does not grant judicial protection and the right to submit a constitutional complaint, which is their distinction from the category of fundamental rights.

Focusing on the classical liberal concept of human rights, the Constitutional Court of the Republic of Austria also does not recognise that the social and economic rights of citizens have the status of fundamental rights, which protection is provided in court. The guarantee of such rights can be the economic policy of the government, the legislation on state support to the unemployed, insurance medicine, etc. It should be reminded that the European Court of Human Rights also decides on the violation of socio-economic rights only to the extent that they are covered by the content of the fundamental rights and freedoms guaranteed by the European Convention.

The next problem in view of the requirement to indicate the human rights guaranteed by the Constitution of Ukraine, which were violated as a result of the application of the law, is the

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<sup>14</sup> H. Harutyunyan Individual Constitutional Complaint: European Trends of System Development [Text] / H. Harutyunyan // Protection of Human Rights by the Bodies of Constitutional Justice: Opportunities and Problems of Individual Access: Materials of International. Conf., Kyiv, September 16, 2011 / Constitutional Court of Ukraine; responsible Ed. A. Holovin. - K.: Logos, 2011. - p. 75.

<sup>15</sup> V. Seriohin Constitutional Law of Ukraine: Teach. manual [Text] / V. Seriohin; Ministry of Internal Affairs of Ukraine, Kharkiv. - Kh.: 2010. – pp. 94-95.

circle of subjects of the right to a constitutional complaint. According to Article 56 of the Law on the Constitutional Court, the subject of the right to constitutional complaint shall be a person who considers that the law of Ukraine applied in the final court judgment in his or her case (specific provisions thereof) contradicts the Constitution of Ukraine. The list of subjects of the right to a constitutional complaint does not include legal persons of public law. This means that such subject includes both natural and legal entities of private law.

This requirement again raises the question of the extent to which the human rights guaranteed by the Constitution of Ukraine belong to legal entities. Repeatedly, at various stages of elaboration of proposals to amend and supplement Chapter II "Human and Citizen's Rights, Freedoms and Duties" of the Fundamental Law suggested that the rights and freedoms enshrined therein should apply to legal entities insofar as they can be applied to such persons, based on the content of the relevant right. Such approach is consistent with the case law of the European Court of Human Rights, which applies certain provisions of the European Convention to protect the rights of legal persons (in particular, property rights or prohibition of discrimination).

At the same time, today there is no established position of the Constitutional Court itself on this issue; on the contrary, in its earlier decisions, the sole body of constitutional jurisdiction held the opposite position. Thus, in the Decision in the case upon the constitutional petition of the National Bank of Ukraine concerning the official interpretation of the provision of Article 58.1 of the Constitution of Ukraine (case on the retroactive effect in time of laws and other regulatory acts) dated February 9, 1999 № 1-rp/99 the court stated: "In the Constitution of Ukraine, Article 58 is contained in Chapter II "Human and Citizen's Rights, Freedoms and Duties", which consolidates primarily human and citizen's constitutional rights, freedoms and responsibilities and their guarantees. This is evidenced by the title of this chapter, as well as a systematic analysis of the content of its articles and Article 3.2 of the Constitution of Ukraine". Accordingly, the Court held that the provisions of Article 58.1 of the Constitution of Ukraine that laws and other normative-legal acts have no retroactive effect in time, except when they mitigate or cancel the responsibility of a person, must be understood in the sense that it concerns a person and citizen (natural person). It is obvious that the circle of the rights and freedoms guaranteed by the Constitution, the violation of which can be referred to by the subject of constitutional complaint – a legal entity of private law, will be clarified precisely through the formation of the relevant case law of the Constitutional Court, while it is appropriate to take into account the arguments presented in the judgments of the European Court of Human Rights.

Turning to other requirements which prove that the constitutional complaint is an effective means of legal protection on the way to the European Court of Human Rights, let us dwell upon the possibility of a constitutional court to prevent the execution of actions if their consequences are irreversible, as well as the possibility of restoring violated rights on the basis of a binding decision in a case.

As regards the first of these requirements, the Law on the Constitutional Court expressly provided for the possibility of ensuring the constitutional complaint. Pursuant to Article 78 of the Law, when considering a constitutional complaint, the Grand Chamber, in exceptional cases, may, on its own initiative, take measures to secure a constitutional complaint by issuing an interim order which is an executive document. The ground for securing the constitutional complaint is the need to prevent irreversible consequences that may arise in connection with the execution of the final court decision. The way to secure a constitutional complaint is to establish a temporary prohibition to take a certain action. The interim order expires on the day the decision was passed or the resolution was issued to terminate the constitutional proceedings in the case.

This provision is an important step in ensuring the effectiveness of the constitutional complaint as a national remedy. After all, if the Constitutional Court adopts a decision in favour

of the subject of the constitutional complaint the latter obtains an opportunity to appeal to courts of general jurisdiction to review the final court decision in view of the newly discovered circumstances. Such possibility is expressly provided for by the procedural codes (Article 245.2.5 of the Code of Administrative Proceedings of Ukraine, Article 361.2.4 of the Civil Procedural Code of Ukraine, 459.2.4 of the Criminal Procedural Code of Ukraine). In addition, the Final Provisions of the Law on the Constitutional Court provided that the initiation of proceedings under new circumstances applies not only to instances where the Court established unconstitutionality of the law of Ukraine or another act (their separate provisions), but also when it provided official interpretation of the provisions of the Constitution of Ukraine, which is different from the one which was applied by the court in deciding on the case.

Regarding the requirement to provide fair compensation upon the results of consideration of a constitutional complaint, such an opportunity within the constitutional proceedings in the case upon a constitutional complaint is not provided. Yet, in case of adopting a decision upon a constitutional complaint in favour of the subject of a constitutional complaint, the latter may take advantage of the constitutional right to reimbursement at the expense of the state or bodies of local self-government of the material and moral damage caused by illegal decisions, actions or omissions of state authorities, local self-government bodies, their officials and officers in the exercise of their powers guaranteed by Article 56 of the Constitution of Ukraine.

Thus, the analysis of the provisions of the Law on the Constitutional Court allows us to propose *a two-tiered test of the assessment of the situation to which a constitutional complaint relates* (in case of its compliance with other admissibility conditions as defined in Article 77 of the Law). This test includes:

1) resolving the question of the substantiation of the claim of the subject of the right to a constitutional complaint concerning violation of human rights guaranteed by the Constitution of Ukraine (conditionally – “*test for violation of rights and freedoms*”); 2) an assessment of the compliance of the law (its separate provisions) with the provisions of the Constitution of Ukraine (conditionally – “*test for the constitutionality of the law*”).

In addition, the Law provides that if the Court, when considering a case upon a constitutional complaint, declares the law of Ukraine (its provisions) as conforming to the Constitution of Ukraine, but at the same time found that the court, when applying the law of Ukraine (its provisions), interpreted it in a method that does not comply with the Constitution of Ukraine, the Constitutional indicates it out in the operative part of the decision (Article 89.4 of the Law). Such provision of the Law on the Constitutional Court of Ukraine, according to the Venice Commission, “is a step in the right direction, which allows further study of the constitutionality of acts, although it cannot introduce a complete constitutional complaint” (paragraph 44 of the Opinion). At the same time, in practical terms, this means the need to supplement the proposed test with the third (optional) stage - *assessment of the “constitutionality” of the interpretation of the law*. However, even having stated the interpretation of the law in a way that does not comply with the Constitution of Ukraine, the Court will not be able to provide its official interpretation, since the interpretation of the laws of Ukraine no longer falls within the powers of the Constitutional Court of Ukraine.

Thus, the experience of foreign states, generalised by the Venice Commission, suggests that a normative constitutional complaint cannot in any case satisfy the requirements for effective national remedies in accordance with Article 13 of the European Convention (see, in particular, *Vekony v. Hungary* (No. 65681/13 dated January 13, 2015). The model of a “normative” constitutional complaint, introduced in Ukraine, directed only at the law, and not on the acts of its application in a specific case, will also not become a national “filter” for all cases before the referral of individual applications to the European Court of Human Rights. In practice, human rights violations are more often caused not by a “technically correct application” of an



unconstitutional law which can be appealed against by such a complaint, but is the result of an unconstitutional individual act, which may, but not necessarily, adopted on the basis of a law that complies with the Constitution. Thus, a large number of human rights violations do not fall within the scope of the normative complaint and “the effectiveness of this filter becomes insignificant”.<sup>16</sup>

However, such a model of a complaint can be considered an effective means of protecting human rights on the way to the Strasbourg Court in cases of violation of rights and freedoms by the law applied in a particular case, and not an individual act adopted contrary to the “constitutional” law. This approach is shared by the European Court of Human Rights itself in its specific judgments. Thus, in *Dorota Szott-Medynska v. Poland*, the Court concluded that ignoring by the person concerned of such a means of protecting his/her rights as the institute of constitutional complaint, even in those countries where the subject matter of the latter is relatively narrow and on the basis of the complaint, an assessment is made only of the constitutionality of the legal norm, which served as the basis for the individual decision which is challenged, may lead to the inadmissibility of an appeal to the European Court of Human Rights.

In practical terms, this means that, in each case before the application to the European Court of Human Rights, the complainant should assess the accessibility and effectiveness of using the constitutional complaint as a national remedy. The same issue will be considered by the Strasbourg Court in deciding whether an individual application is admissible under Article 35 of the European Convention. Potentially this may lead to “competition” of the positions of the Constitutional Court of Ukraine and those of the European Court of Human Rights, in particular, if the Constitutional Court adopts a ruling which rejects to initiate constitutional proceedings in a case upon the constitutional complaint in view of the absence of the violation of human rights guaranteed by the Constitution of Ukraine, while the European Court recognises the violation of the relevant right guaranteed by the European Convention. Avoiding such a situation can be ensured by consistent consideration by the Constitutional Court of Ukraine of the standards of the Council of Europe and the case-law of the European Court of Human Rights when considering constitutional complaints and the implementation of constitutional justice in general, which will enable the fulfilment by the state of its obligations in the field of human rights.

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<sup>16</sup> Draft Study on Individual Access to Constitutional Justice on the basis of comments by Mr. G. Harutyunyan, Ms. A. Nussberger, Mr P. Paczolay. European Commission for Democracy Through Law (Venice Commission), para 84 [Electronic Resource]. - Access: [http://www.venice.coe.int/webforms/documents/CDL-JU\(2010\)018rev-e.aspx#P165\\_13720](http://www.venice.coe.int/webforms/documents/CDL-JU(2010)018rev-e.aspx#P165_13720).