

## **Exhaustion of domestic remedies as a condition of lodging a complaint before the European Court of Human Rights**

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**The subject.** The article is devoted to the subject of the exhaustion of domestic remedies before filing a complaint to the European Court of Human Rights.

**The purpose.** The purpose of this article is to show and reveal the characteristics of such important condition of lodging a complaint before the European Court of Human Rights as the exhaustion of domestic remedies.

**The methodology.** The following scientific methods have been used to write this article: analysis, comparing and making conclusions.

**Results, scope of application.** The right of individual petition is rightly considered to be the hallmark and the greatest achievement of the European Convention on Human Rights. Individuals who consider that their human rights have been violated have the possibility of lodging a complaint before the European Court of Human Rights. However, there are important admissibility requirements set out in the Convention that must be satisfied before a case be examined. Applicants are expected to have exhausted their domestic remedies and have brought their complaints within a period of six months from the date of the final domestic decision. The obligation to exhaust domestic remedies forms part of customary international law, recognized as such in the case – law of the International Court of Justice. The rationale for the exhaustion rule is to give the national authorities, primarily the courts, the opportunity to prevent or put right the alleged violation of the Convention. The domestic legal order should provide an effective remedy for violations of Convention rights.

**Conclusions.** The rule of exhaustion of domestic remedies is an important part of the functioning of the protection system under the Convention and its basic principle.

**Key words:** European Court of Human Rights, complaint, domestic remedies, final domestic decision, national authorities, alleged violation of Convention rights, exhaustion.

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**1. Introduction.** It should be recognized that, despite the emerging trend of reducing the number of complaints from the Russian Federation to the European Court of Human Rights (hereinafter - the ECHR, the Court), the total number is still quite high. According to official statistics, if in 2010 the number of complaints was 14 309, then in 2016 5 591 complaints had been filed. Thus, over the past seven years, the number of complaints to the ECHR has decreased by 61 percent.

This fact can be attributed not only by improvement of effectiveness of the Russian justice system, but also by the policy of tightening the ECHR compliance requirements to admissibility criteria. One of such criteria is the exhaustion of domestic remedies.

**2. The possibility of individual filing a complaint to the European Court of Human Rights as a basic provision of the European Convention on Human Rights.** The right to an individual complaint is rightly considered as a distinctive feature and the greatest achievement of the European Convention on Human Rights (hereinafter - the Convention). A person supposing that his or her rights had been violated can file a complaint to the European

Court of Human Rights. However, there are strict eligibility requirements set out in the Convention, which must be met prior to the consideration of the ECHR case. In particular, potential applicants must have exhausted domestic remedies and may file a complaint only within six months from the date of entry into force of intrastate solution.

**3. Normative justification of the right to appeal to the European Court of Human Rights.** According to Article 35 of the Convention, this condition of admissibility is based on the universally recognized norms of international law. The duty to exhaust domestic remedies is part of international customary law recognized as such in the practice of the International Court of Justice. This condition occurs in other international treaties on human rights: the International Covenant on Civil and Political Rights and the Optional supplemental Protocol thereto, the American Convention on Human Rights and the African Charter of Human and Peoples' Rights.

**4. Subsidiary nature of the mechanism established by the Convention.** European Court of Human Rights plays a subsidiary role in relation to national system of protection of human rights and it is not a supranational authority<sup>1</sup>. In the case complaints reaches Strasbourg, the ECHR should be able to use the findings of domestic courts, as the latter are in direct and direct contact with participants in legal relations in their countries<sup>2</sup>.

It is necessary to draw attention to the fact that paragraph 1 of Article 35 of the Convention speaks only of domestic remedies of protection: it does not require exhaustion of remedies within international organizations. On the contrary, in case of presentation of the complaint for consideration of a supranational body under another procedure of international investigation or settlement, the complaint may be rejected on the basis of subparagraph b of paragraph 2 of Article 35 of the Convention. In this regard, the European Court of Human Rights independently solves the question of whether that authority is a domestic or international one<sup>3</sup>.

The task of the rule of exhaustion of domestic remedies is to allow the national authorities (first of all - the courts) to prevent or remedy the alleged violation of the Convention. This problem stems from Article 13 of the Convention, according to which the internal legal order must be present an effective remedy against violations of rights guaranteed by the Convention. This is precisely the subsidiarity of the mechanism established by the Convention<sup>4</sup>.

**5. Selection of potential remedies.** The rule of exhaustion of domestic remedies, however, is not absolute and cannot be applied automatically<sup>5</sup>. Initially, the applicants are required to comply with the rules and procedures established in the domestic law. Otherwise, the application may be rejected due to non-compliance with the conditions so Article 35 of the Convention.

It is interesting that in case if the national court had examined the applicant's appeal on the merits, even having admitted the appeal inadmissible, the conditions of Article 35 of the Convention shall be deemed as fulfilled<sup>6</sup>.

If there are several potentially effective remedies it is necessary to use only one of them<sup>7</sup>. Thus, the choice of the most appropriate remedy remains to the applicant. In that case, if national law provides several parallel remedies the applicant, who tried to achieve elimination of the alleged violation of the Convention by reference to one of these funds, should not necessarily require recourse to other remedies, which essentially carry out the same task<sup>8</sup>.

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<sup>1</sup> Application no.25579/05, A, B, C v. Ireland, Judgment of 16 December 2010 (здесь и далее доступ: [URL:http://hudoc.echr.coe.int](http://hudoc.echr.coe.int), дата обращения: 26.04.2017 г.).

<sup>2</sup> Application no.13378/05, Burden v. United Kingdom, Judgment of 12 of December 2008.

<sup>3</sup> Application no.41183/02, Jelcic v. Bosnia and Herzegovina, Judgment of 31 October 2006.

<sup>4</sup> Application no.25803/94, Selmouni v. France, Judgment of 28 of July 1999.

<sup>5</sup> Application no. 2334/03, Kozacioglu v. Turkey, Judgment of 19 of February 2009.

<sup>6</sup> Application no. 47169/99, Voggenreiter v. Germany, Judgment of 08 of January 2004.

<sup>7</sup> Application no. 65681/01, Moreira Barbosa v. Portugal, Judgment of 21 of December 2004.

<sup>8</sup> Application no. 45744/08, Jasinskis v.Latvia, Judgment of 21 of December 2010.

**6. Availability of potential internal protection for applicants.** With direct proceedings in the internal affairs of instances there is no need to refer directly to any right guaranteed by the Convention. In the event that the applicant has not referred to the provisions of the Convention, it is based on domestic law, he must submit arguments of such content that would give national courts the base to respond to the alleged violation of the Convention.

Applicants have to use only available domestic remedies which can be activated only directly by the applicants. At the time of the proceedings the remedies must be effective both in theory and in practice. In other words, they must be accessible, able to meet the claims, and there must be a reasonable prospect of a positive outcome of the case<sup>9</sup>.

At the same time, there is no need to use any discretionary or extraordinary means of protection. If protective equipment is not available to the applicant directly but depends on the discretionary power of the intermediate party, this remedy is ineffective. The remedy cannot be considered effective if it does not contain the timing for processing applications and thereby generates uncertainty.

If an applicant attempts to use a remedy which is not considered by the Court as a proper one, the time spent for this appeal does not interrupt the six-month period, which may lead to the Court's rejection.

Means of protection must function with a sufficient guarantee of quality, not only in theory, but also in practice. In order to determine whether a particular remedy satisfies the criteria of availability and effectiveness, it is necessary to take specific circumstances of each case into account. Judicial practice must have a sufficiently well-established nature of the national legal system. The Court must also take into account not only the remedies provided for in the domestic legal system, but also the general legal and political context of the situation, as well as the personal circumstances of the applicant<sup>10</sup>. The Court decides whether the applicant has made all that could reasonably be expected of him to exhaust internal remedies<sup>11</sup>.

**7. Exemption from the obligation to exhaust domestic remedies.** In accordance with the generally recognized principles of international law, an applicant may in certain circumstances be exempt from the obligation to exhaust available domestic remedies<sup>12</sup>. The requirement of exhaustion does not apply in cases where there is evidence of the existence of administrative practice expressed in the repetition of acts violating the Convention and the connivance of official authorities, which turns any procedure into useless or ineffective one<sup>13</sup>. In cases when the requirement for the applicant to use any means would have been unreasonable in practice and would create disproportionate obstacles to the implementation of the right guaranteed by Article 34 of the Convention of the right to a personal appeal, the Court finds that the applicant is exempt from the obligation to use this tool<sup>14</sup>.

If the respondent State claims that there is no exhaustion of domestic remedies, it must prove that the applicant did not address an effective and accessible remedy<sup>15</sup>. The availability of such a tool must be sufficiently confirmed by law and practice<sup>16</sup>. This facility should have a clear basis in domestic law and should ensure the possibility of eliminating a situation generated by the complaint.

The applicant's obligation to exhaust domestic remedies is generally assessed since the date on which the complaint was filed with the Court, except in certain cases where special

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<sup>9</sup> Application no. 34932/04, Paksas v. Lithuania, Judgment of 06 of January 2001.

<sup>10</sup> Application no.21893/ 93, Akdivar and others v.Turkey, Judgment of 01 of April 1998.

<sup>11</sup> Application no.57325/00, D.H. v. Czech Republic, Judgment of 13 of November 2007.

<sup>12</sup> Application no.56581/00, Sejdivic v. Italy, Judgment of 01 of March 2006.

<sup>13</sup> Application no.21987/93, Aksoy v. Turkey, Judgment of 18 of December 1996.

<sup>14</sup> Application no. 31508/07, Veriter v. France, Judgment of 14 of October 2010.

<sup>15</sup> Application no. 26102/95, Dalia v.France, Judgment of 19 of February 1998.

<sup>16</sup> Application no.11889/85, Vernillo v.France, Judgment of 20 of February 1991.

circumstances are possible<sup>17</sup>. However, the Court may take into account the situation when the last stage of remedies will be passed shortly after the filing of the complaint, but before the Court makes its decision on admissibility<sup>18</sup>. However, if the respondent State wishes to declare the non-exhaustion argument, it must do so, as the circumstances and the very nature of the objection permit, in its memorandum before the decision on admissibility is adopted. The defense of non-exhaustion of domestic remedies is often combined with the merits of the case, particularly in cases involving procedural obligations or guarantees<sup>19</sup>.

The issue of exhaustion of domestic remedies is usually resolved in the light of the stage at which the domestic proceedings were pending at the time the complaint applied a complaint. We should also take into account the efficiency and availability of the latter-day protection means in the case of their occurrence. The Court considers that it would be unfair to require the exhaustion of such a new remedy without providing a reasonable time for individuals to study the judicial decision. The duration of the "reasonable time" depends directly on the circumstances of each case, but generally, the Court concludes that the period of six months<sup>20</sup>. As a general rule, in cases of judicial red tape does not require treatment to remedies that do not have preventive effects or does not guarantee compensation. The procedure for appeals against the length of the trial itself should take place without significant delays and provide a decent standard of compensation.

If the Court notes the existence of common or structural deficiencies in domestic law or enforcement practices, it may require the respondent State is to pay attention to the situation and, if necessary, to take effective measures to ensure that this kind of business has not received the Court. The court may decide that the state must change something in the existing set of remedies or create new remedies that can effectively resolve alleged violations of the rights guaranteed by the Convention.

In case the respondent State introduces a new remedy, the Court considers the question of its effectiveness<sup>21</sup>. The court examines this issue by examining the circumstances of each case; the conclusion about the effectiveness or ineffectiveness of the new legal framework should be based on the practical application of the new rules. However, neither the absence of a judicial or administrative practice concerning the application of the legal framework nor the risk that the proceedings may take time, can not by itself mean that the new remedy is ineffective. Here we are talking about domestic remedies that have appeared after the filing of complaints with the Court. Assessment of the exceptional circumstances that oblige the applicant to use this facility will be subject to a new national regulatory mechanisms, as well as the context in which the innovation is implemented.

8. **Conclusions.** Exhaustion of domestic remedies is one of the most important and basic eligibility criteria when filing a complaint with the European Court of Human Rights. Its compliance has a direct impact on the fate of the complaint and its potential consideration on the merits.

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<sup>17</sup> Application no.33592/96, Baumann v. France, Judgment of 22 of May 2001.

<sup>18</sup> Application no. 23205/08, Karoussiotis v.Portugal, Judgment of 01 of February 2011.

<sup>19</sup> Application no.2668 / 07, Dink v. Turkey, Judgment of 14 of September 2010.

<sup>20</sup> Application no. 2115/04, Depauw v.Belgium, Judgment of 10 of June 2008.

<sup>21</sup> Application no.33946/03, Robert Lesjak v. Slovenia, Judgment of 21 of July 2009.

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