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COMPARING THE TURKISH TO THE SERBIAN EXPERIENCES REGARDING CONSTITUTIONAL COMPLAINTS[2]

Contents:

1. Introduction

One of the most remarkable features of the protection of human rights under the European Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter: Convention) consists in its subsidiary character. The founding fathers of the Convention were of

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[2] This paper was presented at the International Conference, organised in January 2014 in Ankara, by the Ankara Bar Association; it will be published in Turkey among the acts of the conference.

opinion that human rights should first and foremost find protection at the national level of member-states to the Convention[3]. It is therefore always more than welcome to enlarge protection of fundamental rights within the scope of the constitutional system of a nation-state. The more over-reaching the protection at the domestic level, the better is the idea of the founding fathers of the Convention fulfilled.

Whenever there is a new remedy in national law the subsidiary character of the Convention is accentuated. What has previously been the subject of protection at the international level of jurisdiction becomes, owing to a new remedy, protected at the national level. In other words one might view the human rights as returning home, i.e. to the environment where they should naturally be protected.

Returning home of human rights i.e. referring their protection back to the national level by no means puts an end to their connection to the international level of protection. On the contrary, one of the most important consequences of the human rights' homecoming is the phenomenon of the dialogue of jurisdictions[4]. It always becomes enriched, for it acquires a new and particular issue. The dialogue is enhanced by the introduction of each and every new remedy and it constantly brings new questions to the agenda.

2. Human Rights' Homecoming

An example of human rights' homecoming has recently occurred in Turkish law. It is therefore of interest to display the stance that the European Court of Human Rights (hereinafter: the Court) took on the issue (2.1), as well as to make a brief overview of remedies similar to the new one in Turkish law (2.2). Last but not least, a caveat should be added (2.3).

2.1. The Court's Stance towards a new Remedy in Turkish Law

The national law of the Republic of Turkey has recently introduced a new remedy aimed at the protection of human rights. Its scope is far

[3]* This paper was presented at the International Conference, organised in January 2014 in Ankara, by the Ankara Bar Association; it will be published in Turkey among the acts of the conference.
On the founding fathers of the Convention and their ideas cf. E.Bates, *The Evolution of the European Convention on Human Rights,* Oxford – New York 2010, 10-171; A.W.B. Simpson, *Human Rights and the End of Empire – Britain and the Genesis of the European Convention,* Oxford 2001, 169-235, 597-874

[4] On the Court's participation in the dialogue of jurisdictions in general cf. D.Popović, "The Emergence of the European Human Rights Law", Den Haag 2011, 51-55.

reaching and the Court dealt with it for the first time in a case in which it gave a decision on 30 April 2013. The facts of the case were the following[5].

The applicant was a defendant in a lawsuit at the national level. An action concerning limits of the plot of land he owns was brought against him in June 2009. In September 2011 the Tribunal of First Instance ruled against the applicant. The judgment was based on an on-site visit of the plot of land, as well as on several testimonies given by witnesses. The applicant filed a cassation appeal, but in September 2012 the Court of Cassation confirmed the judgment given in the first instance[6].

Invoking Articles 6 and 14 of the Convention the applicant filed with the Court. He alleged violation of the Articles mentioned, because the on-site visit of the land had taken place one day in advance, i.e. before the date fixed, so that two witnesses had not been dully summoned. In the applicant's view this led to irregularities of the procedure at the domestic level, falling within the scope of protection of the two Articles invoked[7].

The Court decided to pronounce itself on the admissibility of the application, basing its approach on the new Turkish legislation, namely the Law No 6216, published in the Official Gazette on 3 April 2011, its provisions having meanwhile entered into force on 23 September 2012. The Court's main stance was taken on the exhaustion of domestic remedies[8].

In its introductory remark the Court stressed the subsidiary character of the mechanism of protection of human rights under the Convention and the primordial importance of their protection at the national level of jurisdiction[9]. The Court proceeded further on to the analysis of Turkish law, as it currently stands, beginning with the constitutional provisions.

The Court noted in that respect that due to Constitutional amendments of 2010 the composition of the Constitutional Court of Turkey had been altered in the sense that the number of sitting justices became 17, instead of 11 previously sitting. There were other significant alterations in the Constitutional Court's structure. Two chambers were created, besides the Plenary Court and there was a repartition of competence between the chambers and the Plenary[10].

[5] Hasan Uzun v. Turkey, 10755/13, 30.4.2013 (text in French)
[6] Paras 1 to 6 of the decision
[7] Paras 33 and 34
[8] Paras 14, 15 and 34
[9] Para 39
[10] Paras 7 to 9

The outstanding amendment of the Constitution of the Republic of Turkey occurred by modifying the text of its Article 148, Section 3, which introduced the individual complaint before the Constitutional Court. The remedy could apply in each and every case in which an individual complains of an alleged violation by public authorities of his/her fundamental liberties or rights guaranteed[11].

The right of individual complaint before the Constitutional Court has been shaped by legislative provisions, to which the Court also made reference in its decision on admissibility. The above-mentioned Law 6216 introduced those[12].

The Rules of Procedure of the Constitutional Court of Turkey were amended accordingly, so as to fit the constitutional amendment and the legislation based on it. They were published in the Official Gazette on 12 July 2012 and entered into force on the same day[13]. The construction of a new remedy for protection of human rights was thus completed and the protection was made effective in terms of legal proceedings. That provided basis for the Court to scrutinise the new remedy and take a stance on its implementation in domestic law[14].

The Court assessed the new remedy in Turkish law from three different points of view. First, it was its availability, and then its mode of implementation. Lastly it was the remedy's field of application that the Court also took account of.

As to the availability, the Court considered the provisions guiding the technique of filing a constitutional complaint. The Court found those to be appellant friendly. It has been stipulated in the legislation that a constitutional complaint could be filed not only with the Constitutional Court's registry, but also with any court-of-law in Turkey, as well as with the Turkish diplomatic missions abroad[15].

Other provisions in respect of implementation of the new remedy were also convenient to those seeking justice and protection of human rights. The time frame of thirty days for the filing of constitutional complaint was in line with the provision on the time limit for filing an appeal in cassation under the national law. The thirty days start running

[11] Para 11
[12] Para 25
[13] Paras 26 and 27
[14] Paras 54 to 71
[15] Para 57

from the date on which the ordinary remedies were exhausted, or in case there were none, from the date on which the appellant took account of the violation of his rights[16]. The fee for the constitutional complaint is not excessive. It amounted to 84 euros in 2013. There is a possibility of obtaining legal aid as well[17].

The modes of implementation of the constitutional complaint were also scrutinised by the Court[18]. The Court found in that regard that the amended version of the Rules of Procedure of the Constitutional Court of Turkey entered into force on 12 July 2012. The Court also noted that the Constitutional Court had competence to thoroughly examine a constitutional complaint on the merits. In doing so the Constitutional Court has competence to apply *inter alia* the international treaties ratified by Turkey, including the Convention. It has also been vested with the power to hold a hearing, pronounce interim measures if necessary, as well as to remedy divergent jurisprudence. Therefore the Court's overall assessment was that the new remedy offered adequate means to achieve redress for a violation of human rights and fundamental freedoms.

Finally the Court turned to the field of application of the new remedy, basing its analysis at this point on the scope of competence of the Constitutional Court[19]. The Court accentuated the position taken by the Turkish Parliament, being determined to introduce and construe such competence for the Constitutional Court that would enable the latter to provide efficient redress for violations of human rights. The Constitutional Court has therefore been made competent to order the authorities to put an end to a violation of human rights and also to make them place a complainant in the situation, which would have existed had the violation of human rights complained of not occurred[20]. The Court noted that the judgments of the Constitutional Court of Turkey were of such nature as to provide constraint upon the public authorities to proceed to the redress of a violation of human rights.

The Court's scrutiny of the recently introduced individual constitutional complaint in Turkish law led to the final conclusion that the Constitutional Court was vested with powers to directly and swiftly redress violations of human rights protected by the Convention[21].

[16] Para 55
[17] Paras 56 to 58
[18] Paras 59 to 61
[19] Paras 62 to 67
[20] Para 64
[21] Para 67

After such an exhaustive analysis of the new remedy in domestic law the Court turned to the case at issue and found that the domestic proceedings had ended on 25 September 2012. This made the Court declare the application inadmissible in terms of Article 35.1 of the Convention, for non-exhaustion of domestic remedies[22]. The Court's decision was not explicit at this point, but taken into account what the Court had previously stated, it is clear that its stance was that the remedy had already been effective as of 23 September. The new legislation, i.e. Law 6216 on the Constitutional Court, came into force on that date[23]. It is to be noted that the decision was taken by a majority of judges on the bench[24].

2.2. A brief comparative Overview of similar Remedies

To support its stance on the new Turkish remedy in the admissibility decision that has just been discussed the Court made reference to its previous jurisprudence. It displayed a brief overview of similar remedies in other member-states to the Convention[25].

An outstanding example in this regard was the Court's reference to the practices of the Federal Constitutional Court of Germany. The Court highlighted several points, as elements of its own scrutiny of the German remedy (*Verfassungsbeschwerde*). The Court held the remedy to be accessible to the complainants and effective[26]. The Court's scrutiny of the German legal remedy went so far as to consider its exhaustion obligatory in all cases, including the most important ones. For instance, the Court's stance on the issue was that an applicant invoking Article 3 of the Convention had to exhaust the domestic remedy, when contesting the refusal of the administrative tribunal to grant him an interim measure against expulsion[27].

The Court also made reference to the Constitutional Tribunal of Spain, noting that the remedy existing in the national law (*amparo*) had to be exhausted before filing an application with the Court. The only exception

[22] Para 70 and 71
[23] Para 15
[24] Since the Convention in its Article 45.2 and accordingly Rule 74.2 of the Rules of Court do not allow dissenting opinions to accompany Court's decisions on admissibility we know neither the number of dissenters nor their reasoning.
[25] Paras 42 to 51
[26] Müller v. Germany (dec.) 36395/07, 11.3.2008 ; Schädlich v. Germany (dec.) 21423/07, 3.2.2009
[27] Djilali v. Germany (dec.) 48437/99, 22.6.1999 ; Mogos and Krifka v. Germany (dec.) 78084/01, 27.3.2003

was the cases concerning property, which by virtue of the domestic law of Spain do not enjoy protection of the Constitutional Tribunal[28].

In case of the remedy existing in the law of the Czech Republic the Court also considered its exhaustion obligatory, except if the issue at stake was the length of proceedings. The reason for the exception was that the Czech Constitutional Court had no powers either to award damages or to put a constraint on the ordinary courts to accelerate the proceedings[29].

Among other member-states mentioned in the short overview of remedies the Court made reference to Serbia, concerning a specific issue. It was the date on which the Court was to consider the constitutional complaint an effective remedy. The Court considered relevant in this respect the date on which the first ruling of the Constitutional Court of Serbia was delivered[30]. An application filed with the Court after the critical date is to be declared inadmissible if the applicant had not exhausted the national remedy before the Constitutional Court[31].

2.3. Caveat

By adopting constitutional amendments, followed by new legislation, Turkey joined other member-states to the Convention that allow individual constitutional complaint. The first impression of the step taken is that of enlarging the scope of protection of human rights at the national level. It is defined by Article 148.3 of the Constitution, as modified by Law 5982. Fundamental liberties and rights guaranteed by the Constitution and protected by the Convention fall within the scope of application of the individual constitutional complaint.

It is noteworthy that the provision regulating the field of protection is broad. Basically it covers the whole area of the Convention system of protecting human rights[32]. Other countries have certain restrictions that do not apply in Turkey. For instance, there is no protection of property before the Constitutional Tribunal of Spain; and there is neither any for the length of proceedings in the Czech Republic[33].

[28] Arcadio Fernandez-Molina Gonsalez v. Spain (dec) 64359/01, 8.10.2002
[29] Eremiasova and Pechova v. Czech Republic, 23944/04, 16.2.2012
[30] Vinčić and Others v. Serbia, 44698/06, 44700/06, 45249/07, 1.12.2009
[31] Živomir Jovanović v. Serbia (dec) 9560/09, 14.9.2010
[32] With the exception of those provided for by the additional protocols, which Turkey did not ratify.
[33] Arcadio Fernandez-Molina Gonsalez v. Spain (dec) 64359/01, 8.10.2002; Eremiasova and Pechova v. Czech Republic, 23944/04, 16.2.2012

Two member-states that have just been mentioned do not stand close to Turkey in this regard. On the other hand there are no major restrictions posed to the constitutional complaint either in Germany or in Serbia. However, the amount of fee for a constitutional complaint in Germany is considerable, whereas in Serbia there is none. Turkey seems to be closer to the latter, for the amount of the fee is quite moderate.

In the light of this comparison in brief it should be noted that there might be room for a caveat. Constitutional Courts are unique in all countries in which they exist. All constitutional complaints must be received and dealt with by one court-of-law, which is singled out to bear a heavy burden. It is true that the provisions on the organisation of the Constitutional Court of Turkey have envisaged the situation to come, especially by introducing two chambers and the Plenary Court and making a repartition of their competence. The Constitutional Court's practices will most certainly adapt to the number of complaints and add to the efficiency of that jurisdiction.

It is nevertheless to be remarked that the Constitutional Court of Serbia, which is working under a similar scope of competence as the Turkish Constitutional Court, has been overburdened with cases. It is so, despite the fact that the country has a population amounting to only 9% of the population of Turkey[34]. The Constitutional Court of Serbia started dealing with individual constitutional complaints in September 2008 and got overburdened in a short period, not exceeding five years.

What is at stake here is the role of ordinary judiciary. It should be stressed that the ordinary courts also provide protection of human rights and apply the Convention. If they partly fail to do so, which may be said to be the case at least to some extent in Serbia, the task of the Constitutional Court may become too difficult to perform. Ordinary courts remain primordial protectors of human rights, despite the existence of an adequate remedy before the Constitutional Court.

A remark should be made at this point on the policies of the Government of Turkey, being favourable to complying with the Court's judgments, which introduced special procedures and a body whose task consists of redressing violations of human rights. Following a pilot judgment delivered in 2012 the Parliament adopted the Law 6384

[34] RTS (State Owned Television) News 2.12.2013. There were almost 14000 complaints pending towards the end of the year 2013.

providing for a remedy for the excessive length of proceedings[35]. The Law created a special body competent to indemnify victims of the excessive length of proceedings in all cases in which the proceedings at the national level had started before 23 September 2012. This piece of legislation completes the protection of human rights envisaged by the provisions introducing constitutional complaint.

3. Dialogue of Jurisdictions

A dialogue of jurisdictions is a phenomenon accompanying the homecoming of human rights. If more protection is granted at the national level of jurisdiction it comes into a dialogue with the international, i.e. European instance. An example concerning Serbian law can be illustrative in this respect (3.1). Its developments show the dynamics of the dialogue (3.2) and there is also a reason for a caveat (3.3).

3.1. A Serbian Example

The example from Serbian law is rather specific. It concerns the country's previous socialist regime under which the economy was organised in a way corresponding to the collectivist ideology. Enterprises were neither founded nor owned by private capital. However, they were not properly considered to be state owned, for they enjoyed a certain amount of autonomy, they could compete in the market and were not bound to follow any state production plan. Therefore the then existing legal doctrine labelled them as "socially owned". The term does not provide much clarity; it used to be discussed among lawyers, although the outcome of the discussions could not properly shed decisive light to the concept.

The problem concerning "socially owned enterprises" has acquired huge dimensions because of the enormous amount of debts that such enterprises had made in respect of their own employees. In times of economic crisis the enterprises were unable to pay wages and salaries, as well as contributions to the retirement pension fund.

The employees all over Serbia brought proceedings against the enterprises and won their cases. The judgments rendered in their favour

[35] The pilot judgment was rendered in the case of Ümmühan Kaplan v. Turkey, 24240/07, 20.3.2012. On the remedy cf. Müdür Turgut and Others v. Turkey (dec.) 4860/09, 26.3.2013, paras 19 to 26.

remained unenforced, because the defendant enterprises claimed lack of funds. They were nevertheless still doing business and the Government of Serbia was hesitant to put an end to their activity by way of insolvency proceedings. This was probably due to the Government's fear of a certain growth of unemployment. The vicious circle was thus made complete.

The employees of socially owned enterprises filed applications with the Court, invoking Article 6 of the Convention and Article 1 First Protocol. They basically complained about the non-enforcement of final judgments given at the domestic level of jurisdiction. The leading case was *R.Kačapor and Others v. Serbia*[36]. The Court's ruling was in the applicants' favour on the grounds that the respondent state must be held liable for the debts of the enterprises that were substantially under the government's control. The Court found violations of both Article 6.1 of the Convention and Article 1 First Protocol[37]. The respondent government was ordered to pay the applicants the sums awarded in the final domestic judgments rendered in their favour[38]. Apart from that the Court ordered the payment of specified amounts on account of non-pecuniary damages to each and every applicant[39].

The whole issue concerning debts of the socially owned enterprises seemed to be transferred to the national level of jurisdiction by this ruling. However, the Court's position taken in the leading case caused a dialogue with the Constitutional Court of Serbia and was at the origin of further developments.

3.2. Developments of the Dialogue

The Court had to revisit the topic of the cases against Serbia belonging to the class of "socially owned enterprises". It did so in the case of *Marinković v. Serbia*[40]. The reason for revisiting was the developments in the case-law of the Constitutional Court of Serbia on the same issue. A problem appeared before the Court as a consequence of several rulings of the Constitutional Court of Serbia[41].

[36] R.Kačapor and Others v. Serbia, 2269/06, 3041/06, 3042/06, 3043/06, 3045/06, 3046/06, 15.1.2008; for the status of socially owned enterprises cf. paras 71 to 76 of the judgment.
[37] Paras 116 and 120 of the judgment
[38] Item 5(a) of the Operative Part of the judgment.
[39] Item 5(b) of the Operative Part. Costs and expenses were also awarded under this item, but it is not of interest here.
[40] Marinković v. Serbia, 5353/11, 29.1.2013 (admissibility decision)
[41] Paras 31 to 44 of the admissibility decision in Marinković

The Constitutional Court of Serbia basically complied with the Court's stance that the state was liable for the debts of the socially owned enterprises in the situations corresponding to the pattern of the leading case of *Kačapor*[42]. Its rulings followed the position taken on the issue until the Constitutional Court issued an advisory opinion on 19 April 2012.

According to the national legislation the socially owned enterprises, still existing in Serbia, could undergo restructuring in order to regain their profitable character within the measures envisaged by the government. The Constitutional Court opined that there were no grounds for awarding compensation to a claimant in respect of pecuniary damage in cases in which the principal debtor, i.e. the socially owned enterprise, was undergoing restructuring. This meant that the final domestic judgments rendered against such enterprises would remain unenforced. The fact provided grounds for the applicants before the Court, defying effectiveness on this particular point of the constitutional complaint as a remedy in Serbian law[43].

The Court disagreed with the position taken on the issue by the Constitutional Court of Serbia. It ruled in favour of the admissibility of the application. In the Court's view a non-enforcement of a final judgment rendered at the domestic level of jurisdiction could not be justified by the fact that the principal debtor, i.e. a socially owned enterprise, was undergoing restructuring.

The Court reiterated its stance that the respondent state cannot be held liable for the lack of funds of a private debtor at the national level. However, the Court once again refused to put the "socially owned enterprises" in Serbian law on the same footing as private companies. Therefore the Court's ruling was that the state obligation persisted in case of enforcement against either the state itself or against an entity, which does not enjoy sufficient institutional independence from the state[44]. The latter was exactly the case of the "socially owned enterprises".

This practically meant that the Court maintained its principal position that the constitutional complaint was an effective remedy in Serbian law, but it singled out the pattern of socially owned enterprises undergoing restructuring. Despite the fact that the remedy was deemed to be effective in general it was not considered to be such in the exceptional pattern belonging to the same larger class of cases. The outcome of

[42] Cf. para 36 of Marinković
[43] Para 55 of the decision
[44] Marinković v. Serbia, 5353/11, 22.10.2013 (judgment on the merits), paras 38 and 39

this approach consisted in the fact that applicants complaining of non-enforcement of the final domestic judgments, which concerned socially owned enterprises undergoing restructuring were not under obligation to exhaust the constitutional complaint as a domestic remedy.

The admissibility decision in *Marinković* was adopted in January 2013. It was clear enough that the Court was going to give judgment on the merits of the case (which the Court did in October the same year), so that an echo came from the Constitutional Court of Serbia as early as towards the end of March 2013. In its ruling on the case *Už 1712/2010* the Constitutional Court held that the state was liable for the enforcement of a final judgment rendered at the domestic level against a socially owned enterprise undergoing restructuring[45]. In other words the Constitutional Court of Serbia complied once again with the Court's stance in the same class of cases, but this time it was on a specific issue.

The Court subsequently reopened dialogue with the instance at the national level, so as to reaffirm its position that the constitutional complaint was an effective domestic remedy in Serbian law. Another applicant appeared before the Court, alleging violations of Article 6 of the Convention and Article 1 First Protocol, but also challenging effectiveness of domestic remedy, under Article 13 of the Convention. The case was *Vasvija Ferizović v. Serbia*[46].

The Court now had to decide whether the constitutional complaint was an effective remedy at the national level of jurisdiction in Serbia in respect of the socially owned enterprises undergoing restructuring in the light of the case-law of the Constitutional Court.

To entrench the issue the Court turned to the most recent case-law of the Constitutional Court of Serbia. In doing so the Court relied in the first place on the Constitutional Court's ruling in *Už 1712/2010*, mentioned above[47]. The Court also took account of other cases dealt with by the national Constitutional Court, in which rulings were given to the same effect[48].

The Court's general assessment was that the remedy in question was effective, because "the Constitutional Court of Serbia had recently

[45] Official Gazette of the Republic of Serbia 87/2013 of 4 October 2013, Constitutional Court's ruling of 21 March 2013, Už 1712/2010. The ruling referred to the Court's admissibility decision in Marinković, rendered in January 2013, as mentioned above.
[46] Vasvija Ferizović v. Serbia, 65713/13, 26.11.2013 (admissibility decision), paras 19 and 20
[47] Paras 12 to 16 of the decision in Vasvija Ferizović
[48] Para 17 in Vasvija Ferizović.

fully harmonised its approach towards the non-enforcement of judgments against socially owned enterprises undergoing restructuring"[49].

The Court's further finding was that the applicant had not exhausted the constitutional complaint as a remedy at the national level, so that the application was declared inadmissible by virtue of Article 35 of the Convention. The Court also ruled that the complaint under Article 13 of the Convention was ill founded. This goes hand in hand with the Court's stance that the national remedy was effective[50].

A peculiar circumstance deserves attention at this point, for one may be tempted to reproach certain rigidity to the Court. The application in *Vasvija Ferizović v. Serbia* was filed with the Court on 4 October 2013. It was exactly on that date that the Constitutional Court's ruling in *Už 1712/2010* was published in the Official Gazette of the Republic of Serbia. Although apparently rigid the Court's stance is justified by the fact that there is no time limit for filing constitutional complaints in the class of cases concerned. Therefore the applicant was by no means estopped or precluded from the protection of her rights at the national level.

The Court's dialogue with the Serbian Constitutional Court remained uninterrupted. The Court reaffirmed its previous position on the effectiveness of the constitutional complaint as a remedy in Serbian law. There was no more exception in respect of socially owned enterprises undergoing restructuring. This was due to the evolution of the case-law of the Constitutional Court of Serbia.

3.3. Caveat

As far as the dialogue of jurisdictions is concerned there is also room for a caveat. It goes in line with the one expressed under the paragraph 2.3 of this paper and concerns the phenomenon of the homecoming of human rights, or referring their protection back to the national level of jurisdiction.

If the Court declares a domestic remedy to have become effective it may so happen that a fair number of cases will be transferred to the national level of jurisdiction. That complies with the whole philosophy of the protection of human rights at the European level, but it might nevertheless provoke technical difficulties. For the sake of illustration it

[49] Para 4
[50] Paras 8 to 10

can be mentioned that the docket of cases pending against Serbia in the class that has been of interest here amounted to approximately 2000. The figure speaks for itself and calls for no further comments.

Another aspect concerning dialogue of jurisdictions may also be of interest, if the individual constitutional complaint is to be considered. It concerns the relations at the domestic level between the highest instance of the ordinary jurisdiction and the Constitutional Court. There may be room for a certain amount of tensions between the Supreme Court of Cassation and the Constitutional Court, while implementing the constitutional complaint as a remedy. The Supreme Court of Cassation may on occasions find it awkward to see its judgments in a certain way overruled by the Constitutional Court. This occurs at the beginning and usually disappears with the proper establishing of the system[51]. Once the period of adjustment to the new institutions is over the tensions will be soothed and most probably disappear.

However, an example from Spain can be illustrative in this regard[52]. The elements of the case are the following. The Constitutional Tribunal of Spain dismissed a complaint (*amparo*) in 2002 in its Plenary Session, without stating reasons for the dismissal. The complainant turned to the Supreme Court complaining that a judicial decision had been rendered without reasoning. The Supreme Court ruled in February 2003 that the claim was admissible, because there was room for civil responsibility of the justices of the Constitutional Tribunal. In January 2004 the Supreme Court adjudicated damages to the claimant.

Further developments were such that the justices of the Constitutional Tribunal filed constitutional complaints against the judgment of the Supreme Court, given in January 2004. Now the problem was the impartiality of the Constitutional Tribunal, because its justices could by no means be judges in their own cases[53]. The case before the Constitutional Tribunal is therefore adjourned until the composition of the Constitutional Tribunal changes. Once the justices who filed the *amparo* will have left the Tribunal there will be no more impartiality. The successors of the justices who filed the complaint will impartially decide on the merits.

[51] A personal communication of the former judge of the Court of Strasbourg in respect of Germany, Mrs Renate Jäger, to the author of this text, concerning developments in her country. The tensions of the kind are still present in Serbia, to some extent, because the remedy has recently been introduced.

[52] I am grateful to my Spanish colleague at the Court of Strasbourg, Luis Lopez Guerra, who introduced me to the case.

[53] Constitutional Tribunal, Plen. Sentencia 133/2013, 5.6.2013; published in the Official Bulletin of Spain on 2.7.2013.

4. Conclusions

Several remarks should conclude the analysis made in this paper concerning individual constitutional complaint as a remedy for redress of a violation of human rights at the national level of jurisdiction.

The introduction of a constitutional complaint in the domestic law of a member-state to the Convention is in line with the philosophy of the European system of protection of human rights. It enlarges the scope of protection of human or fundamental rights granted at the national level of jurisdiction and provides efficient redress in case of violations of those rights.

However, although transferring a number of cases to the national judiciary the introduction of constitutional complaint does not break the link between the international and national levels of protection of human rights. A dialogue of jurisdictions remains between the two levels and it becomes more diverse than before and also enriched by new issues and techniques.

One aspect concerning remedies for protection of human and fundamental rights at the national level of jurisdiction should be highlighted above all. Irrespective of the way in which it is construed in domestic law, the constitutional complaint does not cover the whole area of protection of human rights. Ordinary courts also serve the task to provide protection of human rights. They must continue to do so, despite the fact that a new and specific remedy has been introduced. It is of great importance and indeed decisive that ordinary courts carry on their task providing protection of human rights. Otherwise the whole system of their protection at the national level may face difficulties and even become dysfunctional.

In the light of the comments made in the conclusions it seems inevitable that the final assessment of individual complaint with the Constitutional Court at the domestic level should be favourable to the remedy at stake. An individual complaint to the Constitutional Court most certainly enhances and puts forward the protection of human rights in each and every country where it is introduced.

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UPOREĐIVANJE TURSKIH I SRPSKIH ISKUSTAVA U VEZI USTAVNIH ŽALBI

Rezime

Jedna od najupečatljivijih karakteristika zaštite ljudskih prava prema Evropskoj konvenciji za zaštitu ljudskih prava i osnovnih sloboda sastoji se njenom supsidijernom karakteru.Taj suspidijerni karakter je uvek izražen kad postoji mogućnost isticanja novog pravnog leka u nacionalnim pravima. Ono što je ranije bio predmet zaštite na međunarodnom nivou nadležnosti, sada se, zahvaljujći novom pravnom leku, štiti na nacionalnom nivou. To nikako ne znači da se prekida veza sa zaštitom na međunarodnom niovu. U radu se govori o iksustvima u zakonodavstvima Turske i Srbije u ovoj oblasti, a u vezi sa ustavnim žalbama.

Ključne reči: ljudska prava, zaštita, ustavna žalba, pravo Turske, pravo Srbije.