

Effective use of national remedies in domestic legal proceedings in the Balkan region and the subsidiary role of the European Court of Human Rights

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Introduction

The effectiveness of human rights implementation largely depends on the effectiveness of the remedies provided at national level to redress violations. The right to a remedy in respect of an arguable claim of a violation of a fundamental right is expressly guaranteed by almost all international human rights instruments, including the European Convention on Human Rights (ECHR). The main purpose of including this right in the text of the ECHR was to enhance the judicial protection of individuals against the violation of their rights. The *international* guarantee of a remedy implies that a State has the primary duty to protect human rights within its own jurisdiction.

At the same time, the right to an effective remedy is one of the key elements of the principle of subsidiarity, which lies at the core of the human rights protection system set out by the ECHR. This principle implies that it is the State which is primarily responsible for the protection of human rights and the implementation of human rights standards. Article 13 of the ECHR is closely linked to Article 35 (1). All individuals are invited to exhaust “all domestic remedies” and only after that to address the European Court of Human Rights (ECtHR). The idea behind this was to allow the ECtHR to focus on the most important cases in which it could develop its standards and shape the European system of the protection of human rights.

The subsidiarity filter, with its reliance on domestic remedies, did not work properly. This forced the member states to launch a process of the reform of the Convention mechanism. The main conclusion of this process, which was

expressly stated in the final documents of the four high-level conferences, was that the role of States Parties in the implementation of the ECHR provisions should by all means be strengthened, thus emphasising the responsibilities of the States themselves to be the first and primary protectors of human rights. In other words, the principle of subsidiarity was reaffirmed, meaning that the responsibility for the implementation of the ECHR is shared between the State Parties, the ECtHR and the Committee of Ministers, inviting the ECtHR to remain vigilant in upholding the States Parties' margin of appreciation¹. This issue of co-operation between the states and the Council of Europe in respect of the implementation of human rights standards is discussed below by Judge Ksenia Turković.

It is crucial to remember that the long-term efficiency of the human rights protection system established by the ECHR, depends primarily on the capacity of the ECtHR to deal rapidly with cases brought before it. Moreover it also depends on the ability of the Council of Europe member states to effectively address violations and prevent their repetition. The ECHR, and the mechanisms of human rights protection built therein, largely depend on the availability and effectiveness of domestic remedies in a given country.

State parties to the ECHR have varying legal traditions. However, the regional similarities rooted in shared history, result in similar problems with the implementation of the Convention, including the guarantee of an effective legal remedy.

This overview looks at the countries of the Western Balkans, which ratified the ECHR at around the same period in early 2000s. Despite sometimes adopting different approaches to reforms that intend to align legislation and practice in these states with the Council of Europe standards, a recognisable pattern of systemic issues can be identified. This should be addressed by the authorities in order to fulfil their countries' commitments to the protection of human rights. The specific role of the Council of Europe is to assist them in recognising and overcoming the key problems. In this regard, the very idea of this overview is to see what could be considered as an effective domestic remedy in various legal systems in the countries of the Western Balkans, to share best practice on how to make them (more) available, and how the ECHR standards can be applied and strengthened at national level. As a separate issue the relevance

1. High Level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration, available at: http://justice.belgium.be/fr/binaries/Declaration_EN_tcm421-265137.pdf.

of constitutional court decisions as possible domestic remedies was looked at, as well as the availability of individual complaints procedure as a useful tool for providing resolution of potential human rights violations at a national level.

Another objective was to compare the admissibility procedures before the ECtHR and constitutional courts to assess whether the criteria set serve their purpose and do not in effect build a barrier for the protection of the applicants' rights.

Finally, the possible roots of the problem were identified and the issue of professional training of legal professionals was brought forward. The Council of Europe is paying much more attention to this issue in recent years. It developed a comprehensive range of distance learning courses for legal professionals under its Programme for Human Rights Education for Legal Professionals (HELP), which is already widely used in some countries of the region, and has received positive feedback from judges, prosecutors and lawyers on its functioning and relevance to their work.

The overview includes contributions from leading legal experts from the region, judges of the ECtHR and lawyers of its Registry, as well as judges of constitutional and supreme national courts and legal practitioners who share their experience with the application of legal remedies in their respective countries, and their vision of the future of the ECHR in the region.

Some of the conclusions that could be drawn from the contributions to this overview are the following:

- ▶ With regards to the effectiveness of domestic remedies, one should bear in mind that it is clearly linked to the efficiency of the judiciary as a whole (the latter being seen as a prerequisite to the former). Efficiency of the judiciary as a whole, and the efficiency of courts, in a narrower sense, depends on many factors least of all on the personality of a judge. Sometimes courts are not able to provide timely redress due to backlog, inadequate case-management systems, absence or lack of access to case law databases, etc. Addressing these issues, along with a harmonized judicial practice, can significantly improve the effectiveness of available remedies. In addition, it is recommended to develop clear indicators of what is considered to be an effective remedy, and an early-warning system to enable the identification of a fading effectiveness as early as possible. These indicators may be developed through the case law of the ECtHR, but a more efficient and speedy reaction can only result from an action at a national level – by national constitutional or supreme courts.

As was noted by the Venice Commission, “the judicial performances should not be seen as the number of cases processed regardless of their complexity and argumentation used, or the number of judgments upheld at higher instance. While it was acknowledged that statistics regarding case processing and reversal rate can be useful for purposes of judicial administration, management and budgeting, they should be used with great caution when it comes to assessing the performance of an individual judge. (...) If there were to be a measurement of workloads, systems would need to be in place to evaluate the weight and the difficulty of different files. Any judgment requires an assessment of the best time that should be allocated to each case.”²

- ▶ This approach also clearly underlines that competence and quality should prevail over “stopwatch justice”. This is of particular importance for transitional countries searching for the right path towards protection of democracy, human rights and rule of law. The well-reasoned decisions at national level will lead to a more consistent judicial practice at national level, thus ensuring the principle of legal certainty (not only for end users i.e. party in the court proceedings, but also for the judges themselves).
- ▶ In order for constitutional courts to be considered as an accessible domestic remedy, they should be legally allowed to keep their leading role as the “guardians” of the ECHR at national level. These courts are the main participants in the inter-judicial dialogue with Strasbourg. The relevance of the constitutional courts is ever growing, in particular after the Brighton Declaration. Increasingly, constitutional courts will have to get involved in cases which until recently would have not required their involvement. Strengthening of the abstract normative control by constitutional courts can further improve the effectiveness of domestic remedies, and serve as a preventive mechanism against human rights violation by the legislature.
- ▶ At the same time, ordinary courts should be using the existing resources more widely and should be encouraged to take the initiative as much as possible thus facilitating the application of the standards of the ECtHR, and engaging themselves into a dialogue with their peers from other courts on the implementation of the ECHR. Holding regular exchanges either facilitated by supreme courts or self-governing judicial bodies

2. The Venice Commission Opinion No. 751/2013 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)007-e)

might have a big impact and encourage judges to apply the Convention more freely.

- ▶ Supreme and constitutional courts should encourage the implementation of the ECHR by lower courts by means of the authority of their own decisions. At the same time, the courts should be reminded that implementation of the Convention is the implementation of domestic legislation. Courts should develop a standard approach to drafting judgments and preparing summaries thereof.
- ▶ Judges and lawyers should develop their knowledge of the ECHR, and to this end it is important to incorporate a human rights component into the curriculum of law schools in the region, national training institutions for judges and bar associations. This will help legal practitioners to better substantiate their decisions or arguments before the courts, respectively, which would increase the chances for a human rights case to be solved with respect to the standards set out by the ECtHR.
- ▶ Where legal training is concerned, efforts should be made to develop human rights curricula at regional level to be used by all state-run law schools, and to make integration of a compulsory human rights component in all courses (e.g. material and procedural criminal law, material and procedural civil law, family law course and others). Law students should be given sufficient basic knowledge of the ECHR and its system to optimise the level of knowledge and skills for the level of studies. One of the ways to introduce these changes is through legal clinics, which should be made more attractive and more accessible to all students. The Council of Europe might look into the possibilities to assist and encourage the organisation of national and regional moot court competitions.
- ▶ Legal practitioners should be motivated by emphasizing that knowledge of the ECHR and the ECtHR case law is an advantage, and not an extra burden, and can be easily gained by the use of existing resources, in particular the translated case law. At the same time, the practitioners need to understand that legal education is a never-ending process that lasts until the end of one's career. To that effect, it is necessary to improve programmes of initial and continuous training programmes for legal practitioners.
- ▶ Finally, multiprofessional training should be put into place, where judges, prosecutors and lawyers would all come together, exchange experience and be given an opportunity to get their understanding of the ECtHR

closer to each other ensuring an even understanding of the Convention and its more harmonised application at all levels and in all areas of law.

This publication is a contribution to the dialogue between the Council of Europe and legal professionals of its member states and hopefully will launch a discussion that will eventually lead to the answers and solutions to the complex issues discussed in the articles that follow. It was prepared by the Human Rights National Implementation Division of the Directorate General of Human Rights and the Rule of Law. The contributions were compiled and edited by Sergey Dikman and Milica Vesovic, from the Secretariat.

Reinforcing partnership in effective implementation of the European Convention on Human Rights

Ksenija TURKOVIC³

1. Introduction

The Brussels Declaration⁴ in March 2015 confirmed that states (various national authorities, namely parliaments, courts, governments and state administration), the ECtHR and the Committee of Ministers of the Council of Europe have a shared responsibility for implementation and the long-term effectiveness of the ECHR. The ECtHR and the member states have been called since the Interlaken Conference held in 2010 to reinforce their partnership in securing viability and effectiveness of the

3. Judge of the European Court of Human Rights elected in respect of Croatia

4. *Brussels Declaration*, High level conference: "Implementation of the European Convention on Human Rights: our shared responsibility" 27 March 2015 at, http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf.

Convention system primarily relying on the principle of subsidiarity. This should ensure a more stable equilibrium in the Convention system and a stronger human rights regime in Europe to the greater benefit of all those who are protected by it.⁵

The High Level Conference at Interlaken (“the Interlaken Conference”) in its Declaration of 19 February 2010 noted with deep concern that the deficit between applications introduced and applications disposed of continued to grow; it considered that this situation caused damage to the effectiveness and credibility of the ECHR and its supervisory mechanism and represented a threat to the quality and the consistency of the case law and the authority of the ECtHR.⁶ In the meantime the ECtHR has implemented a number of reforms (more efficient filtering of incoming applications through single judge mechanism, new admissibility criteria and creation of a Special Filtering Section; new mechanisms to deal with repetitive applications such as pilot judgments, new simplified and abbreviated procedure for cases involving well established case law (WECL procedure); steady increase in the use of friendly settlements and unilateral declarations; a prioritisation policy concentrating resources on the cases whose adjudication will have the most impact in securing the goals of the ECHR, as well as those raising the most serious allegations of human rights violations (leading and priority cases) – such cases have to be communicated within one year and resolved within two years after communication – which have contributed to steep and steady decline in the number of applications in the ECtHR’s docket from over 160,000 in 2011 to 66,150 at the end of September 2015.⁷

The ECtHR has made a significant progress in decreasing the backlog of pending applications and increasing its efficiency. However, the main challenges facing the ECtHR, most notably the high number of repetitive applications and persistent human rights violations of a particularly serious nature, could not be resolved without the commitment of all High Contracting Parties to discharge their obligations under the ECHR. There is a need to make the notion of subsidiarity operable in practice by strengthening and enhancing the authority of ECHR rights and the ECtHR case law at national level,⁸

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5. See, *Contribution of the Court to the Brussels Conference*, § 3, 26 January 2015, at, http://www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf.
 6. *Interlaken Declaration*, High Level Conference on the Future of the European Court of Human Rights, 19 February 2010 at, http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf.
 7. According to internal statistics of the ECtHR, as of September 2015.
 8. For example the Parliamentary Assembly called national parliaments to amend legislation according to standards stemming from the case law of the Court and to establish procedures

by putting in place effective domestic remedies,⁹ primarily in areas affected by structural problems, and by ensuring rapid and effective implementation of the ECtHR's judgments.¹⁰

for carefully examining whether (draft) legislation is compatible with Convention (Resolution 1823 (2011) on national parliaments: guarantors of human rights in Europe). There appears to be the beginning of a practice in Europe of creating specific structures within parliaments tasked with briefing legislators on the requirements of law of the ECHR requirements as well as other appropriate internal structures to ensure rigorous and regular monitoring of states' compliance with international human rights obligations (see in this respect good practice in Great Britain and Netherlands). The fact that the parliamentary record indicates that there was in-depth consideration of the human rights implications of an enactment can be of significance, as the ECtHR case law shows, in cases in which margin of appreciation arises. Furthermore, the Parliamentary Assembly called member states to ensure that the ECHR and the ECtHR case law is implemented by all relevant national authorities as well as to take awareness raising measures to promote ECHR standards as interpreted by the ECtHR (these measures could consist, in particular, in creating a publicly available database containing the ECtHR's case law, including judgments pertinent to the State Party concerned in official translation; improving legal education with a view to deepening knowledge about the ECHR among legal professionals; establishing permanent, non-governmental information centers for potential applicants in order to advise them on ECHR standards; strengthen national authorities' co-operation with civil society, bar associations, experts and national human rights institutions). See, Resolution 1856 (2012) and Recommendation 1991 (2012). It is also important for national authorities to give serious consideration to the implications of judgments against other states. To enhance the preventive function of the national authorities in carrying out their ECHR role, the ECtHR is helping through the Human Rights Trust Fund with the translation of the case law into the national languages. It has also issued different types of publication, such as case law guidelines, the guide to admissibility and numerous thematic factsheets. The ECtHR also provides an active training programme for judges and lawyers from all over Europe who take part in training sessions at the ECtHR, conducted by judges and Registry lawyers. Recently it created a case law information network under the responsibility of Jurisconsult which is open to supreme courts to ensure the transformation on case law of the ECtHR. See, *Contribution of the Court to Brussels Conference*, at www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf. See also the ECtHR's note on Interlaken Process and the Court (2015), at http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=#n13740528735758554841286_pointer.

9. See, chapter 3 below.

10. For example the Parliamentary Assembly called member states to improve and where necessary to set up domestic mechanisms and procedures – both at the level of governments and of parliaments – to secure timely and effective implementation of the ECtHR judgments through co-ordinated action of all national actors concerned and with the necessary support at the highest political level. member states should consider establishing a national body responsible solely for the execution of the ECtHR judgments, in order to avoid a conflict of responsibilities with the agent representing the government before the ECtHR (see Resolution 1516 (2006) on the implementation of judgments of the ECtHR, Recommendation CM/Rec(2008)2, see also Resolution 1787 (2011) and Recommendation 1764 (2006) and Recommendation 1955 (2011)). They in particular have to ensure a prompt response to judgments raising structural problems. Italy introduced the supervision of the implementation of judgments by the Government and Parliament; the United Kingdom

2. Subsidiarity

The principle of subsidiarity is one of the fundamental principles underpinning the whole ECHR system. The ECHR in its present version does not expressly mention the principle of subsidiarity. However, it provides a legal framework for its operation. Firstly Article 1 requires the High Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention. This requirement is reinforced by Article 13 which stipulates that states must provide an effective remedy for violations of the ECHR rights and freedoms. Secondly under Article 35 § 1 the ECtHR is prevented from dealing with an application before all domestic remedies have been exhausted. Reference may also be made to Article 53 which expressly recognizes that Contracting States may go further than the ECHR in the protection offered. Subsidiarity is also present by implication in many of the substantive articles of the ECHR, in particular those which allow for restrictions on the protected rights and freedoms or grant rights in accordance with domestic law.¹¹ Finally, under Article 46 the High Contracting Parties undertake to abide by the final judgment of the ECHR in any case to which they are parties.

Within this framework the principle of subsidiarity has been gradually evolving. As far back as 1968, in the *Belgian linguistic* case the ECtHR emphasized that “*it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention*”¹² while in *Varnava and Others v. Turkey* the ECtHR stressed that “*the domestic authorities are best placed to ... act to put right any alleged violations.*”¹³ The principle has been given special prominence

introduced a new practice in March 2006 consisting of progress reports on the implementation of ECtHR judgments presented by the Joint Human Rights Committee of the British Parliament; Ukraine adopted a law in 2006 providing for a coordinated approach, under the supervision of the Government Agent before the ECtHR. In order to expedite effective implementation of ECtHR's judgments the Croatian Government established in 2012 the Council for the Execution of ECtHR's Judgments and Decisions as an intergovernmental body with the task to coordinate and supervise the execution of ECtHR's judgments and decisions. Representatives of the Constitutional Court, Supreme Court, State Attorney's Office, various ministries and other bodies are members of the Council. State Agent is giving an annual report to the Parliament on the cases before the Court and execution of the Court's judgments against Croatia.

11. These are the rights guaranteed by Articles 8 to 11 as well as Article 5 § 1 regulating deprivation of liberty and Article 12 regulating right to marry in accordance with domestic law.
12. *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), no. 1474/62 et al., § 10, 23 July 1968. More recently this was confirmed in *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 140, ECHR 2006-V.
13. *Varnava and Others v. Turkey* [GC], nos. 16064/90, § 164, ECHR 2009.

in *Gherghina v. Romania* which underlined that “it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. The Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of the Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined in the Convention are respected and protected at domestic level.”¹⁴

Recently the principle of subsidiarity was addressed at intergovernmental conferences¹⁵ and has been confirmed by the Brighton Declaration¹⁶. Finally, once Protocol No. 15 to the ECHR enters into force the principle of subsidiarity will find its place in the text of the Preamble to the ECHR¹⁷

Subsidiarity can have several different shades of meaning depending on the sphere in which it is being invoked.¹⁸ However, in the specific context of the ECtHR it describes the relationship and division of labour between the ECtHR and the national authorities of the State Parties. It affirms that the High Contracting Parties have the primary role and responsibility in guaranteeing and protecting rights and freedoms defined in the ECHR and the Protocols thereto at the domestic level subject to judicial scrutiny at European level. The ECtHR supervises the implementation by the High Contracting Parties of their obligations under the ECHR acting upon individual or inter-state applications (Article 19 in connection with Articles 33 and 34 of the ECHR).

The principle of subsidiarity has its limits. Among others, the principle that rights must be effective¹⁹ requires the ECtHR to intervene as supervisory mechanism where failure by the ECtHR to act would result in a denial of justice on its part, rendering the fundamental rights guarantees under the

14. *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 83, 9 July 2015.

15. Interlaken Conference of 2010, Izmir Conference of 2011, Brighton Conference of 2012, Oslo conference of 2014 and Brussels Conference of 2015. For the relevant documents and the reform work done by the ECtHR in this respect see, http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=#n13740528735758554841286_pointer.

16. Adopted at the Highlevel Conference on the future of the ECtHR (Brighton, UK, 18-20 April 2012): www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH_2012_007_en.pdf (visited November 2015).

17. Protocol No. 15 amending the ECHR, 24 June 2013, Council of Europe Treaty Series - No. 213.

18. See, Gerald L. Neuman, *Subsidiarity*, in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law*, 360-377 (2013).

19. The Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, among many other authorities, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

ECHR inoperative. Furthermore, the principle of the evolutive interpretation of the ECHR²⁰ enables the ECtHR to evolve over the years or decades its position regarding the scope of a particular ECHR right with the result that a specific matter hitherto left entirely to states' discretion may be called into question by the ECtHR. Finally, the principle of subsidiarity itself is neither static nor unilateral.²¹ The use of the concept is likely to expand and evolve in the future.

This complex relationship between the ECtHR and national authorities affect the way in which on the one hand the High Contracting Parties are expected to perform their obligations and on the other hand the ECtHR should conduct its review. In the 2015 Seminar to mark the official opening of the judicial year, the principle of subsidiarity was described as a two-sided coin which creates respective roles and obligations for both, the states and the ECHR machinery.²²

The Contracting States have substantive a obligation to ensure that the rights and freedoms set out in the ECHR are adequately protected, this being an obligation of result rather than means (Article 1 of the ECHR).²³ They have also a procedural obligation to provide an effective remedy when that protection breaks down (Article 13 in connection with Article 1 of the ECHR).²⁴ Finally, under Article 46 of the ECHR they are obliged to execute ECtHR judgments.²⁵ These obligations apply to all state authorities, the legislative branch of the state (which must enact laws in conformity with the ECHR), the executive (whose task is to apply those laws in a manner compatible with the ECHR and to issue regulations in the same spirit) and the courts who, being subjected

20. According to this principle the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (see *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII).

21. For more detailed analysis see, *Principle of Subsidiarity, Interlaken follow-up – Note by Jurisconsult* at, http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.

22. See at, http://www.echr.coe.int/Pages/home.aspx?p=court/events&c=#n14228958756406372029684_pointer.

23. Article 1 of the Convention implies that the Contracting States have a negative obligation to refrain, as far as possible, from infringing the rights and freedoms enshrined in the Convention. They also have a positive obligation to create, in respect of the persons within their jurisdiction, conditions which are in conformity with the requirements of the Convention; the scope of this obligation will vary depending on the case and the nature of the right in question.

24. See *Kudła v. Poland* [GC] no. 30210/96, § 152, 26 October 2000.

25. Special importance in this context have proceedings of reopening in domestic legal systems, pilot and WECL proceedings.

in principle to guarantees of impartiality and independence, are best placed to ensure respect for the individual rights guaranteed by the ECHR.

The principle of subsidiarity requires the ECtHR to exercise self-restraint. It places limits, both procedural (requirement to exhaust domestic remedies under Article 35 § 1 of the ECHR)²⁶ and substantive (the fourth instance rule, the doctrine of the margin of appreciation, remedial subsidiarity)²⁷ to the scope of the ECtHR's review.

The central theme of this article is the effective use of national remedies in domestic legal proceedings and the subsidiary role of the ECtHR. Thus the focal point is on the procedural aspects of the principle of subsidiarity, primarily the right to an effective national remedy under Article 13 which gives "*direct expression to the States' obligation to protect human rights first and foremost within their own legal system*"²⁸ and the way in which it influences subsidiary role of the ECtHR through the requirement to exhaust domestic remedies under Article 35 § 1 of the ECHR. Both of these Articles are central to the cooperative relationship between the ECHR and national legal systems.²⁹

3. Providing Effective National Remedies

Article 13 of the ECHR guarantees the availability at national level of a remedy to enforce the substance of the ECHR rights and freedoms in whatever form they may happen to be secured in the domestic legal order and to grant appropriate relief.³⁰ It establishes "*an additional guarantee for an individual in order to ensure that he or she effectively enjoys [Convention] rights.*"³¹ The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the ECHR and to grant appropriate relief.

26. Procedural subsidiarity governs the working relationship between the ECtHR and the national authorities and the division of responsibility for action and intervention.

27. Substantive subsidiarity governs relative responsibilities for decision making and assessment. Elements of two types of subsidiarity in various rules and doctrines often overlap.

28. *Kudła*, *supra* note 24, § 152.

29. Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 764 (3rd ed., 2014).

30. See, *Rotaru v. Romania*, no. 28341/95, § 67, 4 May 2000.

31. *Id.*

The ECtHR has refrained from giving an abstract definition of the notion of arguability, preferring in each case to determine, in the light of the particular facts and the nature of the legal issue or issues raised, whether a claim of a violation forming the basis of a complaint under Article 13 is arguable and, if so, whether the requirements of this provision were met in relation thereto.³² A violation of Article 13 does not depend on there actually being a violation of another ECHR right.³³ However, a complaint that has been declared “*manifestly ill-founded will not satisfy the threshold test for reliance on Article 13 and there will be no violation of that provision*”.³⁴

The exact way in which states provide for appropriate relief is up to them. They are afforded a margin of appreciation in conforming to their obligation under Article 13. National authorities by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions.³⁵ States are not required to provide one single remedy that would entirely satisfy the requirements of Article 13, provided that an aggregate of remedies may do so on the facts.³⁶

3.1. Requirements of an Effective Remedy

The remedy provided must be effective “*in practice as well as in law*.” That means that a remedy must be available in theory and practice at the relevant time. The availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case law.³⁷ Such case law must in principle be well established and date back to the period before the application was lodged,³⁸ subject to exceptions which may be justified by the particular circumstances of the case.

32. *M.A. v. Cyprus*, no. 41872/10, § 117, ECHR 2013 (extracts).

33. See *Leander v. Sweden*, 26 March 1987, § 77, Series A no. 116; see also, *Bubbins v. the United Kingdom*, no. 50196/99, § 170, ECHR 2005-II (extracts).

34. See *Čonka v. Belgium*, no. 51564/99, § 76, ECHR 2002-I

35. See *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, § 50, Series A no. 20; *Chapman v. the United Kingdom*. [GC], no. 27238/95, § 91, ECHR 2001-I; *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 90, ECHR 2007-I

36. *Leander*, *supra* note 33. However, the ECtHR is reluctant to employ this approach nowadays. See, *Sürmeli v. Germany*, no. 75529/01, § 115, 8 June 2006.

37. See, *Gherghina*, *supra* note 13, § 88, citing *McFarlane v. Ireland* [GC], no. 31333/06, §§ 117 and 120, 10 September 2010, and *Mikolajová v. Slovakia*, no. 4479/03, § 34, 18 January 2011.

38. See, *Gherghina*, *id.*, citing *Sürmeli*, *supra* note 35, § 110; *Norbert Sikorski v. Poland*, no. 17599/05, § 115, 22 October 2009; and *Zutter v. France* (dec.), no. 197/96, 27 June 2000.

That also means that a remedy must be capable of remedying directly the impugned state of affairs either in the sense of preventing the alleged violation or its continuation (preventive remedy) or in providing adequate redress for any violation that has already occurred (compensatory remedy)³⁹ and it must offer reasonable prospects of success.⁴⁰ Effectiveness does not depend upon the certainty of a favourable outcome; however, a remedy which is offering no reasonable prospect of success will be regarded as ineffective.⁴¹

Therefore it may be necessary for a respondent government which maintains that a particular remedy satisfies Article 13 to provide examples of the remedy's application so as to establish its effectiveness.⁴² In this respect the ECtHR will not regard an absence of judicial practice as decisive in relation to a law that has recently entered into force, but it does require a remedy that has acquired a "*sufficient level of certainty*."⁴³ Thus the ECtHR has held that recourse to a higher court ceases to be effective on account of divergences in that court's case law, as long as these divergences continue to exist.⁴⁴

Furthermore the speediness of the remedial action may be an important aspect of the Article 13 enquiry⁴⁵ as well as, the timely payment of a compensation award⁴⁶ and the level of compensation which must not be unreasonably low in comparison with the awards made by the ECtHR in similar cases.⁴⁷

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39. Up to now the ECtHR has not demonstrated much willingness to accept as compensatory measures besides restitution and compensation other measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and similar. For a contrary approach of Human Rights Committee see *Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 16*.
 40. See, *Kudla*, supra note 23, §§ 157-158; *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 74, 25 March 2014; and *Gherghina*, supra note 11, § 85.
 41. See *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The former Yugoslav Republic of Macedonia"* [GC], no. 60642/08, § 133, ECHR 2014.
 42. *Kudla*, supra note 21, § 159; *Paulino Tomas v. Portugal* (dec.), no. 58698/00, ECHR 2003-VIII. See also, *Ališić*, supra note 41, § 132, where "... the Slovenian Government have failed to demonstrate that at least one such judgment has been enforced. There is therefore no evidence to date that this remedy was capable of providing the applicants with appropriate and sufficient redress."
 43. *Krasuski v. Poland*, no. 61444/00, § 70-72, ECHR 2005-V (extracts).
 44. *Ferreira Alves v. Portugal* [no. 6], no. 46436/06 et al., §§ 28-29, 13 April 2010.
 45. For example in situations in which the authorities are taking decisions or giving permissions for demonstrations. See, *De Souza Ribeiro v. France* [GC], no. 22689/07, § 81, ECHR 2012.
 46. *Öneryıldız v. Turkey* [GC], no. 48939/99, § 152, ECHR 2004-XII.
 47. See for example *Scordino v. Italy* (dec.), no. 36813/97, ECHR 2003-IV; *Ananyev and others v. Russia*, no. 42525/07 et al., §§ 113-118, 10 January 2012; *Gorbulya v. Russia*, no. 31535/09, § 56, 6 March 2014.

The national remedy need not always be judicial, nor it needs to satisfy all the criteria of Article 6 § 1. However, the national authority concerned must be able to produce a binding decision. Furthermore, the decision-maker must be sufficiently independent. If the authority is non-judicial, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.⁴⁸

Furthermore, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.

Even if an Article 13 remedy may exist, if its exercise is unjustifiably hindered via the acts or omissions of the authorities of the respondent state, then this will entail a violation of Article 13.⁴⁹

The ECtHR ascertains the effectiveness of the remedy by examining the circumstances of each case on the basis of the practical application of the remedy.⁵⁰ However, neither the fact that no judicial or administrative practice has yet emerged as regards the application of the framework nor the risk that the proceedings might take a considerable time can in themselves render the new remedy ineffective.⁵¹

3.2. Requirements of Article 13 in the Context of Specific Articles of the Convention

What kind of remedy would be sufficient for the purposes of Article 13 and respectively Article 35 § 1 is determined by two main criteria: a) the nature of the invoked ECHR right and a kind of a complaint and b) whether the impugned situation has already ceased or is continuing. More important rights require more stringent remedies. Besides, the ECtHR has developed implied procedural obligations in respect of the ECHR substantive provisions. Article 13, thus imposes, without prejudice to any other remedy available under the domestic system, an obligation on states to carry out effective investigation of cases

48. See, Harris et al., *supra* note 29, p. 770.

49. See for example *Lonić v. Croatia*, no. 8067/12, § 63, 4 December 2014 or *Štitić v. Croatia*, no. 29660/03, § 80-87, 8 November 2007. In these cases the ECtHR did not call into question the adequacy of remedies provided for under the national law in respect of the prison conditions as such, however it found that in the circumstances of these cases the applicant did not have an effective remedy for his grievances about the inadequate conditions of detention.

50. *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII.

51. *Nagovitsyn and Nalgiyev v. Russia* (dec.), no 27451/09 et al., § 30, 23 September 2010.

concerning deaths, physical injury, ill treatment or deprivation of liberty. This obligation to investigate also extends to alleged breaches where committed by private individuals. This emphasis on the procedural requirements reinforces the principle of subsidiarity. Where the procedural requirements are satisfied, the ECtHR will be less inclined to review the substantive issue.

In cases concerning deaths (Article 2) or torture, inhuman or degrading treatment (Article 3) the range of available remedies should include a mechanism for establishing any liability of state officials or bodies for acts or omissions in breach of the ECHR and a compensation for the non-pecuniary damage flowing therefrom.⁵²

In the context of Article 2, the ECtHR has held that *“the obligation to protect the right to life under this provision, read in conjunction with the state’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, imposes a duty on that state to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (procedural limb of Article 2). This obligation requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force”⁵³ or “in [otherwise] suspicious circumstances, even where the presumed perpetrator of the fatal attack is not a state agent.”⁵⁴*

The form of investigation required by this obligation varies according to the nature of the infringement of life: although a criminal investigation is generally necessary where death is caused intentionally, civil or even disciplinary proceedings may satisfy this requirement where death occurs as a result of negligence,⁵⁵ as for example in the sphere of medical negligence.⁵⁶

In order to be *“effective”* an investigation must firstly be adequate.⁵⁷ That is, it must be capable of leading to the establishment of the facts and,

52. *O’Keeffe v. Ireland* [GC], no. 35810/09, §177, ECHR 2014 (extracts).

53. *McCann and Others v. the United Kingdom*, no. 18984/91, § 161, 27 September 1995.

54. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, §§ 169-171, 14 April 2015.

55. See, inter alia, *Calvelli and Cigliio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII; and *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII.

56. See *Erikson v. Italy* (dec.), no. 37900/97, 26 October 1999; *Powell v. the United Kingdom* (dec.), no. 45305/99, 4 May 2000; and *Byrzykowski v. Poland*, no. 11562/05, § 104, 27 June 2006; *Šilih v. Slovenia*, no. 71463/01, § 194, 9 April 2009.

57. See *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, ECHR 2007-II.

where appropriate, the identification and punishment of those responsible. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident and the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. The persons responsible for the investigations should be independent and impartial. In addition the investigation must satisfy the requirements of promptness and reasonable expedition;⁵⁸ it must be accessible to the victim's family and there must be a sufficient element of public scrutiny of the investigation.⁵⁹

In cases concerning deaths (Article 2) or torture, inhuman or degrading treatment (Article 3), the requirement for compensation for the damage sustained as a result of death or ill-treatment is in addition to the requirement of an effective investigation capable of leading to the identification and punishment of those responsible and not an alternative.⁶⁰ This is irrespective of whether the outcome of the criminal proceedings is or is not determinative for the success of compensation proceedings in the domestic law. Thus the purely compensatory remedy cannot be regarded as sufficient for a Contracting State's obligations under Article 2 and 3 of the ECHR, as it is aimed at awarding damages rather than identifying and punishing those responsible.⁶¹

Concerning prison conditions and medical treatment in prison, the solution depends on whether the impugned conditions still persist. If they have ended and the applicant merely complains about the past, a civil claim for damages is an effective and sufficient remedy;⁶² if not, a preventive remedy aimed at changing the conditions is required. Were it otherwise, the prospect of future compensation would legitimize suffering in breach of Article 3⁶³ and would not deter wrongful behaviour on the part of the authorities.⁶⁴ The ECtHR considers that an adequate remedy in such a situation should imply a properly

58. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 167, ECHR 2011.

59. *Tunç*, *supra* note 53, §§ 169-182.

60. *Gäfgen v. Germany* [GC], no. 22978/05, § 116-118, ECHR 2010.

61. Thus a respondent government cannot argue that the applicant should have lodged a claim for compensation in the civil courts while the proceedings before the criminal courts were still pending. See, *Sapožkovs v. Latvia*, no. 8550/03, §§ 51 and 55-56, 11 February 2014.

62. The award in such cases should not be made conditional on the establishment of fault on the part of the authorities. See *Gorbulya*, *supra* note 47.

63. See *Slawomir Musiał v. Poland*, no. 28300/06, §§ 77 and 82, 20 January 2009; *Vladimir Romanov v. Russia*, no. 41461/02, § 78, 24 July 2008. The scarcity of funds available to the state should not be accepted as mitigating its conduct and should be irrelevant in assessing damages under the compensatory claims.

64. *Reshetnyak v. Russia*, no. 56027/10, § 72, 8 January 2013.

functioning mechanism of monitoring the conduct of national authorities with a view to putting an end to the alleged violation of the applicant's rights and preventing the recurrence of such a violation in the future. Therefore, a purely compensatory remedy would not suffice to satisfy the requirements of effectiveness and adequacy in a case of an alleged continuous violation and should be replaced by another judicial mechanism performing both the preventive and compensatory functions.⁶⁵

The same logic governs cases under Article 5 (deprivation of liberty). In addition in *M. v. Ukraine*⁶⁶, the ECtHR stressed that the specific requirements of Article 5 § 4 of the ECHR concerning the judicial character of a necessary procedure, including guarantees of independent and impartial review based on the adversarial nature of the procedure and the principle of equality of arms, are inherent in a remedy capable of immediately terminating the continued violation by ordering release. A retrospective compensatory relief could be supplementary to that remedy.⁶⁷

In length of proceedings cases (Article 6 § 1) a compensatory claim may be effective and sufficient even though the procedure is still pending and even if it is taken alone and if it is not able to accelerate the proceedings. The approach here is the alternative one, a remedy is effective if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays that have already occurred.⁶⁸ However, the ECtHR has, without being prescriptive, also indicated its strong preference for a preventive remedy since this addresses the root causes of the problem.⁶⁹ Such an approach may be seen as an attempt to use Article 13 of the ECHR to repatriate the problem of unreasonable length of judicial proceedings to the member states.⁷⁰ Finally, it is also clear that for countries where length-of-proceedings violations already exist, a remedy designed only to expedite the proceedings – although desirable for the future – may not be

65. *Id.* § 71. See also, *Andrey Gorbunov v. Russia*, nos. 41211/98 et al., § 57, 5 February 2013; *Iliev and Others v. Bulgaria*, nos. 4473/02 et al., 10 February 2011.

66. *M. v. Ukraine*, no. 2452/04, 19 April 2012.

67. *M. v. Ukraine*, no. 2452/04, § 84, 19 April 2012.

68. *Kudla*, *supra* note 24, § 158. See also, *Misfud v. France* (dec.) [GC], no. 57220/00, §§ 16-18, 11 September 2002.

69. In *Sürmeli*, the Grand Chamber noted that “[s]ome States have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation” (citing *Cocchiarella v. Italy* [GC], no. 64886/01, §74 and §77, ECHR 2006-V). See, *Sürmeli v. Turkey*, no. 75529/01, § 100, 8 June, 2006.

70. See Harris et al., *supra* note 29, p. 778.

adequate to redress a situation in which the proceedings have clearly already been excessively long.⁷¹

The rights which the respondent state has undertaken to safeguard by virtue of Article 2 of Protocol No. 1 – which requires any State that has set up higher-education institutions to ensure effective access to them – are at risk of becoming illusory if the only remedies available to litigants are of a compensatory nature and can lead solely to a retrospective award of pecuniary compensation. For the remedies in such cases to be deemed “*effective they must have been capable, primarily, of preventing or putting a swift end to the alleged violations and, secondarily, of affording adequate redress for any violation that had already occurred*”⁷²

The ECtHR has also recognized that there is a procedural limb to Article 10 which requires a restrictive measure to be justified by a sufficient reasoning and subject to appropriate judicial review.⁷³

In relation to Article 8, the ECtHR has found that while that provision contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8,⁷⁴ for e.g. the parents have to be involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests;⁷⁵ the best interest of the child has to be given primary, and in some circumstances paramount importance. The value of the additional protection afforded by Article 13 is also apparent in the context of claims under Article 8 and Article 1 of the Protocol No. 1 emanating from forcible eviction from homes and deliberate destruction of homes and property. The ECtHR is prepared to find violation of Article 13 when the respondent state fails to create a mechanism which would allow the applicant(s) having arguable claims⁷⁶ as regards violations under Article 1 of Protocol No. 1 and Article 8 to have their rights in respect of property and

71. *Cocchiarella, id.*, § 76.

72. See, *Gherghina, supra* note 14, § 91.

73. *Lombardi Vallauri v. Italy*, no. 39128/05, § 46, 20 October, 2009.

74. *Buscemi v. Italy*, no. 29569/95, § 58, ECHR 1999-VI

75. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as ‘necessary’ within the meaning of Article 8. *Id.*

76. Providing the claim has been declared admissible and the ECtHR accepts that the “*allegation could not be discarded as being prima facie untenable*” (see *Nuri Kurt v. Turkey*, no. 37038/97, § 117, 29 November 2005) or the ECtHR has found violations under Article 1 protocol No. 1 and Article 8 of the ECHR (see, *Dogan and Others v. Turkey*, no. 8803/02, § 163, 29 June 2004).

home restored and to obtain compensation for the losses suffered⁷⁷ or based on ineffectiveness of the domestic enquiry into the allegations of property destruction⁷⁸ or enforcement of property repossession.⁷⁹

3.3. Effective Remedies in the States of former Yugoslavia seen through the Jurisprudence of the Court

All of the states of former Yugoslavia provide for the individual constitutional claim, except “The former Yugoslav Republic of Macedonia”, and in all of them individual constitutional claim represents an effective remedy that the applicants have to exhaust before coming to the ECtHR. Notwithstanding, in number of cases against the states of former Yugoslavia the Court has found that applicants were not provided effective remedies.

A number of those cases have been related to lack of effective remedy in relation to length of proceedings. In the meantime all of the states of former Yugoslavia (except Montenegro and for certain proceedings Slovenia⁸⁰) developed effective remedy for the length of proceedings.⁸¹ Croatia recently introduced a new remedy for the length of proceedings whose effectiveness has not as of yet been evaluated by the ECtHR.

The ECtHR held that Slovenia violated Article 13 of the ECHR on account of the lack of an effective and accessible remedy under domestic law for the applicants’ complaints in respect of the conditions of their detention and the ECtHR encouraged Slovenia under Article 46 to develop an effective instrument which would provide a speedy reaction to complaints concerning inadequate conditions of detention and ensure that, when necessary, a

77. See, *Sargsyan v. Azerbaijan* [GC], no. 40167/06, §§ 269-274, 16 June 2015; *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 213-215, 16 June 2015.

78. *Nuri Kurt*, supra note 76, §§ 119-121.

79. See, *Radanović v. Croatia*, no. 9056/02, §§ 55-57, 21 December 2006.

80. For example, in *Zavodnik v. Slovenia* (no. 53723/13, §§101-06, 21 May 2015), the ECtHR found that there are no effective domestic remedies available to the applicants for raising a complaint about the length of the bankruptcy proceedings.

81. In *Adzi-Spirkoska and Others v. “The former Yugoslav Republic of Macedonia”* (dec.), nos. 38914/05, 3 November 2011, the Court has confirmed that the respondent states have provided effective remedy for the length of proceedings. For the overview of the development of the effective remedies related to the length of proceedings in Croatia see Turković, Ksenija; Omejec, Jasna. *Croatia: commitment to reform: assessing the impact of the ECtHR’s Case Law on Reinforcing Democratization Efforts in Croatian Legal Order. // KNJIGA: The Impact of the ECHR on Democratic Change in Central and Eastern Europe. Judicial Perspectives*. Cambridge: Cambridge University Press. (2016).

transfer of a detainee is ordered to ECHR compatible conditions.⁸² The ECtHR has found that Croatia provides an effective remedy in relation to conditions in prisons, although the remedy could be in certain circumstances ineffective.⁸³

Denial of the right to an effective remedy in connection with the lack of effective investigation under Article 2, 3, 5 or 8 the ECtHR has established in *El Masri v. "The former Yugoslav Republic of Macedonia"*.⁸⁴ In Croatian cases in which the ECtHR has found violation of Article 2 or 3 on the basis of ineffective investigation, the ECtHR has considered that in view of its findings in respect of the procedural aspect of Article 2 or 3, no separate issue is left to be examined under Article 13 of the ECHR.⁸⁵

Furthermore, in *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The former Yugoslav Republic of Macedonia"* the ECtHR has found that the applicants did not have adequate domestic remedy for their substantive complaint under Article 1 Protocol No.1.⁸⁶ In *Đorđević v. Croatia* the ECtHR held that the applicants had no effective remedy by which to obtain protection against acts of harassment and violence in connection with their complaints under Articles 3 and 8 of the ECHR.⁸⁷ In *Rodić and Others v. Bosnia and Herzegovina* the ECtHR has found that the applicants had no effective domestic remedy at their disposal for their Article 3 complaints (threat due to ethnic origin by other prisoners to their physical wellbeing).⁸⁸ In *Mitovi v. "The former Yugoslav Republic of Macedonia"* the ECtHR held that the applicants (grandparents) did not have an effective remedy regarding their complaints related to access rights to their grandchildren under Article 8 of the ECHR.⁸⁹

3.4. Pilot Proceedings

The ECtHR has stressed the importance of introducing national remedies particularly in situations of structural or systemic violation. In the context of

82. *Mandić and Jović v. Slovenia*, nos. 5774/10 et al., §§ 121-128, 20 October 2011. The Court did the same in *Stručel and Others v. Slovenia*, nos. 5903/10 et al., §§ 134-141, 20 October 2011.

83. See for example, *Štitić*, *supra* note 49 and *Lonić*, *supra* note 49.

84. *El-Masri v. "The former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, §251-262, ECHR 2012.

85. See for example *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 71, 15 January 2009 (Article 2); *Šečić v. Croatia*, no. 40116/02, § 61, 31 May 2007 (Article 3).

86. *Ališić*, *supra* note 40, §§ 131-36.

87. *Đorđević v. Croatia*, no. 41526/10, §§ 167-168, 24 July 2012.

88. *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, §§ 84-85, 27 May 2008.

89. *Mitovi v. "The former Yugoslav Republic of Macedonia"*, no. 53565/13, 71-76, 16 April 2015.

'pilot judgments' responsibility is placed on the national authorities for correcting these situations and for affording redress for the resulting violations. The respondent state's action may also include *ad hoc* solutions such as friendly settlements with the applicants or unilateral remedial offers in line with the ECHR requirements. This procedural innovation redirecting the focus back on the role of the national authorities in the practical implementation of the ECHR is not only more effective (a solution on an individual basis at international level would be simply unrealistic) and speedy,⁹⁰ but it is also consistent with the notion of subsidiarity.⁹¹ If, however, the respondent state fails to adopt such measures following a pilot judgment and continues to violate the ECHR, the ECtHR will have no choice but to resume the examination of all similar applications pending before it and to take them to judgment in order to ensure effective observance of the ECHR.⁹²

In the states of former Yugoslavia the ECtHR has decided to apply the pilot judgment procedure under Article 46 of the ECHR and Rule 61 of the Rules of Court in only four cases, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The former Yugoslav Republic of Macedonia"*,⁹³ *Suljagić v. Bosnia and Herzegovina*,⁹⁴ *Kurić v. Slovenia*⁹⁵ and *Zorica Jovanović v. Serbia*.⁹⁶ In all of these cases the ECtHR has adjourned its examination of similar cases

90. See *Wolkenberg and Others v. Poland* (dec.), no. 50003/99, § 34, 4 December 2007.

91. See Resolution Res (2004) 3 of the Committee of Ministers on judgments revealing an underlying systemic problem of 12 May 2004; Rule 61 of the Rules of Court; and *Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, §§189-94, ECHR 2005-IX.

92. *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, § 136, 13 March 2014.

93. *Supra* note 41. Slovenia and Serbia were ordered to make all necessary arrangements, including legislative amendments, within one year and under the supervision of the Committee of Ministers, in order to allow applicants and all others in their position to recover their "old" foreign-currency savings under the same conditions as Slovenian and Serbian citizens who had such savings in the domestic branches of Slovenian and Serbian banks.

94. The ECtHR considered that government bonds must be issued and any outstanding instalments must be paid in the Federation of Bosnia and Herzegovina within six months from the date on which the present judgment became final. See *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, §§ 58-65, 3 November 2009.

95. The ECtHR ordered Slovenia, as a general measure, to set up an *ad hoc* domestic compensation scheme within one year of the delivery of the present judgment in order to secure proper redress to the "erased" persons at national level. *Kurić*, *supra* note 92, §§ 132-144.

96. The ECtHR ordered Serbia to take all appropriate measures, preferably by means of a *lex specialis* to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant's. This mechanism should be supervised by an independent body, with adequate powers, which would be capable of providing credible answers regarding the fate of each child and awarding adequate compensation as appropriate. *Zorica Jovanović v. Serbia*, no. 21794/08, §§89-93, ECHR 2013.

for one year pending the adoption of the remedial measures at issue without prejudice to the ECtHR's power at any moment to declare inadmissible any such case or to strike it out of its list in accordance with the ECHR.

In *Statileo v. Croatia*, the ECtHR made a general observation that the problem underlying the violation concerned the legislation itself and that its findings had extent beyond the sole interests of the applicant in the instant case. However, the ECtHR refrained from applying pilot judgment procedure taking into account that legislative reform has been under way and the ECtHR left the state free to choose the means by which it will discharge its obligations under Article 46 subject to the supervision of the Committee of Ministers.⁹⁷ Similarly, to prevent future violations of the right to a trial within a reasonable time, the ECtHR in *Lukenda v. Slovenia* encouraged the respondent State to either amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of that right.⁹⁸

4. Exhaustion of Domestic Remedies

The major procedural element of subsidiarity is the obligation to exhaust domestic remedies under Article 35 § 1 of the ECHR.⁹⁹ The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the ECHR, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation.¹⁰⁰ In accordance with Article 35 § 1 of the ECHR, the ECtHR may only deal with a matter after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right violations alleged against them before those allegations are submitted to the ECtHR.¹⁰¹ This way the ECtHR has also the benefit of the views of the national courts that are in direct contact with the vital forces of their countries.¹⁰²

It is incumbent on the government claiming non-exhaustion to prove that the remedy was an effective one, available in theory and practice at the relevant

97. *Statileo v. Croatia*, no. 12027/10, § 165, 10 July 2014.

98. *Lukenda v. Slovenia*, no. 23032/02, § 89-98, ECHR 2005-X

99. This obligation has its bases in the generally recognized rules of the international law.

100. Among many other authorities, *Vučković*, *supra* note 39.

101. See, *Gherghina*, *supra* note 14, §§ 84 and 115. See also, among many other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV; *Vučković*, *supra* note 40, § 70; *Misfud*, *supra* note 68, §15.

102. *Burden v. The United Kingdom*, no. 13378/05, § 42, 29 April 2008.

time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the government was exhausted in fact, or was for some reason inadequate or ineffective in the particular circumstances of the case or that there existed special circumstances absolving him/her from this requirement.¹⁰³

4.1. The Basic Requirements

A complaint submitted to the ECtHR should first be made to the appropriate national bodies in accordance with the formal requirements of domestic law and within the prescribed time-limits. When the applicant had clearly sought to exhaust a remedy but through his own negligence failed to observe the requirements of domestic law (e.g. time-limit or paying of court fees) the ECtHR would frequently reject case for non-exhaustion if there were no special circumstances justifying the failure.¹⁰⁴ There are possible exceptions for example, if domestic courts interpret procedural rules too strictly as to prevent an applicant using an available remedy,¹⁰⁵ or if they do not permit an applicant to make reference to new ECtHR case law delivered after the deadline for submissions in domestic proceedings,¹⁰⁶ or when they have examined substance of appeal in spite of the applicant's failure to observe formal requirements of domestic procedure.¹⁰⁷

In order to properly exhaust domestic remedies it is not sufficient that a violation of the ECHR is "evident" from the facts of the case or applicants' submissions. Applicants are not, however, required to invoke the ECHR right relied on expressly in the national proceedings. It is enough to raise the issue in substance or implicitly. Yet, this must be done in a manner which leaves no doubt that the same complaint that was subsequently submitted to the ECtHR had indeed been raised at the domestic level on the bases of domestic law.¹⁰⁸ In so far as there exists at national level a remedy enabling the national courts to address, at least in substance, the argument of violation of the ECHR right, it is that remedy which should be used. It would be contrary to the subsidiary character of the ECHR machinery if an applicant, ignoring a possible ECHR

103. See, *Gherghina*, id., § 89, citing *Akdivar*, supra note 101, § 68; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, et al., § 69, 1 March 2010; and *Vučković*, supra note 40, § 77.

104. *Ben Salah Adraqui and Dhaima v. Spain* (dec.), no. 45023/98, 27 April 2000.

105. *Miragall Escolano and Others v. Spain*, no. 38366/97, § 36, 25 May 2000.

106. *Merger and Cros v. France*, no. 68864/01 et al., 22 December 2004.

107. *Vladimir Romanov v. Russia*, no. 41461/02, § 52, 24 July 2008.

108. *Merot D.O.O. and Storitve Tir D.O.O. v. Croatia* (dec.), no. 29426/08 et al., § 36, 10 December 2013.

argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the ECtHR on the basis of the ECHR argument.¹⁰⁹

Any procedural means that might prevent a breach of the ECHR should be used.¹¹⁰ The applicant has to do everything that could reasonably be expected from him or her to exhaust domestic remedies.¹¹¹ Nevertheless, the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are accessible, capable of providing redress in respect of their complaints (effective and sufficient) and offering reasonable prospects of success in respect of his ECHR grievances.¹¹² If more than one potentially effective remedy with essentially the same objective is available, the applicant is only required to have used one of them.

4.2. Exceptions to the Obligation to Exhaust Domestic Remedies

There is no obligation to have recourse to remedies which are inadequate or ineffective.¹¹³ However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile does not automatically absolve the applicant from the obligation to exhaust it.¹¹⁴

There may be special circumstances which absolve the applicant from the obligation to exhaust domestic remedies at his or her disposal.¹¹⁵ This means, among other things, that the ECtHR must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants.¹¹⁶ Thus the authorities must take into account the particularly vulnerable situation of

109. *Azinas v. Cyprus* [GC], no. 56679/00, §38, ECHR 2004-III

110. See, *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008.

111. *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116-22, ECHR 2007-IV

112. See *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; *Paksas v. Lithuania* [GC], no. 34932/04, §75, ECHR 2011 (extracts)

113. *Akdivar and Others*, *supra* note 101, § 67, and *Vučković*, *supra* note 40, § 73, *Gheghina*, *supra* note 14, § 86. On effectiveness of remedies see above para. 3.3.

114. See, *inter alia*, *Akdivar and Others*, *id.*, § 71; *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 70, 17 September 2009; and *Vučković*, *id.*, § 74; *Gheghina*, *id.*

115. See *M.S. v. Croatia*, no. 36337/10, § 63, 25 April 2013.

116. See *Selmouni v. France* [GC], no. 25803/94, § 77, 28 July 1999; and *Henaf v. France*, no. 65436/01, § 32, 27 November 2003.

victims, for example, the fact that people who have been subjected to serious illtreatment will often be less ready or willing to make a complaint¹¹⁷ or that patients confined in psychiatric hospitals are often in position of inferiority and powerlessness.¹¹⁸

The rule is also inapplicable when an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the state authorities has been shown to exist and is of such nature to make proceedings futile or ineffective.¹¹⁹

5. Conclusion

Member states must ensure that individuals have accessible, effective and enforceable remedies and obtain reparations where violations of human rights have occurred. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The rights recognized under the Convention can be effectively assured by the domestic authorities in many different ways, including direct applicability of the ECHR, application of comparable constitutional or other provisions of law, or the interpretative effect of the ECHR in the application of national law.

All states of the former Yugoslavia, once they became independent, have provided for the monistic approach to international treaties according to which international and domestic laws are two aspects of one system of law. Accordingly, in all of these legal systems the ECHR constitutes a self-executing international agreement which is directly enforceable by ordinary courts and other public authorities and it has legal force superior to that of ordinary laws. In short, the ECHR may be pleaded as a source of applicable law before all domestic courts competent for the determination of a case. Courts should give the statutes an interpretation in line with the ECHR looking not only into the decisions of the ECtHR against their own states, but reading into the provisions of the ECHR the whole acquisition of the ECtHR, at least when it amounts to clear and constant general rules.

117. See *Bati and Others v. Turkey*, nos. 33097/96 et al., § 133, 3 June 2004.

118. See, *inter alia*, *Herczegfalvy v. Austria*, 24 September 1992, Series A no. 244; or *M.S. v. Croatia* (No.2), 75450/12, § 123, 19 February 2015.

119. *Statileo*, *supra* note 97, § 96.

However, if the national law is not in compliance with the ECHR as interpreted by settled ECtHR case law, courts and other bodies vested with state and public authority are obliged to disregard the national law, even if subsequent to the ECHR, and apply the ECHR instead (the abandonment of the *lex posteriori derogate legi priori* principle). This was recently taken into consideration in the decision *Habulinec and Filipović v. Croatia*,¹²⁰ in which the ECtHR concluded that in view of the monistic character of the legal system, the applicants' argument that they had no prospect of success because there was a statutory provision preventing the first applicant from having his paternity established bears less significance, since in the Croatian legal system the ECHR has precedence over domestic statutes, and there was already in Strasbourg the case resolving the similar issue. The applicants should have thus, in accordance with the principle of subsidiarity, before bringing their application with the ECtHR, presented their arguments before the national authorities and thus given them the opportunity of remedying their situation. The ECtHR has therefore declared the application inadmissible for non-exhaustion of domestic remedies. This was an attempt of the ECtHR to emphasize the subsidiarity principle and invite Croatian courts for dialog and direct application of the ECHR.

Notwithstanding, the ECtHR is aware that in all states of the former Yugoslavia ordinary courts are still reluctant to apply directly the ECHR. Furthermore, in all states of the former Yugoslavia, the ordinary courts and to somewhat lesser degree the constitutional courts are still struggling with the overly formalistic application of law. Both of these deficiencies affect negatively development and implementation of effective domestic remedies.¹²¹

120. *Habulinec and Filipović v. Croatia* (dec.), no. 51166/10, 4 June 2013.

121. Exactly due to these deficiencies in domestic legal system the Court has refused a unilateral declaration by Croatian Government in *Topčić-Rosenberg v. Croatia*, no. 19391/11, §§ 46-48, 14 November 2013.

The Effective Use of National Remedies and the subsidiary Role of the European Court on Human Rights

Hasan BAKIRCI¹²²

By the end of 2010 with over 160,000 cases pending, the ECtHR had become a "*victim of its own success*". Against that background, the Interlaken, Izmir and Brighton Declarations identified a variety of issues for the effective functioning of the Convention mechanism, ranging from the implementation of the ECHR at domestic level and the execution of the ECtHR judgments, to cooperation between the ECtHR and national authorities. These declarations reaffirmed that the viability of the human rights protection system under the ECHR was based upon the premise of a shared responsibility between the Council of Europe institutions and the Contracting States.

Since the adoption of the Interlaken Declaration in 2010, the ECtHR has successfully carried out the necessary reforms, has made progress in clearing the immense backlog of unmeritorious cases and has now moved to tackle further challenges.

122. Deputy Section Registrar of the Filtering Section at the ECtHR.

The 2012 Brighton Declaration reaffirmed the preeminent role of the ECtHR in protecting human rights in Europe. But at the same time it highlighted the Contracting States' responsibility to effectively implement the ECHR domestically and the subsidiary role of the ECtHR in cases where violations were not remedied at the national level.

The reforms introduced by virtue of Protocol no. 14 to the ECHR (which entered into force in June 2010), in particular the single-judge mechanism, new admissibility criteria to dismiss complaints whose authors have not suffered "*significant disadvantage*" and creation by the ECtHR of a Special Filtering Section within its Registry to make full use of that mechanism produced positive results. These procedural tools and structures have led to a more efficient filtering of incoming applications and speedy allocation of meritorious cases. In addition, the ECtHR's prioritisation of applications and its increasingly frequent use of the pilot judgment procedure showed positive effects.

The number of pending cases has drastically decreased from 160,000 to less than 70,000 currently. The immense backlog of manifestly inadmissible (single judge) cases has almost gone before the set deadline, which was July 2015.

Although the disposal of the single judge backlog gave hope to the ECtHR in order for it to focus on more important cases, there still remains a big obstacle, namely the backlog of almost 33,643 repetitive applications which clog up the ECtHR and take away its resources and time.

The repetitive applications mainly arise from five main categories of systemic issue: a) excessive length of domestic proceedings, b) non-enforcement of final judicial decisions, c) inadequate detention conditions, d) various issues concerning property rights, and e) problems concerning pre-trial detention/detention on remand.

Seven countries account for more than 90% of the repetitive cases on the Court's docket: Ukraine (10,462 applications); Italy (8,052 applications); Turkey (5,045 applications); Russia (2,621 applications); Slovenia (1,462 applications); Romania (1,307) applications); and Serbia (1,149 applications).

Pilot Judgment Procedure and Repetitive Applications

The term "*repetitive application*" denotes an application which follows a pilot or leading judgment where the ECtHR has identified a national dysfunction - systemic or structural problem - in a member state.

The first pilot judgment was delivered in the *Broniowski v. Poland* case which concerned a landowner who was forced to abandon his property after a shift in the country's borders following the Second World War. The dispute originated in a widespread problem which results from a malfunctioning of the Polish legislation and administrative practice affecting 80,000 claimants and 167 pending applications. After finding a violation of the right to property, the ECtHR held that Poland was obliged to provide a remedy at national level that takes into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the ECtHR's finding of a violation so as not to overburden the ECtHR with a large number of applications deriving from the same cause. One year after this judgment, the ECtHR approved a friendly settlement of the dispute, but only after Poland had enacted new legislation that provided compensatory remedies to all of the former property owners.¹²³

The ECtHR's invention of international law's first class action mechanism saved the ECtHR an enormous amount of time and labour and dramatically publicised its determination to find comprehensive solutions to systemic human rights problems.¹²⁴ The ECtHR has since applied the pilot judgment procedure to civil and political rights violations in other Contracting States.

Repatriation of Repetitive Applications

The most appropriate strategy to be followed in situations where the ECtHR delivered a pilot/leading judgment is to wait for the respondent government to set up effective remedies. Once such a remedy has been introduced by the national authorities, retroactively if appropriate, the ECtHR examines the proposed remedy and verifies whether it is an effective one capable of providing adequate redress for the complainants.

When the ECtHR is satisfied with the legislative and administrative measures taken by the respondent government and considers that the new remedy is accessible and provides reasonable prospects of success, it does not examine the applications pending before it but rather asks the applicants to avail themselves of the new remedy in the respondent state.¹²⁵

123. *Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, ECHR 2005-IX.

124. Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a deep Structural Principle of the European Human Rights Regime", *EJIL* (2008), Vol. 19 No. 1, 125-159.

125. *Charzyński v. Poland* (dec.), no. 15212/03, ECHR 2005-V; and *Tadeusz Michalak v. Poland*, no. 24549/03, 1 March 2005.

The new Abbreviated WECL Procedure

A simplified procedure for cases involving well established case law (WECL procedure) is coming into operation for repetitive cases.

As the case law is well-established, the ECtHR has no need of observations on the legal issues and would urge Contracting States to keep any interventions on these cases to a strict minimum and, if any, restricting them to points of material fact not adverted to by the applicant. The ECtHR will also no longer shelve repetitive cases but will implement a “one case in – one case out” strategy. In other words, supported by the use of information technology tools, the repetitive cases will be processed with a fast-track grouped communication and will be disposed of by way of a friendly settlement or a grouped judgment.

The ECtHR aims at the disposal of all the repetitive cases in its docket by the end of 2016, respecting the time limits set by the Brighton Declaration.

From all the above said, it seems that the ECtHR is living up to its responsibility and is operating very well. It is striving to clear the backlog of applications and to enhance the efficiency of its working methods and allocating its limited resources in a manner that allows it to effectively respond to the most pressing general issues.

In order for the ECtHR to accept its subsidiary role, member states have to be the primary protectors of Convention rights. The problem is that it is a two-sided coin. The ECtHR has done its part of the reforms and now it is the Contracting States’ turn to fulfil their primary responsibility. As the recent Report of the Parliamentary Assembly emphasised:

“[T]he current issues threatening the sustainability of the Convention system relate primarily to shortcomings in the implementation of the Convention by States parties. Accordingly, [...] ensuring the long-term effectiveness of the Convention system will be contingent, first and foremost, on making the notion of subsidiarity operable in practice, by reinforcing the implementation of Convention standards at the national level, and guaranteeing the full, effective, and prompt execution of judgments of the Court”¹²⁶.

126. Pozzo Di Borgo Y. (rapporteur), ‘The effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond’, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 2 March 2015, available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21565&lang=en>.

Effective Domestic Remedies as a Prevention of Human Rights Violations: Execution of Pilot Judgments and General Measures

Irene KITSOU-MILONAS¹²⁷

The main objective of this piece is not about discussing in detail the Committee of Ministers' practice and case law regarding the supervision of the execution of pilot judgments, general measures and the introduction of domestic remedies but rather an attempt to sketch out a method based on certain emerging trends¹²⁸ in order to tackle certain specific points.

127. Head of the Unit on the Reform of the Court, Human Rights Intergovernmental Co-operation Division, Human Rights Policy and Co-operation Department; DGI Human Rights and Rule of Law, Council of Europe. The views expressed herein belong solely to the author.

128. Data and information as of March 2015.

First of all, it is important to note that not *all* pilot judgments¹²⁹ require the adoption of domestic remedies. For example, in the *Sulajić v. Bosnia and Herzegovina*¹³⁰ judgment, the ECtHR identified a systemic problem concerning the deficient implementation of the domestic legislation in banks in Bosnia-Herzegovina on the repayment scheme for old foreign currency savings (deposited before the dissolution of the Socialist Federal Republic of Yugoslavia): if state bonds were issued, the deposited savings could have been reimbursed. In its above-mentioned pilot judgment, the ECtHR requested that, within six months of the date on which the judgment became final, government bonds be issued so that any outstanding instalments (or default interest in case of late payment) could be paid.

Secondly, the introduction of a national effective remedy for ECHR violations was requested by the Committee of Ministers in its supervisory function exercised under Article 46 of the ECHR regarding the adoption of general measures, long before the pilot judgment procedure (“PJP”) was introduced. Indeed, the obligation to take general measures aims at preventing violations similar to the one(s) found and may, depending on the circumstances, imply a review of legislation, regulations and/or judicial practice and even constitutional changes. When examining those general measures, the Committee of Ministers paid particular attention to the introduction of domestic remedies and built a case law on the basis of the fundamental text of Recommendation CM/Rec(2004)6 on the improvement of domestic remedies. The aim of the Recommendation was to prevent the ECtHR from being compelled to address a huge number of “*manifestly ill-founded complaints*” simply to provide redress unavailable at domestic level.

In light of this second remark, the natural question would then be how the PJP procedure contributed to the adoption of general measures preventing future violations, and in particular to the introduction of domestic remedies? In light of the study of the relevant judgments,¹³¹ the elements that emerge seem to be construed around three sequences: urgency, prevention and complexity.

129. See Factsheet “Pilot judgments”, Press Unit, European Court of Human Rights, last updated June 2015.

130. *Sulajić v. Bosnia and Herzegovina*, no. 27912/02, 3 February 2010; CM/Res DH(2011)44; procedure closed by the ECtHR in its decision *Josip Zadrić v. Bosnia and Herzegovina*, no. 18804/04, 16 October 2010.

131. The presentation in this paper is not exhaustive; see the list of judgments in the Factsheet cited in footnote 2 above; for the list of pilot judgments rendered in 2014, see Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 8th Annual Report of the Committee of Ministers 2014, p. 84.

I. The Urgent Necessity to Introduce an Effective Remedy within the Timeframe set by the Court

Urgency and Close Supervision

With the indication of a specific deadline within which the measures need to be adopted in order to put in place an effective domestic remedy, the PJP introduced in the supervision process the notion of “urgency”.¹³² This is also why, in the context of its 2010 revision of its working methods, the Committee of Ministers introduced the PJP as one of the criteria required for the *enhanced* supervision of cases.¹³³

However, the urgent treatment of those cases by the ECtHR and the Committee of Ministers does not necessarily mean that the systemic problems identified are new. In fact, the *urgency* often responds to what is *overdue*: systemic problems had been identified by the Committee in groups of similar cases pending before it for a long time, despite the efforts made through its collective supervision.¹³⁴ Those issues are being transformed by the ECtHR into pilot judgments as a means to exert pressure for delayed execution.¹³⁵ In certain cases, this would imply the decision not to adjourn the ECtHR’s proceedings in similar applications in order to remind the respondent state of its obligations.¹³⁶

The cases concerned are examined by the Committee of Ministers very closely, sometimes in all its “Human Rights” meetings until the expiry of the deadline (including when an extension of this deadline has been granted by the ECtHR).¹³⁷ The Committee welcomed a number of success stories with a timely adoption of the remedy, sometimes coinciding with the meeting itself. The swift response by States Parties and the endorsement of the effectiveness of the remedy by the ECtHR in an inadmissibility decision led to the closure

132. The lessons learned discussed under I. relate to the study of pilot judgments requesting the introduction of domestic remedies in cases of the length of proceedings and poor conditions of detention.

133. “Enhanced supervision would only concern cases to which the Committee of Ministers needs to give priority and which would also entail more intensive involvement of the Secretariat”; See documents CM/Inf/DH(2010)45, para. 10 and CM/Inf/DH(2010)3, para. 8.

134. *Via* numerous decisions or interim resolutions.

135. For example, *Vassilios Athanasiou and Others v. Greece*, no. 50973/08, 21 December 2010, in response to the Group of cases *Manios v. Greece*, no. 70626/01, 11 March 2004.

136. E.g. *Rumpf v. Germany*, no. 46344/06, §75, 2 December 2010.

137. See the order of business of the Committee of Ministers’ Human Rights meetings: http://www.coe.int/t/dghl/monitoring/execution/WCD/DHMeetings_en.asp.

of cases or to a change of the supervision procedure (transfer from enhanced to standard supervision procedure).

An interesting nuance regarding the introduction of a domestic remedy was offered by the pilot judgment in the *Ananyev* case¹³⁸ where the ECtHR applied the PJP regarding poor conditions of detention of the applicants in remand centres (SIZO) under the authority of the Federal Penitentiary Service (Article 3) and due to the lack of an effective remedy in this respect (Article 13). As regards the domestic remedies, the ECtHR held that the Russian authorities must produce, in co-operation with the Committee of Ministers, by 10 October 2012, a binding timeframe within which to make available a combination of effective remedies having preventive and compensatory effects and complying with the requirements set out in the ECtHR judgment. Thus, for the first time the ECtHR did not set a deadline for the introduction of the remedy but for a time frame allowing its adoption.

Effectiveness in Practice after the Adoption of the Domestic Remedy

With the endorsement of the remedy by the ECtHR in an inadmissibility decision and the subsequent repatriation of the cases at national level, the execution process does not come to an end. The remedy needs to be tested in practice and be in conformity with ECHR requirements. As the ECtHR noted in its inadmissibility decision in the case of *Taron v. Germany*:¹³⁹

“For reasons of fairness and effectiveness the Court sees no necessity for treating pending cases with this Court differently and to require only applicants of cases lodged after the pilot judgment (Rumpf, cited above) to make use of the new remedy. After the judgment in Sürmeli v. Germany ([GC], No. 75529/01, ECHR 2006VII on 8 June 2006) it had become clear that the existing legal provisions in Germany were insufficient to expedite proceedings and to compensate for protracted proceedings. Since then the German legislator has worked on various ways to comply with the requirements of the Convention which finally resulted in the above mentioned Remedy Act.

However, the Court’s position may be subject to review in the future depending, in particular, on the domestic courts’ capacity to establish consistent case law

138. *Ananyev and Others v. Russia*, no. 42525/07, 10 April 2012; for the status of execution of this judgment, see: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=ananyev&StateCode=&SectionCode=

139. *Taron v. Germany* (dec.), no. 53126/07, 29 May 2012; see also *Garcia Cancio v. Germany*, n°19488/09, 29 May 2012.

under the Remedy Act in line with the Convention requirements (see *Korenjak*, cited above, § 73). Furthermore, the burden of proof as to the effectiveness of the new remedy will lie in practice with the respondent Government.”¹⁴⁰

This reasoning demonstrates the importance of the work to be carried out at domestic level in order to secure the effectiveness of the remedies introduced (compensatory and/or preventive or the combination of remedies) under the supervision of the Committee of Ministers.

In its inadmissibility decision, *Stella and Others v. Italy*¹⁴¹ of 16 September 2014, following the pilot judgment of *Torreggiani and Others*¹⁴² regarding prison overcrowding, the ECtHR noted that the new domestic preventive remedy (a judicial complaint with the judge responsible for the execution of sentences in order to complain of serious breaches of their rights, which included the right to enjoy sufficient living space and appropriate physical living conditions) constituted, *a priori*, an accessible remedy, capable of offering litigants reasonable prospects of success. As to the compensatory remedy, the remedy in question provided for two types of compensation. Individuals who were detained and still had to complete their sentence could receive a reduction in sentence equal to one day for each ten-day period of detention incompatible with the ECHR. Individuals who had served their sentences or in respect of whom the part of the sentence which remained to be served did not allow for full application of the reduction could obtain compensation of 8 Euros for each day spent in conditions considered contrary to the ECHR. The ECtHR held that the reduction in sentence constituted an adequate remedy in the event of poor material conditions of detention insofar as, on the one hand, it was specifically granted to repair the violation of Article 3 of the ECHR and, on the other, its impact on the length of the sentence of the person concerned was measurable. In addition, this form of redress had the undeniable advantage of helping resolve the problem of overcrowding by speeding up detainees’ release from prison. With regard to the financial compensation, the amount of compensation provided for under domestic law could not be considered unreasonable – even if it was lower than that set by the ECtHR – or such that it would prevent the remedy introduced by the respondent state from being effective.

140. Paras 44-45; emphasis added.

141. *Stella and Others v. Italy (dec.)*, no. 49169/09 et al., 16 September 2014.

142. *Torreggiani and Others*, no. 43517/09, 8 January 2013.

In conclusion, the ECtHR considered that it had no evidence on which to find that the remedies in question did not offer, in principle, prospects of appropriate relief for the complaints submitted under Article 3 of the ECHR. However, this conclusion in no way prejudged a possible re-examination of the remedy's effectiveness and the capacity of the domestic courts to establish a harmonised case law that was compatible with the requirements of the ECHR.

Consequently, following the ECtHR's decision in *Stella*, the Committee of Ministers¹⁴³ welcomed the steps taken by the authorities to rapidly put in place the remedies required, in response to the pilot judgment, and underlined the importance of monitoring their implementation. However, the Committee stressed that the authorities should provide information on the functioning of the remedies in practice; statistics showing a consolidation of the positive trends achieved so far; along with information on all other measures aimed at improving conditions of detention.

II. The Need to Adopt Additional Preventive Measures to Address the Roots of the Violation

With the introduction of the remedy, the focus by the authorities, the Committee of Ministers and the Department for the Execution of the Judgments of the ECtHR is shifted towards the heart of the execution process, namely the measures required to redress the roots of the violations at the origins of the systemic problem identified by the ECtHR and not limited to the PJP. The ECtHR's decision in *Stella* serves again as a reference. As the ECtHR noted, compensation does not remove from the state the obligation to conduct the necessary structural reforms to eradicate the root causes of the problem of overcrowding¹⁴⁴. A careful study of the leading cases pending before the Committee of Ministers shows the efforts deployed by all the actors concerned to this effect.¹⁴⁵

143. Decision adopted on 4 December 2014, 1214th Human Rights meeting.

144. *Stella and Others v. Italy (dec.)*, no. 49169/09 et al., §61, 16 September 2014.

145. For example, see *Ananyev and Others v. Russia*, no. 42525/07, 10 April 2012; for the various analyses by the Department for the Execution of the Judgments of the ECtHR see: http://www.coe.int/t/dghl/monitoring/execution/Themes/Add_info/Doc_exec_en.asp.

III. The Added Value of enhanced Co-operation for Pilot Judgments requiring the Adoption of Complex Measures and long-Term Reforms

The study of a specific category of cases regarding the non-enforcement of domestic decisions allowing the compensation or restitution of nationalised properties¹⁴⁶ demonstrates the necessity to explore different avenues to boost a complex process requiring long-term reforms with difficult budgetary implications.

The pilot judgment in the case of *Maria Atanasiu and Others v. Romania*¹⁴⁷ covering a group of similar cases (Strain)¹⁴⁸ already pending before the Committee is an example of such a complexity. The violations found in these cases originated in an important structural problem connected with the ineffectiveness of the mechanism set up to afford restitution or compensation for properties nationalised during the communist period.¹⁴⁹

Considering the scale of the problem, the ECtHR in the case of *Maria Atanasiu* requested the adoption of measures capable of affording adequate redress to all the persons affected by the restitution laws. The ECtHR adjourned the examination of all applications resulting from the same general problem until the adoption of one or several decisions of principle on the measures taken by the government in response to the pilot judgment.

On 5 April 2013, high representatives of the Romanian Government, with the Department for the Execution of Judgments of the ECtHR and the Registry of the ECtHR, carried out in-depth consultations¹⁵⁰ on the draft law prepared

146. With exceptions such as the pilot judgment *Burdov v. Russia (no. 2)*, no. 33509/04, ECHR 2009; see Interim Resolution CM/Res DH (2011)293.

147. *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, 12 October 2010.

148. *Maria Atanasiu and Others v. Romania*, no. 30767/05, 12 January 2011; and *Străin and Others v. Romania*, no. 57001/00, ECHR 2005-VII.

149. The cases in this group mainly concern: the sale by the state of nationalised property to the tenants, without securing compensation for the legitimate owners, despite domestic courts' rulings, between 1993 and 2006, declaring unlawful the acts of nationalisation (violations of Article 1 of Protocol No. 1, see the case of *Străin and Others v. Romania*, 30 November 2005); delayed enforcement by the administrative authorities or their failure to enforce judicial or administrative decisions delivered between 1991 and 2006, ordering the restitution of nationalised property and/or payment of compensation in lieu (violations of Article 1 of Protocol No. 1 and/or of Article 6 §1, see *Sabin Popescu*, no. 48102/99, 2 March 2004 and the *Viasu v. Romania*, no. 75951/01, 9 December 2008).

150. See Memorandum H/Exec(2013)1 + Addendum – Conclusions of the tripartite consultations between high level representatives of the Romanian Government, the Execution Department and the Registry of the European Court on the draft law of March 2013.

by the Romanian authorities in response to the pilot judgment in the case of *Maria Atanasiu and Others v. Romania*, in order to remedy problems in the mechanism set up with a view to the restitution of or compensation for nationalised assets in Romania. The law reforming the reparation mechanism came into force on 20 May 2013. The new law provided, as a general rule, for the restitution of properties, but envisaged a system of compensation in situations in which restitution is not possible. It established a roadmap for the adoption of a number of measures to render the reparation mechanism functional: in particular, it established a number of preparatory measures, including institutional measures, the drawing up of an inventory of available agricultural land and woodland and the setting-up of a National Fund of agricultural lands and other immovable properties.

In the *Preda and Others case v. Romania*¹⁵¹, a follow-up judgment to the pilot judgment, the ECtHR decided that the new law provided, in principle, an accessible and effective framework for redress of the complaints raised in this group of cases, in certain circumstances (para.129 of the judgment).¹⁵² However, the ECtHR stated that the new law did not contain any provisions of a procedural or substantive nature that were capable of affording redress in cases where there were multiple documents of title for the same building, which did not address the situation of former owners who, in the absence of restitution would have the right to compensation, but seem not to have access to that compensation, as the fact rendering the restitution impossible became known after the expiry of the time-limit set for the introduction of a compensation claim (para. 124 of the *Preda* judgment).

Given the positive assessment by the ECtHR and the progress made so far, the Committee of Ministers decided to close the examination of cases concerning situations identified in the *Preda* judgment as covered by the new mechanism and in which all the individual measures have been taken, and to adopt final Resolution CM/ResDH(2014)274. Stressing the importance of ensuring the effectiveness of the reparation mechanism and solving the outstanding issues identified by the ECtHR, it decided to continue monitoring developments in

151. *Preda and Others v. Romania*, no. 9584/02, 29 April 2014.

152. Those are: competing documents of title for the same plot of land, the invalidation of a document of title without challenging the entitlement to restitution or compensation, the issuing of a final decision confirming the entitlement to the compensation of an unspecified amount, non-payment of compensation awarded in a final decision, and protracted failure to give a decision on a claim for restitution.

this regard within the framework of the pilot judgment *Maria Atanasiu and Others* and the other judgments not covered by the above final resolution.

The above explains the reasons for a complex execution process but also the potential of tripartite co-operation among the authorities, the Registry of the ECtHR and the Department for the Execution of Judgments finding the initial breakthrough.

It is also evident that in this field, political and financial difficulties will influence the process¹⁵³ and will render the domestic remedial response slow.¹⁵⁴

Co-operation activities largely supported by the Human Rights Trust Fund are key to address significant or persistent structural problems. These activities can take the form of expertise of different kinds, notably of action plans and draft legislation, and different forms of counselling and training activities. It is evident that activities bringing together the domestic and European actors concerned contribute to the efficient domestic capacity to rapidly execute the ECtHR judgments as put forward by the Committee of Ministers' Recommendation CM/Rec (2008)2.

153. See in that respect the commitment to set up a compensation mechanism, as required by the pilot judgment *Manushaqe Puto and Others v. Albania*, nos. 604/07, 31 July 2012; and the submission in 2014 of the action plan formally adopted by the Council of Ministers: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=ALB&SectionCode.

154. Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 8th Annual Report of the Committee of Ministers (2014), Introduction by the Chairs of the Human Rights meetings.

The “Single Judge Procedure” and the Application of the Revised Rule 47 of the Rules of the European Court of Human Rights

Ana VILFAN-VOSPERNIK¹⁵⁵

With Protocol no. 14, several important changes were introduced into the functioning of the ECtHR. The most notable is the introduction of the formation of the single judge procedure. Previously, the applications which did not fulfil the basic admissibility criteria under Article 35 of the ECHR were examined by a committee of three judges. Now, they are examined by a single judge, assisted by members of the Registry, so called non-judicial rapporteurs in accordance with Article 24 of the ECHR. The single judge formation presents an exception to the rule that the national judge shall sit in a chamber dealing with applications against his or her country.

155. Lawyer of the Registry of the ECtHR, Research Division.

In addition to these formal changes, the ECtHR has made considerable efforts in changing its working methods, including the introduction of filtering incoming cases, where the Registry is trying to identify early potential systemic issues in incoming cases with a view to early consideration of whether they might benefit from a pilot judgment.

A Filtering Section was formed, and within it several teams dealing with such applications lodged against countries with a high number of cases before the ECtHR. A combination of examination of old and newly lodged applications was adopted. As a priority, new applications are dealt with on a so-called “one in – one out basis”, meaning that plainly inadmissible applications are immediately examined and subsequently declared inadmissible in the single judge procedure. For the great majority of countries, the backlog of single judge cases has been eliminated and it was planned that it would disappear completely in 2015.

Current statistics show that the number of all applications pending on 1 January 2015 was 69,900, which represents a decrease of 30 percent since the previous year. 86,000 applications were disposed of in 2014. Most of these applications were decided by a single judge (78,000). On 1 March 2015, there were roughly 7200 pending cases allocated to the single judge formation.

Some statistics in relation to the countries in the Balkan region demonstrate this trend: in the beginning of March 2015, there were approximately 200 applications allocated to a single judge pending against Bosnia and Herzegovina; 150 against Croatia; 20 against “The former Yugoslav Republic of Macedonia”; 300 against Montenegro; more than 1000 against Serbia and 50 against Slovenia.

The single judge acting in respect of Bosnia and Herzegovina, Montenegro and Serbia is the Swedish Judge Helena Jäderblom, the single judge for Croatia is the Austrian Judge Elisabeth Steiner, the single judge for “The former Yugoslav Republic of Macedonia” is the Greek Judge Linos Sicilianos and the single judge for Slovenia is the French Judge André Potocki.

Single judges deal only with clearly inadmissible cases. When in doubt that a ECHR issue arises, the single judge sends the case to a Committee of three judges or a Chamber of seven judges. It has happened that such a case has ended before the Grand Chamber. New inadmissibility issues are dealt with by a Chamber and so are inadmissibility decisions which lead to the disposal of groups of Single judge cases.

Another aspect of procedural subsidiarity which was introduced by Protocol No. 14 may also be worth mentioning: a new inadmissibility ground in Article 35 § 3 (b) according to which an application may be declared inadmissible where the applicant has not suffered a significant disadvantage.

As to the non-exhaustion, in the recent Grand Chamber judgment of *Vučković and Others v. Serbia*¹⁵⁶, the Court recalled the general principles applicable to exhaustion in the following terms:

"It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection."

In the ECtHR system, single judges are the first beneficiaries of a well-functioning system of domestic remedies.

For instance, effective remedies in respect of protracted length-of-proceedings have been introduced in most of the countries and many cases have been decided by a single judge. Of course, after a legislative change, the ECtHR verifies again if the functioning of the remedies fulfils the ECtHR's standards.

Hence, in relation to effective remedies in Slovenia, for example, the general rule of effectiveness was applied to individual complaints to the Constitutional Court. However, in *Kurić and Others*¹⁵⁷, *Berger-Krall and Others*¹⁵⁸ the ECtHR reviewed these principles, still confirming that the constitutional complaint in principle was an available and effective remedy, however, it was not up to the requested standards of availability and effectiveness in those particular situations.

How domestic remedies may drastically change the situation regarding certain States and the number of cases pending before the ECtHR may be well seen in the example of Serbia. Following the judgments in the cases of *Lukenda*¹⁵⁹

156. *Vučković and Others v. Serbia* [GC], no. 17153/11, §§ 69-77, 25 March 2014.

157. *Kurić and Others v. Slovenia*, no. 26828/06, 13 July 2010.

158. *Berger-Krall and Others v. Slovenia*, no. 14717/04), 12 June 2014.

159. *Lukenda v. Slovenia*, no. 23032/02, ECHR 2005-X.

as well as *Mandić and Jović*¹⁶⁰ and the follow-up decisions finding domestic legal avenues effective, many decisions were taken by a single judge and more than 5,400 Serbian cases have been declared inadmissible, thus causing a considerable drop in Serbian cases, from 11,250 to 2,500.

A similar situation happened in the cases of the so-called old foreign currency savings filed against Bosnia and Herzegovina. Following the judgment of *Suljagić*¹⁶¹ and the decision in *Zadrić*¹⁶², 1,500 such cases were decided by a single judge. Similarly, following the leading judgment of *Đurić*¹⁶³ on war damages, once the Committee of Ministers is satisfied that the judgment is properly executed, 400 cases pending before the ECtHR may be declared inadmissible, while there is an estimate that domestically there are potentially some 10,000 such cases.

Consequently, once shortcomings have been identified in the national system and a response by either the national legislator or the domestic judiciary given, it is the single judge who, after a decision on the principle of compatibility with the ECCCHR criteria, will deal with the bulk of such cases, and dispose of them in large numbers.

Finally, the ECtHR has been criticised that the reasons given in the letter informing the applicant about the rejection of the application are very brief and uniform, giving no information about particular inadmissibility grounds. While the Registry is aware of possible shortcomings of such an approach, there are good reasons for it, and mostly come down to the rationalisation of resources to be used in cases which should not have come to the ECtHR in the first place. Nonetheless, given that the number of pending cases seems to have become more manageable, there are initiatives that this may be changed, however, it is too early to discuss these initiatives at the moment.

What is important to be remembered is that, regardless of the critiques, the single judge procedure remains a judicial procedure, and the decision of a single judge is by its nature a decision of the ECtHR.

Another important change introduced in January 2014 is a revised version of Rule 47 of the Rules of ECtHR, imposing stricter criteria on applicants. In

160. *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, 20 October 2011.

161. *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, 3 November 2009

162. *Zadrić v. Bosnia and Herzegovina*, no. 18804/04, 16 November 2010

163. *Juhas Đurić v. Serbia* (revision), no. 48155/06, 10 April 2012

accordance with these changes, the application should be lodged on a new, downloadable, application available on the ECtHR' website. The applicants should fill in all fields and append all necessary supporting documents. They must also provide a signed authority form if they are represented and sign the application form.

The consequence of the failure to comply fully with the new strict requirements of Rule 47 is that the application will not be allocated to a Court formation for decision (save for limited exceptions), and the applications will be disposed of without being given a case number. Out of 52,758 new applications received in 2014, 23 per cent (12,191) in general failed to comply with the revised Rule.

However, it is interesting to note that the "no acceptance" ratio was slightly higher in 2014 for most of our countries, 39 per cent for Bosnia and Herzegovina, 35 per cent for Croatia, 34 for "The former Yugoslav Republic of Macedonia", 47 per cent for Montenegro and 31 per cent for Slovenia. Only Serbia was below the average, with 19 per cent.

The most common grounds of rejection in practice have been: failure to submit complaints on the new application form (for instance, this is the main reason for rejection for Slovenia and also in respect of Bosnia and Herzegovina and Montenegro); failure to provide documents concerning the decisions or measures which the applicant is complaining of; failure to provide a statement of violations; lack of any statement of compliance with the admissibility criteria; and failure to provide documents showing that the applicant has complied with the obligation to exhaust available domestic remedies. However, there is also room for exceptions under Rule 47 § 5 and they were indeed applied in a number of situations.

The rejection made under Rule 47 is an administrative rejection and the applicants may come back within the 6 months' time-limit. They are taken under the responsibility of the Registrar of the Filtering Section, according to guidelines approved by the Plenary Court and under the supervision of the President of the ECtHR who is consulted in all cases which raise new aspects of the application of the procedure or which are borderline or sensitive in some way.

The applicants or their representatives are informed by a detailed letter for which reason (or reasons) the application was not registered. These letters should be carefully read. It would also be wise not to wait for the last moment in order to lodge an application. Under the revised Rule 47 § 6, the date of introduction of the application for the purposes of the 6 months' time-limit is no longer the date of the first letter introducing the substance of a case but the date of despatch

of the full and complete application. If the application is after the exhaustion of domestic remedies and in advance, the applicants have enough time to re/lodge the application, correcting the initial mistake. The Registry does not keep wrongfully lodged applications, so all documents should be sent again.

Finally, it is worth mentioning the ECtHR's endeavours in the dissemination of the case law.

In November 2014 the third updated edition of the *Practical Guide on Admissibility Criteria*¹⁶⁴ which describes the formal conditions which an application to the ECtHR must meet was published. This new edition covers case law up to 1 January 2014 and the stricter procedural conditions for applying to the ECtHR which came into force on that date. The previous editions of the Admissibility Guide were translated into more than twenty languages with the assistance of governments and various other partners.

The ECtHR Research Division also produced several case law guides (on Article 4, Article 5, two on Article 6 on both the civil and criminal-law aspects). Work has also been started on the preparation of further case law guides covering Articles 2, 7, 8, 9 and Article 1 of Protocol No. 1, with relevant general principles and the recent case law. Judges and lawyers are using them internally. In addition, nearly sixty factsheets have now been prepared on various ECHR-related topics. Further publications in collaboration with other partners were already prepared or are in preparation. The requirements for a national remedy to be effective in respect of different Articles can be found there. This should help national courts to develop adequate reasoning, following the Strasbourg assessment criteria.

The importance of translation into domestic languages was also acknowledged and resources have been dedicated for this, both in Strasbourg and at the domestic level.

It is also noteworthy that the ECtHR is currently working on developing a network of the Supreme Courts of member states, in view of the entry into force of Protocol No. 16. Given the early stage of this initiative, however, it is too early to discuss it in detail, in particular given that the Protocol is yet to come into force. However, it is an important step towards ensuring good and effective co-operation of the ECtHR and national judiciaries, and will certainly bring the compliance with the ECHR at the national level one step further.

164. *Practical Guide on Admissibility Criteria*, Council of Europe/European Court of Human Rights, 2014 http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

OVERVIEW OF REGIONAL PRACTICES

Domestic Legal Remedies: the Constitutional Court at the Crossroads of the National Legislation and Convention Mechanism

Jasna OMEJEC¹⁶⁵

The development of the principle of subsidiarity started with the *Belgian linguistic* case in 1968¹⁶⁶. Years of a more sophisticated approach to the principle ensued, culminating with the full development of the doctrines of margin of appreciation and fourth instance. The process was intensified with the Brighton Declaration in 2012, and will be formally put to an end with the entry into force of Protocol No. 15, when the principle of subsidiarity will be inserted into the preamble of the ECHR.

The legal education in the region, based on a socialistic interpretation of Kelsen's legal positivism and strict formal legal analysis, was under no influence whatsoever of the jurisprudence of the ECtHR. Hence, even though legal education was

165. President of the Constitutional Court of the Republic of Croatia. The opinions expressed here are, however, personal opinions of Ms Omejec and are not to be taken as the official positions of the Constitutional Court of Croatia.

166. *Case Relating to certain aspects of the laws on the use of languages in education in Belgium*, judgment of 23 July 1968, at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57525>.

of good quality, it was burdened with strict “textual” or “grammatical” positivism. The ECtHR, however, seeks changes. It seeks stepping away from such positivism and accepting a larger number of different, perhaps new, principles of legal interpretation, as well as accepting a new approach to law. It also requires new methodologies of dealing with cases. These are requirements that demand a radical change of legal awareness and a switch in legal thinking. Moreover, experience tells us that even keeping abreast of and relying on ECtHR case law will not suffice if the legal positions expressed therein are not in their substance accepted and if they do not become our inner legal reasoning.

Having this in mind, introducing the ECHR control mechanism as a subsidiary mechanism could not be a more difficult and complex requirement. Indeed, it may be seen as the most difficult international-legal requirement put before the states in the region.

It might, hence, be of value to illustrate the path of the Croatian Constitutional Court on their way towards accepting the subsidiarity of the ECHR supervision mechanism. It can be divided into three periods, with reference to the protection of the right to a hearing within a reasonable time.

There have been three phases of development of the legal thinking in the Croatian Constitutional Court.

In the first phase, which led to the recognition of the right to a reasonable length of proceedings in Croatia, the Constitutional Court was expected to change its case law to accommodate the requirements of the ECtHR case law in relation to rights already existing in the Constitution.

In 1999, the new Constitutional Act on the Constitutional Court of the Republic of Croatia recognised the right to a trial within reasonable time and provided the protection of this right by means of the constitutional appeal. However, already in 2001, in the *Horvat* case¹⁶⁷ the ECtHR found that the constitutional complaint as defined in 1999 could not be considered an effective domestic legal remedy for cases involving the right to a hearing within reasonable time. This was also the first judgment the ECtHR adopted against Croatia.

In implementing the *Horvat* judgment, in March 2002 the Croatian Parliament amended the Constitutional Act, and introduced a “new” constitutional complaint against unreasonably long proceedings. Three months after the adoption of these amendments, the ECtHR adopted a decision in the case of *Slaviček*¹⁶⁸,

167. *Horvat v. Croatia*, no. 51585/99, ECHR 2001-VIII.

168. *Slaviček v. Croatia* (dec.), no. 20862/02, ECHR 2002-VII.

which declared the application inadmissible, in view of the fact that a new remedy had been introduced in Croatia, finding the remedy available and effective. But this is when the troubles started.

Finally, the ECtHR started successively declaring the constitutional complaint from 2002 as an inefficient domestic remedy in relation to certain types of situations, including in relation to: already finalised proceedings; unreasonable length of enforcement proceedings; proceedings before the Constitutional Court; administrative proceedings; or the amount of compensation awarded to the applicant. In all these circumstances, and in all these cases, the Croatian Constitutional Court has had a tough assignment.

Following such decisions, the Constitutional Court was bound to start changing its position, or rather: its competences to decide on reasonable length of certain kinds of proceedings, so as to make them in line with the findings of the ECtHR. Upon reflection, however, those challenges were quite simple, given that the right to reasonable length of proceedings was guaranteed by the Constitution itself, and with each intervention in order to bring the case law in line with that of the ECtHR, the Constitution was there to be relied upon.

The second phase was much more difficult, when the Constitutional Court needed to start interpreting the Constitution broadly, in order to follow the ECtHR case law.

One good example of this, second phase, is the right to home. This right is guaranteed by Article 34 of the Croatian Constitution. But, interpreted grammatically, this protection is only provided to a narrow segment of the right to the protection of home from illegal search. And for a long time, this is how this provision was interpreted by the Constitutional Court. However, with the judgments of the ECtHR on Article 8 of the ECHR, the Constitutional Court needed to deal with the problem. A solution was found in the interpretative potentials of the Constitution, by interpreting Article 34 paragraph 1 of the Constitution in light of Article 16 which deals with the principle of proportionality, at the same time neglecting other provisions. However, finally the Constitutional Court started relying directly on Article 8 of the ECHR, dealing with its own cases in accordance with the Strasbourg case law.

The third phase is related to situations when the Constitutional Court cannot base their decision on a constitutional norm, while the ECtHR is finding violations in such cases.

For example, the Croatian Constitution provides that the Constitutional Court decides only on the constitutional complaints against decisions of public authorities in individual cases, where such decisions violate human rights and fundamental freedoms. Hence, there is a requirement for a formal, written, individual decision. Nonetheless, violations may be made by mere actions or omissions of public authorities, and not only through formal written decisions. An example of such a situation is prison conditions or other forms of ill treatment, as well as ineffective investigations.

Due to the lack of jurisdiction for the Constitutional Court to decide on violations committed by acts and omissions of public authorities, the high number of judgments of the ECtHR in relation to such violations could not be a surprise¹⁶⁹.

The Constitutional Court has been trying to tackle this problem and took the hard way by making some radical moves in order to change their jurisdiction – without changing the normative framework – and make it compliant with the case law of the ECtHR. An example is a decision¹⁷⁰ where the Constitutional Court found a violation of the prohibition of ill-treatment of a person deprived of liberty, in its procedural aspect, where none of the items were decided on the merits – finding a violation, awarding compensation and ordering an investigation – and were not founded on the domestic legislation.

It is also important to emphasise that, due to the slowness of the legislator, the Constitutional Court starts creating new domestic legal remedies by its jurisprudence, in order to prevent future violations of the rights from the ECHR. And this is one of the forms or ways to achieve the principle of subsidiarity. One such an example is a recent decision in the case of *Hršum*¹⁷¹ where the Constitutional Court created new legal remedies so that legal remedies that used to be guaranteed to prisoners were extended to also be applicable to persons held in pre-trial detention. The Constitutional Court also decided who will decide on those rights.

169. See judgments in relation to Article 2 of the ECHR: *Kudra v. Croatia*, no. 13904/07, 18 March 2013; *Bajić v. Croatia*, no. 41108/10, 13 February 2013; *Skendžić and Krznarić v. Croatia*, no. 16212/08, 20 January 2011; *Jularić v. Croatia*, no. 20106/06, 20 January 2011; *Starčević v. Croatia*, no. 80909/12, 13 November 2014; *Jelić v. Croatia*, no. 57856/11, 12 June 2014. And judgments in relation to Article 3 of the ECHR: *Cenbauer v. Croatia*, no. 73786/01, ECHR 2006-III; *Testa v. Croatia*, no. 20877/04, 12 July 2007; *Štitić v. Croatia*, no. 29660/03, 8 November 2007; *Piličić v. Croatia*, no. 33138/06, 17 January 2008; *Longin v. Croatia*, no. 49268/10, 6 November 2012; *Lonić v. Croatia*, no. 8067/12, 4 December 2014.

170. Decision no. U-III-4182/2008, U-III-678/2009 of 17 March 2009.

171. U-III-6559/2010 od 13. studenoga 2014

What the Constitutional Court does in such situations is indeed leaving the strict framework of the national legal order and taking over the protection of the ECtHR as their own, acting so it becomes a quasi-ECtHR at the national level.

Of course, in such a situation, the question of the protection of national legal orders is immediately raised, and in that light the counter-doctrine of the margin of appreciation gains importance. As a conclusion, it is important to reply to two questions, which are related to the requirements of subsidiarity of the ECHR control mechanism.

The first question is: what is the principal problem in the legal life of Croatia today, regarding the principle of subsidiarity of the ECHR control mechanism? One suggestion may be that the biggest problem is the absence of full awareness that, beside the Constitutional Court, all other national institutions, in particular courts of regular jurisdiction, need to act as bearers of the European architecture of human rights protection, and have to, together with the ECtHR as a strong member of this joint effort, create a European network of knowledge.

The other question is: which problems there are within the Constitutional Court itself when it comes to the realisation of the principle of subsidiarity of the European control mechanism? The largest problem is that the Constitutional Court is often not able to see and recognise the problem which might subsequently be detected by the ECtHR and find a violation. In other words, the Constitutional Court still fails to fully accept the way of judicial thinking which is inherent to the ECtHR. This is a slow developing process which requires a change in legal consciousness.

An additional problem is in the still underdeveloped methods of interpretative argumentation. As noted above, the Constitutional Court may be low in developing creativity and observing issues contextually and teleologically.

However, unlike the other institutions in Croatia, the Constitutional Court is at least moving towards creating a European constitutional space in Croatian circumstances.

It is important to note, however, that the coin of subsidiarity has a flip to it. It is not necessary to elaborate on how difficult it is to navigate through the rules applicable in the ECHR supervision system. Exceptions to general rules are more and more imaginative, and the critique directed against the ECtHR today is quite serious, in particular bearing in mind that such criticism is coming from old member states.

The critique is well-known and may be summarised through four main groups of issues: 1) violation of the fourth instance doctrine and frequent replacement of the assessment of national courts with their own assessment; 2) unclear criteria regarding the margin of appreciation; 3) losing energy on technical issues and unnecessary details; 4) lack of foreseeability regarding the procedural subsidiarity, i.e. regarding the requirement of exhaustion of domestic remedies, but also in relation to the substantive subsidiarity, which in relation to Croatia may be very well seen at the example of the judgment of *Oršuš and others*¹⁷².

Prof. Wildhaber emphasised a number of times that the ECtHR needs, in modern circumstances, to concentrate its efforts to 'decisions of principle', decisions which create jurisprudence since only leading judgments, principal judgments, judgments which contribute to human rights jurisprudence across Europe, help build up the European 'public order'. It is these judgments which enable the Court in its innate 'constitutional' role to decide on issues which are in their essence questions of public policy.¹⁷³

In the words of the Judge Angelika Nussberger, "*national judges are drivers, and the directions are clearly given*". That is the 'compliance with the ECHR. The ECtHR judgments are guidelines. They should, like a quiet voice in the navigation system, say 'turn left', but national judges can still chose a different path and arrive at the same destination, since they know the field better. Navigation systems will, in principle, accept the choice of the national judge, and adjust accordingly. But, it might also warn that the path chosen by the judge will not take to the desired destination. In that case, the quiet voice should say 'Please turn around and go back to the right way'.

Only knowledge and developing one's own legal culture can bring progress. Hence it should be merged into what our German colleagues call *Lernverbund* – an alliance to learn. Wisdom, dialogue and raising awareness of democratic values and the European legal culture, which are devotedly being transposed by the ECtHR, are in this difficult period the most important, if not even crucial for, our continent. This is why judgments of the ECtHR need to be respected supported and enforced, even when we do not agree with them. Each responsible Council of Europe member states should take seriously the principle of subsidiarity. For genuine European partners it would be wise in these difficult times to safeguard the joint foundations of Europe as the most valuable thing they have.

172. *Oršuš and Others v. Croatia*, no. 15766/03, 16 March 2010.

173. Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, N.P. Engel, 2002.

The Efficiency of Protection of Human Rights and Freedoms in Montenegro¹⁷⁴ (normative framework and jurisprudence)

Desanka LOPIČIĆ¹⁷⁵

Democracy is necessary, but it is not a sufficient precondition for the safeguarding of the rule of law and therefore it is also necessary to have a protection mechanism for assessing the contents of key areas of human freedom and dignity. Here one has to emphasise the importance of decisions by international tribunals, in particular judgments of the ECtHR, for the countries which have short and insufficient experience in democracy and protection of human rights. Those are the countries which have passed

174. For decisions mentioned in the text, please refer to the website of the Constitutional Court of Montenegro.

175. President of the Constitutional Court of Montenegro.

through the phase of “real socialism”, where human rights and freedoms, according to the ruling ideology, did not have an important place.

The Preamble of the Constitution of Montenegro, adopted on 22 October 2007, specifies the main normative principle – “*commitment of the citizens of Montenegro to live in a state in which the basic values are freedom, peace, tolerance, respect for human rights and liberties, multiculturalism, democracy and the rule of law*”. In its basic provisions the Constitution stipulates that Montenegro is a sovereign civil, democratic, ecological, state of social justice, based on the rule of law. Under Article 6(1) of the Constitution the state guarantees protection of human rights and freedoms, and under Article 8(1) it prohibits any direct or indirect discrimination on any ground. More than a third of the Constitution’s text refers to the guarantee of freedoms and human and civil rights. The Chapter “Human rights and Liberties” specifically defines individual human rights and principles and mechanisms for their protection. The Constitution guarantees equality of all citizens before the law, regardless of any particularity or personal feature, the equality of women and men and developing of the policy of equal opportunities, the right to legal remedy, right to legal aid and a sound environment.

In almost five decades, the only source of constitutional review in Montenegro has been, in essence, the text of the applicable Constitution, and today those sources include *jus cogens* norms and endorsed international treaties, as well as the practice of international institutions supervising the implementation of international human rights standards. First of all there is the jurisprudence of the ECtHR, as a specific constitutional court which has given its contribution to the rise of constitutional law in European countries to the position of the most significant area of law and the constitutional review of public authorities to the level of the highly important area of legal and political activity. “*Dynamics of administration of constitutional law continues transforming the nature of legislative and judicial authorities*”. This is particularly important to Montenegro as a member state of the Council of Europe in terms of respect and ensuring protection of human rights and freedoms according to standards developed primarily through the ECtHR case law and Montenegro as a candidate country for European Union accession with regards to setting and application of fundamental principles and solutions on which the European law is based.

For the first time the Constitution expressly defines that “*the ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal system, shall have supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation*”. The said constitutional order indicates that Montenegro,

recognising international treaties as an integral part of its legal system, has joined the countries which have changed their attitude towards international law. In the part of the Constitution focused on constitutionality and legality it has been established that a law has to be in compliance with the Constitution and ratified international agreements, and other regulations must be in compliance with the constitution and the law. The Constitutional Court's jurisdiction, in the area of abstract review has been extended to ruling on compliance of laws with the Constitution and endorsed and published international treaties.

The ECHR, as the most important ratified international treaty in the field of the protection of human rights and freedoms, is an integral part of the internal Montenegrin legal system, and thereby directly applicable and, according to the Constitution, hierarchically supersedes other laws.

The primary task of Signatory States to the ECHR, their courts in particular, is to apply and ensure the ECHR effectiveness in their national law. This principle is clearly expressed in different parts of the Convention, Articles 1, 13, and 35. It is often reasonably pointed out that the review by the ECtHR "*should not replace but reinforce national legislation*". It concerns "*positive activism in favour of human rights protection*". Of course, the ECtHR should ensure that it follows the principle of exhausting all national law legal instruments as well as the principle of subsidiarity. Similarly, as Professor Dimitrijević emphasised, one must take into account the area for assessment of the state and cultural framework of countries concerned.

In the process of review of national legislation against international standards in the field of protection of human rights, a number of amendments to the applicable laws have been adopted by the Parliament of Montenegro, particularly in the field of criminal law and criminal procedure, execution of criminal sanctions, equality of genders, protection of children's rights, protection of displaced persons and refugees, women, including victims of violence, elderly persons, disabled persons, members of minorities, etc. In these fields the executive authorities have adopted action and strategic documents practically ensuring that the legal mechanism for the protection of human rights and liberties is continuously improving.

The Constitution of Montenegro in its entirety projects the vision of a social order founded on values of equality, freedom, justice, dignity and related social and moral values. The Constitution has further recognised the principle of judicial constitutional review as one of the essential achievements of the rule of law. This was mostly supported by the constitutional provisions on

functions and powers of the Court in the domain of ensuring the supremacy of the Constitution, protection of human rights and freedoms, as well as various disputes of highest social and political importance. The effect of the mentioned constitutional solutions, and subsequent decisions of the Court which followed in the recent years regarding protection of fundamental principles and values on which the modern constitutional system of Montenegro is based (rule of law, division of power, independence of judicial authorities, political pluralism, etc.) including those related to protection of human rights and freedoms, has clearly shaped up the new position of the Constitutional Court.

The main (original) authority of the Constitutional Court of Montenegro in protection of fundamental rights and freedoms is reflected in the right of the Court to remove a law, other regulation, or some of their individual provisions from the legal system when it finds that the law or any other regulation is not in compliance with the Constitution due to formal or essential-substantive reasons. Revoking such acts, the Court ensures protection or compliance with the Constitution and its superiority in the legal system, and brings a legislator back to the constitutional framework. Following the jurisprudence of the ECtHR, and starting from the notion of an autonomous concept of "the law" which this Court has defined within the meaning of ECHR provisions, the Constitutional Court has started annulling (cassation) not only the provisions of laws formally and substantially in contravention of the Constitution, but also those provisions of laws which do not satisfy specific requirements and standards with respect to "clarity and accuracy", or "comprehensiveness", "likelihood" and "predictability".

Some decisions rendered by the Constitutional Court in this field have directly caused the passage of new, or amendments to some, laws. Namely, after the announcement of the Court of Cassation's decision, some unconstitutional provisions of some laws or entire laws were eliminated from the legal system, causing a legal gap which required urgent legislative action.

In support of the judicial, legal aspect of constitutional review by the Constitutional Court as the basic one, and its independence and neutrality, today this institution cannot be deprived of deciding the disputes dealing with issues of general political significance which require that the Court utilises its expert approach to interpretation of constitutional norms. The Constitutional Court's role in ruling on such disputes also includes ensuring "authentic reading" of the Constitution and leading and directing constitutional reality toward constitutional norms as a desirable goal to "an optimum extent". "Abstract judgments depending on time and space may not exist. Political culture of each country has significant impact". The Court is rightfully expected to bring constitutional principles into

rational connection to the democratic constitutional order, particularly in situations when constitutional norms and reality are not in concordance. This is why the Constitutional Court of Montenegro is much more inclined today than before to the interpretation of the so-called basic principles, i.e. fundamental constitutional principles directly relying on international standards, ensuring and facilitating the Court to gain wider space in exercising its function of "a guardian" of the Constitution, or the main constitutionality reviewer.

The Constitutional Court of Montenegro regularly refers to jurisprudence of the ECtHR in its decisions, not only in the cases against Montenegro, but also in cases against other contracting states. Such approach of the Constitutional Court has supported currently common opinion that the contracting states should respect and execute the ECtHR judgments, delivered in their cases, as well as the case law which the ECtHR has and develops through judgments which result from its rulings on cases against other states. By doing so, the Constitutional Court of Montenegro directly accepts and applies the so-called "interpretational authority" of a judgment the ECtHR regardless of the state against which the judgment is delivered. Accepting "the interpretational authority", i.e. judicial activism, stemming from the ECtHR's evolutionary interpretation, the Constitutional Court accepts its role as a constitutional standard creator on one hand, and its interpretation of the ECHR, on the other "as a constitutional instrument of European public law". By accepting and applying the ECtHR's opinions it further informs and educates both its judges and all other addressees to whom its judgments and decisions refer, in the same manner as it does by its evolutionary interpretations and activist position taken based thereon.

It is the interpretation of basic constitutional principles on which the constitution-committed order of modern Montenegro is based; through a number of decisions, the Constitutional Court has largely contributed to their implementation in practice. In that regard, in the decision U-I No. 35/10 dated 28 February 2014 - constitutionality review of the provision in Article 34(3) of the Energy Act pertaining to arguments by applicants that the application of the challenged provision of the Act violates provisions of international agreements referring to international standards on autonomy and independence of an energy regulatory authority, the Constitutional Court has found that the challenged provision of the Act is not in contravention of provisions of Article 8(1) of the Constitution, Article 14 of the ECHR, and Article 1 of Protocol No. 12 to the ECHR, guaranteeing prohibition of discrimination. Taking into account the possibility of the European law interpretational effect, the Constitutional Court assessed that the challenged provision of Article 34 (3) was not in contravention of provisions of

Article 35(5) of the Directive 2009/72 EC of the European Parliament and Council dated 13 July 2009, prescribing requirements for the member states for ensuring a regulatory authority independence. Namely, provisions of Article 35(5) of the Directive, inter alia, set forth that the Board members, or, in absence of the Board, members of the top management may be relieved of duty during their mandates only if they do not satisfy the requirements under this Article or are accused for mismanagement pursuant to the national act, because these provisions do not rule out the parliamentary supervision of the authority's operations, and the sanction due to failure to comply with requirements set by the national act.

The Decision U-I No. 14/11, dated 23 July 2014 – constitutionality review of provisions of Article 2(2), Article 3(1), (3) and (4) and Article 4 of the Law on Protection of State's Interests in the Sector of Mining and Metallurgy. The Constitutional Court has revoked the challenged provisions of the Law, established a violation of principle of division of authority, right to a fair trial before an independent and impartial court, violation of assumption of legal safety and legality, rule of law principle and assessed that the challenged provisions of the Law do not satisfy the legality standard, within the meaning of ECtHR's opinions:

"The Constitutional Court has found that in violation of the mentioned Constitution and Convention principles, through challenged provisions of Article 3 (4) and Article 4 of the Law, the legislator had conditioned the Court's judgment (on selling to a strategic investor and conclusion of a sales agreement) by a prior approval by the Assembly of Montenegro, i.e. conditioned the State that only following the approval by the Assembly of Montenegro the legal entity might be bought off. Providing itself with powers contained in the challenged provisions of Article 3 (4) and Article 4 of the Law, the Assembly of Montenegro, in the opinion of the Constitutional Court, was constituted in violation of the Constitution, as a new authority of the bankruptcy procedure, with unacceptable degree of arbitrariness in the proceedings concerned. In addition, by the challenged provisions of Article 2 (2) and Article 3(1) of the Act, the legislator denied the right to select the most favourable selling model, pursuant to Article 134 (2) of the Law on Bankruptcy, i.e. reduced the scope of powers to the authorities in bankruptcy proceedings which had been vested in them by the Law".

In the case U-I No. 14/11, dated 23 July 2014 - review of constitutionality of provisions of Articles 10, 11, and 26 of the Public Assembly Act, the Constitutional Court has revoked the challenged provisions of the Act and found the violation of rule of law principle, right to peaceful assembly and assessed that the challenged provisions do not meet the legality standard, within the meaning of the ECtHR's opinions:

"In the case at hand the Constitutional Court has found that no urgent social need exists for absolute ban of peaceful assembly, i.e. "an urgent social need", to legally (generally, by blanket ban, absolutely, and a priori), ban peaceful assemblies, within the meaning of Article 11 (2) of the European Convention, as it was done by the legislator through the challenged provisions of the Law. The Constitutional Court has found that even the challenged provisions of Articles 11 and 26 of the Law, giving discretionary powers to the competent authority (the police), to ban peaceful assemblies and public events, to assess the locations of assemblies, existence of real threat (...) and the like, without legally defined criteria, do not satisfy the legality standard, with respect to the mentioned ECtHR's opinions. The law which allows uncertainty regarding the final effect of its provisions, cannot be considered either as the law based on the rule of law principle, or the law which establishes the principle of legal certainty and predictability."

In the Decision U-I No. 34/11, dated 23 July 2014 - an abstract constitutional review of the provision of Article 257 (2) of the Criminal Procedure Code (Official Gazette of Montenegro, Nos. 57/09. and 49/10.), in the section reading: "request from the entity delivering telecommunication services to establish identity of telecommunication addresses that have been connected", (the so-called listing), the Constitutional Court has revoked the challenged part of the Code provision, and found the breach of the right to confidentiality of letters, phone conversations and other communication means and the right to respect for private and family life, home and correspondence. Although the challenged provision has a legitimate goal (violence and crime prevention), in the Constitutional Court's opinion it is in contravention of the principle of judicial supervision under Article 42 (2) of the Constitution and Article 8 (2) of the ECHR, leading to conclusion that a court is the only authority authorised for approval of application of such actions, i.e., that the court alone may allow deviations from confidentiality as defined by Article 42 (1) of the Constitution.

In the case U-I No. 49/11. and 59/11., dated 25 December 2014 – abstract constitutionality review of the provision of Article 2(1) of the Decision on Forms of Social and Child Protection the Constitutional Court has revoked the challenged provision of the Decision and found the violation of Constitution and ECHR principles, under Article 8 (1) and Article 17(2) of the Constitution, Article 14 of the ECHR and Article 1 of the Protocol No. 12 to the ECHR on general prohibition of discrimination and equality before the law:

"In the case at hand, the Constitutional Court has found that the challenged provision of Article 2 (1) of the Decision, which conditions the right to social and child protection

to those persons residing in the territory of the Capital, by having Montenegrin citizenship, is of discriminatory nature. Specifically, the mentioned provision of Article 2 (1) of the Decision rules out the possibility of exercising the right to social and child protection to all persons who do not have Montenegrin citizenship or if they are persons which do not have any citizenship, although they reside in the territory of the Capital and meet other stipulated requirements for obtaining that right. By establishing a different, more favourable regime for persons having Montenegrin citizenship the decision maker has discriminated against the persons who do not have Montenegrin citizenship and the persons who do not have any citizenship, or the persons who have the status of a foreigner with approved temporary residence or permanent residence, and are in the same legal situation, the status of socially vulnerable persons and have residence in the territory of the Capital. The difference established between the persons who have Montenegrin citizenship and all other persons who do not have Montenegrin citizenship and reside in the territory of the Capital and are socially vulnerable persons, in the Constitutional Court's opinion has no objective and sound reasons in terms of possibility of exercising of those rights. The Constitutional Court has also assessed that there is no allowed constitutional and legal or lawful-legitimate goal, to justify the challenged citizenship-based discrimination, that is, inequality in exercising of the rights to social and child protection, based on personal particulars of the Capital residents."

The biggest novelty with respect to change of role and competence of the Constitutional Court of Montenegro based on the 2007 Constitution, was introduced by provisions defining direct protection of human rights and freedoms by the Court via constitutional complaint. The Constitutional Court of Montenegro, as a *sui generis* body, has been assigned a significant role to remove violations of human rights and fundamental freedoms guaranteeing individual rights and freedoms and harmonising national legislation with international standards in the field of human rights protection.

Although the constitutional complaint expressly defined by the text of the Constitution as a tool for legal protection before the Constitutional Court, as a whole, does not challenge the main role of the Constitutional Court which reflects in the abstract review of constitutionality and legality of all general acts in the Montenegrin legal system, it definitely "dilutes" to a certain extent, the Constitutional Court concept. It follows from the Constitution that the constitutional complaint is a specific legal remedy against the violation of constitutional right or freedom allowing entities, which deem that such right has been violated and denied to them, to address the Constitutional Court under certain conditions.

The Constitutional Court rules on a constitutional complaint regarding the violation of human rights and freedoms guaranteed by the Constitution after all effective legal instruments have been exhausted.

The Constitution does not define an entity entitled to file a constitutional complaint (*ratione personae*), i.e. the entity which has capacity to file a complaint (legitimacy to file a constitutional complaint). The Law recognises such right to “every person”, whose human right and freedom guaranteed by the Constitution have been violated by an individual act, an act by a state authority, public government authority, local self-government authority, or a legal entity exercising public authorities has decided on his/her rights, obligation, or a lawful interest. It is not disputable that a constitutional complaint may be filed by a physical persons-national and foreign legal persons entitled to rights and freedoms guaranteed by the Constitution, as well as other persons in accordance with a written authorisation by a person filing a constitutional complaint.

The Law also contains other admissibility requirements for filing a constitutional complaint which are not expressly defined, but fall under the general term of the so-called “other procedural requirements”, assessed in every specific case, in accordance with other procedural laws and case law of the ECtHR. In rendering its decisions, the Constitutional Court is “bound” by the request from the constitutional complaint with respect to establishing a breach of a right or freedom.

The aforementioned leads to the conclusion that the framer of the Constitution in defining the said solution took the position that the ruling of the Constitutional Court of Montenegro on a constitutional complaint may not (and must not) bring this court to the position of a state supervision body, and also the body which protects human rights and freedoms only in theory. The introduction of a constitutional complaint as an additional and subsidiary legal instrument provides that the citizens may not “skip” regular constitutionally and legally stipulated proceedings in protection of his/her rights and interests before courts and other competent authorities in order for them to directly address the Constitutional Court, on one hand, and that in Montenegro, on the other hand, no constitutionally guaranteed human right or freedom may remain legally unprotected. Such nature of the constitutional complaint, as a legal instrument, is necessary because on the contrary its introduction would lead to yet another legal protection instrument filed to courts and other state authorities (the third or fourth level), and the constitutional complaint itself

would lose the nature of “ultimate, extraordinary legal instrument” filed only for the purpose of protection.

Once the Constitutional Court has found that the challenged individual act has violated any human right or freedom guaranteed by the Constitution, it will admit the complaint and revoke that act, in its entirety or partially, and remand the case to the authority which rendered the revoked act for renewal of proceedings. The decision on a constitutional complaint is final and binding. The Constitution does not allow review of decisions establishing nullity, after their announcement, or delivery to the parties to the proceedings.

“Constitutional adjudication does not primarily affect the legislature but it does the ordinary administration of justice, and in practice, it extends constitutionalism (primarily through the protection of fundamental rights) to areas beyond public law, to criminal, administrative, and private law”.

For example, in the case UŽ-III No. 188/12, dated 2 October 2012 - a constitutional complaint, civil proceedings, the Constitutional Court revoked the Supreme Court judgment and remanded the case for renewed proceedings, due to violation of the complainant’s right to property, under Article 58 of the Constitution and Article 1 of Protocol No. 1 to the Convention.

In the case at hand, having conducted constitutional review, the Constitutional Court has established that the payment of complainant’s service pension was suspended based on the decision of Republic Pension and Disability Insurance Fund, because of performance of attorney activity, which was rendered on 29 July 2005, precisely, after the ratification of Article 1 of the Protocol 1 to the ECHR by the then State Union of Serbia and Montenegro (*ratione temporis*). The suspension of pension payment was caused by amendments to the Law on Pension and Disability Insurance considered being in effect as of 1 January 2004, while the complainant was obliged to indemnify the Pension Fund Allowance Service. Having in mind all circumstances surrounding this case, the Constitutional Court assessed that interfering in the complainant’s right to peacefully use his pension, was lawful, but not proportionate to the goal which was desired to be achieved by interference, therefore the reasons, which the Supreme Court stated in its decision, may not be considered as relevant and sufficient to justify such interference.

The Decision UŽ-III No. 455/10, dated 17 April 2014 - constitutional complaint – civil proceedings, the Constitutional Court has revoked the judgment by the High Court in Podgorica because the interference in the right to freedom of expression of journalists under Article 47 of the Constitution and Article 10

of the ECHR, was not “proportionate with legitimate goal” attempted to be achieved, was neither “necessary in a democratic society”, nor was there a “strong social need” due to which the protection of individual right should have been placed above complainant’s right to freedom of expression. The High Court judgment was based on expressions(...), the complainant had taken from the weekly “NIN”, without taking into account all circumstances of this case and the context in which the information was released, considering only the establishment of “the nature”- “accuracy” of arguments about the plaintiff, in a part of the disputable text. Without taking into account the essential meaning of the right to freedom of expression, the High Court disregarded a legitimate right of a journalist to react through a public debate via the printed media to some statements released by other media in the context of issues of public interest (criminal group activity) which stems from the text and its general context.

The Constitutional Court case law analysis has showed that a constitutional complaint as a legal instrument has become the major mechanism of protection of human rights and freedoms in Montenegro since the 2007 Constitution was adopted. Thus, due to a great number of constitutional complaints filed, the Constitutional Court has “departed” from its standard jurisdiction, an abstract review of the law and other regulations. Specifically, in the overall number of cases before the Constitutional Court, 80% are the cases pending proceedings upon a constitutional complaint. Such a high number of constitutional complaints are caused by various reasons including the following as the most significant ones: the public is not sufficiently informed about the nature of constitutional complaint, lengthy court proceedings, incompetence of Constitutional Court for ruling upon some constitutional matters, etc.

A significant step forward regarding which referred to the Constitutional Court was expressed by the ECtHR in its judgment dated 4 November 2014, in the case *Đorđe Ćapin v. Montenegro* (Application Nos. 15573/07 and 38709/10).

“48. The applicant submitted that he retained victim status. In particular, a constitutional appeal was not an effective domestic remedy as it had taken the Constitutional Court more than three years to rule upon it, and it had done so only after the case had been communicated to the respondent State.

50. ... the Court notes that the Constitutional Court found that the applicant’s freedom of expression under Article 10 of the Convention had been violated – thereby acknowledging the breach complained of and, effectively, satisfying the first condition laid down in the Court’s case law.

51. Furthermore, the Constitutional Court quashed the High Court judgment of 22 February 2010, ordered a re-trial and ordered that its decision be published in the Official Gazette. Following this, the High Court quashed the applicant's conviction on which his complaint under Article 10 before this Court was based (see paragraphs 20 and 21 above) and acquitted the applicant. This in itself, in the present case, could be considered an appropriate and sufficient redress.

52. In any event, the applicant could, in addition, have sought compensation and requested other forms of redress capable of affording adequate non-pecuniary satisfaction, pursuant to the relevant provisions of the Obligations Act (see paragraphs 35-36 above), which he failed to do. Furthermore, he has failed to justify such an omission (see, *mutatis mutandis*, *Predić-Joksić v. Serbia* (dec.), No. 19424/07, §§ 25-27, 20 March 2012).

53. In such circumstances, the Court considers that the applicant can no longer claim to be a "victim" within the meaning of Article 34 of the Convention of the violation of his right to freedom of expression and that his complaint must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention (see, *mutatis mutandis*, *Predić-Joksić v. Serbia* (dec.), cited above, § 28)."

The introduction of a constitutional complaint into the Montenegrin legal system cannot meet its goal in the protection of human rights if it does not become an effective legal remedy. In that regard in late February 2015 the Assembly of Montenegro adopted a new law on Constitutional Court of Montenegro, which has been harmonised with amendments to the Constitution. The most important novelties in the Law refer to the subject matter and ruling procedure upon a constitutional complaint. Based on the new Law, a constitutional complaint may be filed by every natural and legal person, organisation, settlement, a group of persons and other forms of organisation which do not have a capacity of legal person, if they deem that their human right or freedom guaranteed by the Constitution has been violated not only by an individual act, but also by the action or failing to act of any state authority, state governance authority, local self- government authority, legal person or any other entity exercising public authority. A new solution is that a constitutional complaint may be filed also before legal instruments have been exhausted, if the party filing a constitutional complaint proves that a legal instrument to which he/she is entitled in the case at hand is not or would not be effective.

A major novelty in the Law is a possibility of fair compensation due to the violation of a human right or freedom guaranteed by the Constitution, that is, the introduction of an effective compensation component for a party filing a constitutional complaint, if the legal effect of the individual act subject to the constitutional complaint ceased in the process of ruling upon the constitutional

complaint, and the Constitutional Court established that the act has violated the human right or freedom guaranteed by the Constitution. Opinions on some issues expressed in the Constitutional Court decisions are binding to all state authorities, state government authorities, local self-government authorities, or local administration, legal entities and other entities exercising public authorities.

Court proceedings against Montenegro before the ECtHR in the past have indicated the need to improve the Montenegrin legal system and thereby to preventively remove weaknesses which might trigger new applications against Montenegro before the ECtHR. Through amendments to the Constitution and the adoption of a new law on the Constitutional Court of Montenegro, a new normative framework has been created to act upon a constitutional complaint, so as to be recognised as an effective legal instrument by the ECtHR.

Conclusion

In spite of all the difficulties, the implementation of an idea of human rights is unimaginable without Constitutional Court action. The most generous task which the legal system and authorities implementing it have, i.e. protection of the weak, protection of minorities is also an assignment of the Constitutional Court which must actively sanction violations of the Constitution committed by legislative, executive authorities and the regular judiciary and must not avoid activist decisions when main constitutional values are threatened or when such values are undermined due to disregard of the Constitutional Court's views.

Taking into account that today it is possible to use social benefits from the previous civilisation values on which modern constitutional states have been built, the aim is to ensure that those civilisation achievements are not threatened, then there is no other choice for but to professionally and persistently strive for their safeguarding. By doing so, it confirms the meaning of the constitutional justice system in the best possible way in practice. This is why the Constitutional Court of Montenegro itself, combining constitutional solutions with constitutional practice and theoretical knowledge is striving to and seeking to set good standards in its performance of constitutional review.

The effectiveness of domestic remedies: example of Slovenia

Miodrag ĐORĐEVIĆ¹⁷⁶

Introduction

The right to an effective remedy is one of the key elements of the principle of subsidiarity, which lies at the core of the human rights protection system set out by the ECHR. This principle implies that it is the state which is primarily responsible for the protection of human rights and the implementation of human rights standards. Article 13 of the ECHR is closely interconnected with Article 35 (paragraph 1). All individuals are invited to exhaust “all domestic remedies” and only after that to address the ECtHR.

It is essential for the filter of domestic remedies to work properly, to ensure the effective implementation of the principle of exhaustion of national legal remedies before seeking international protection, and the effective and appropriate use of available national legal remedies.

176. Supreme Court Judge of the Republic of Slovenia

Each state has the primary duty to protect human rights within its own legal system. Each State Party has to ensure effective implementation of the ECHR by “considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention”, and also by “enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention”, including the case law of the ECtHR, and “enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw the attention of national courts and tribunals to any relevant provisions of the Convention and jurisprudence of the Court”.¹⁷⁷

It is important that national courts and tribunals, when conducting proceedings and formulating judgments, take into account the principles of the ECHR as developed through the case law of the ECtHR. This helps ensure that the domestic remedies are as effective as possible in remedying violations of the ECHR rights, and contributes to the dialogue between the ECtHR and national courts and tribunals.

*“The Contracting States have two main obligations. The first is to ensure that the rights and freedoms set out in the Convention are adequately protected. In other words, they must put in place the structures and procedures necessary to secure in practice the rights and freedoms guaranteed by the Convention. The second is to provide a remedy when that protection breaks down. Enshrining a right in national law is not sufficient; it must be possible to secure redress at national level.”*¹⁷⁸

An examination of the application on the merits is required. There is no place for arbitrariness or otherwise manifestly unreasonable decisions. It is expected that the balancing exercise of the relevant competing interests had been undertaken by national courts in conformity with the criteria laid down in the case law of the ECtHR. The decision-making process must be fair and such as to ensure due respect of the interests safeguarded by the ECHR. It falls to the national courts to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the ECHR. Namely, the national courts are better placed to assess the necessity and proportionality of measures restricting the ECHR rights and freedoms. Furthermore, subsidiarity is not covering just the possibility of review but its intensity, through the

177. *Brighton Declaration*, §9.c.iii) and iv), 19 and 20 April 2012. see also, *Guide to good practice in respect of domestic remedies* (introduction part), adopted by the Committee of Ministers on 18 September 2013.

178. *Seminar to mark the official opening of the judicial year - Background paper*, §25, European Court of Human Rights, 30 January 2015.

development of notions such as “the margin appreciation”¹⁷⁹ and “the fourth instance rule”.¹⁸⁰

EFFECTIVENESS OF DOMESTIC REMEDIES

The governments of the States Parties are bound by the ECHR and obliged to respect human rights and fundamental freedoms. All the national courts of the States Parties are also bound by the ECHR in their decision-making process. Courts are bound by the case law of the ECtHR, which expands and explains the provisions of the Convention. The judgments of the ECtHR are complementary to the provisions of the ECHR and their interpretation.

By ratifying the Convention, the Republic of Slovenia is obliged to respect the standards of human rights and fundamental freedoms guaranteed by the ECHR (Article 1), and has agreed to abide by the decision of the ECtHR if it finds a violation of the ECHR rights. Namely, Article 8 of the Convention (second sentence) provides: “*Ratified and published Treaties shall be applied directly*”, while Article 46 of the Convention (paragraph 1) provides: “*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*”

On its territory, the Republic of Slovenia is committed to provide human rights and fundamental freedoms laid down in the ECHR and to enforce the decisions of the ECtHR. All Slovenian courts are obliged to interpret individual rights and freedoms as developed through the case law of the ECtHR. The ECHR is a living mechanism that develops through the protocols and case law of the ECtHR. National courts should be able to develop their own reasoning from a national point of view but analysing the Convention law.

CONSTITUTION OF THE REPUBLIC OF SLOVENIA

According to paragraph 1 of Article 6 of the ECHR “*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of his civil rights and obligations or of any criminal charge against him*”. This protection is conditional upon the existence of rights in the law and in particular of procedural nature (trial within

179. Supra 178, §16-23.

180. Supra 178, §12-25.

a reasonable time, independence, impartiality and the like). The Constitution of the Republic of Slovenia provides substantially the same procedural guarantees as the ECHR, in particular in Article 22 (Equal protection of rights), Article 23 (Right to judicial protection) and Article 24 (Public hearing).

The criteria for assessing whether in a particular case there is a violation of the right to “equal protection of rights” and of the right to “fair trial” in the court proceedings are laid down by the Constitutional Court of the Republic of Slovenia and its decisions, with reliance also on the case law of the ECtHR. When taking the decisions, judges are in fact bound by the Constitution and the laws (second sentence of Article 125 of the Constitution), as well as by the provisions of the ECHR. In addition to the domestic law and the case law, they must also be familiar with the Convention law and the case law of the ECtHR.

While the task of the ECtHR is to protect the human rights protected by the ECHR it is not the task of the Constitutional Court only to protect the human rights protected by the Constitution, but also those human rights that are protected by the ECHR.

It should be noted that the ECHR provides only minimum standards for the protection of human rights. Article 53 of the ECHR provides that “*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party*”. In other words, when the scope of human rights, as set out in the ECHR and the ECtHR case law, is broader than the definition in the Constitution, it must be (in accordance with the paragraph 5 of Article 15 of the Constitution¹⁸¹ and the law of the ECtHR) interpreted in a broader sense. And vice versa, when the decision of the ECtHR follows the restrictive approach, the national court should not rely upon its case law as an argument for narrow interpretation of human rights that are recognised as broader by the Constitution than by the ECHR.

*Decision of CC RS, No Up-790/14
and No U-I-227/14 of 21 11 2014*

**Article 13 of the European Convention
on Human Rights (Right to an effective remedy)**

“12. The Constitutional Court has repeatedly emphasised that it is not the intention of the Constitution to recognise human rights purely formally and theoretically. Namely, the constitutional requirement is to secure the possibility of efficient

181. Constitution of the Republic of Slovenia, adopted on 25 June 1991 (Official Gazette of the Republic of Slovenia, Nos. 1-4/91-I and 19/91)

and effective implementation of human rights (Decision, No Up- 275/97 of 16 7 1998). This constitutional requirement makes clear that is the state's obligation to provide an effective remedy for the protection of human rights and fundamental freedoms. The requirement for an effective remedy is also deriving from Article 13 of the Convention."

DECISION-MAKING OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA

Competences of the Constitutional Court of the Republic of Slovenia are set out in Article 160 of the Constitution. In addition to classic constitutional competences, the competence of the Constitutional Court is to decide on constitutional complaints regarding the violations of human rights and fundamental freedoms. Namely, the Constitutional Court is to decide on constitutional complaints regarding the violations of human rights and fundamental freedoms by individual acts (sixth indent of paragraph 1 of Article 160 of the Constitution), but only if (unless the law provides otherwise) the legal protection has been [formally and substantially] exhausted and if the constitutional complaint has been accepted for consideration by the Constitutional Court (paragraph 3 of Article 160 of the Constitution).

When the Constitutional Court decides on a constitutional complaint, the (judicial) decision of the national court or other authority is the direct object of its assessment. When making the decisions, the Constitutional Court is limited to examination of whether any human right or fundamental freedom of the appellant has been violated by the decision of a court or other authority.

As the highest judicial authority for the protection of constitutionality, legality, human rights and fundamental freedoms (paragraph 1 of Article 1 of the Constitutional Court Act, ZUstS) the Constitutional Court (also) decides on constitutional complaints against decisions of the courts (and other authorities). In this context, it should be the Constitutional Court that is "*raised hierarchically above the Supreme Court of the Republic of Slovenia, which is by the Constitution the highest court in the country (paragraph 1 of Article 127 of the Constitution)*". The Constitutional Court should not assess whether the ordinary court has correctly applied the law, but if it has properly understood the Constitution. Namely, the Constitutional Court is "*without prejudice to the competences of the ordinary courts, as long as the basis for his decision are not different understanding of the content of the constitutional right, defined in the Constitution.*"

Such perception of the role of the Constitutional Court (as the national fourth instance) causes some tension in relation to the Supreme Court, because the Constitutional Court is neither an instance to the Supreme Court nor the last instance court, which would verify the correctness and legality of the decisions taken by the ordinary courts. However, depending on the constitutional position and powers of the Constitutional Court it is logical that there is such tension between ordinary and constitutional judiciary. Because of possible situations when the ordinary court could give the specific regulation the content which is not admissible by the recognised interpretation rules and when the Constitutional Court should intervene with its own interpretation (in accordance with paragraph 1 of Article 160 of the Constitution). It is possible that the interpretation of the ordinary court is wrong but still consistent with the Constitution or that is incorrect and moreover, inconsistent with the Constitution, while the other (correct) interpretation will be in accordance with the Constitution. On the other hand, it is sometimes difficult to accept the decisions of the Constitutional Court. Because of the method for recruiting the judges of the Constitutional Court, which is mainly political, their decisions sometimes look to be political.

Judgment of SC RS, No G 1/2014 of 20 1 2015

Article 26 of the Constitution (The right to judicial protection - access to justice)

Prevention of Restriction of Competition Act (ZPOmK-1)

Competition protection office (Public Agency for protection of competition) – investigation order – (non)exclusion - head of the office - subjective impartiality - serious doubt

6. In its decision No Up-974/13-11 of 20 11 2014 the Constitutional Court stated that the decision on the merits should not be placed under too heavy formal obstacles, as this can interfere with the right of access to judicial protection under Article 23 of the Constitution the Republic of Slovenia. The Constitutional Court found the stance of the Supreme Court, taken in the judgment No G-20/2012-12 of 24 9 2013, that the plaintiff would have to challenge J. S. in the proceedings before the Office and that this action could only be successful if its request would be unreasonably refused in such proceedings, unduly restrictive.

8. The purpose of the institution of exclusion of the head of the office or of an authorized officer is to ensure the (subjective and objective) impartial decision-making and performance of individual actions in the process. In the interest of parties as well as in the interest of the economy of the process itself (which is one of the fundamental principles of administrative procedure) is to settle this issue at the earliest possible stage of the proceedings, as the exclusion applies "in advance". This is particularly important as the fact that decisions were taken by, or individual acts performed by, a

person who should be excluded may affect the validity of decisions already taken or acts already performed. The regulations therefore often explicitly determine the latest point in the proceedings when the exclusion could be required. The Administrative Procedure Act (hereafter also ZUP) does not contain such an express provision, but the position is adopted that a party must request exclusion as soon as it becomes aware of the grounds for exclusion. The duties of an administrative body to act in accordance with the principle of legality (Article 6 of the Administrative Procedure Act) and to make for parties easier to protect and enforce their rights (Article 7 of the Administrative Procedure Act) is balanced with the obligation of the parties to use their procedural rights fairly (Article 11 of the Administrative Procedure Act). The party should therefore challenge the officer whose impartiality it doubts as soon as possible.

12. Either way, it should be clarified that both the institution of the proceedings as well as the investigation order are procedural decisions – the basis to start collecting the evidence that will be the basis for the adoption of a final decision on the (non)existence of an infringement of the competition rules. They are without prejudice to the rights or the legal position of subjects being investigated. At the time of issuance of the decision on the investigation, the head of office (public agency) or another official, is, therefore, not yet in possession of the evidence to make assessment that could be with prejudice or bias to subsequently adopted final decision on the merits. Therefore, it is, at this stage of the proceedings, conceptually difficult to talk about his (un)bias. The institution of the proceedings and the decision on investigation are primarily based on the knowledge of the authority of a particular conduct of company(ies), which with certain probability violates the legal provisions on the protection of competition, and on the reasonable suspicion of the authority that such a violation has occurred. However, the knowledge of this behaviour is only the knowledge of an objective fact. Only after the end of the process of collection of evidence regarding this fact (as well as regarding potential new facts) it is possible, taking into account every evidence separately and all the evidence in relation to each other, to make the final submission of the facts under the rule of law and to take the final decision. Only in this stage of the process it is possible to identify the bias of the decision maker, his familiarity with the circumstances outside the range of evidence or his personal relationship with the party that may influence the perception and interpretation of evidence.

13. The plaintiff alleges that J. S. as a former agent of the plaintiff or attorney was familiar with the internal and confidential information of company S., their activities and internal organization and that the plaintiff was represented by him in the transactions, subsequently subject of the proceedings before the Office. Therefore, it could not be ruled out that J. S. had a certain personal relationship with the plaintiff. [...] However, it was already explained above, that in that stage of the procedure the subjective attitude does not apply to the assessment of the evidence in the true sense of the word. Standard for the institution of the proceedings and for the

investigation is much lower than the standard for the adoption of a final decision. A range of information on the conduct of the company, which objectively shows the potential breach of the provisions of the so-called Competition Act [hereafter also ZPOmK-1] or the violation of those provisions or which evokes a reasonable suspicion of such a breach is sufficient. In the present case this information was (as claimed by the Office) obtained from an independent source - investigations in other companies - and on itself, without a comprehensive assessment of the evidence, gave the authority the foundation for a reasonable suspicion of violations and was consequently sufficient to institute the proceedings and the investigation. Only later in the procedure the Office considered whether the facts which were the reason for the institution of the proceedings were true. It should also be noted that the Office as a competition watchdog, has acted in accordance with the law, when it commenced the investigation based on the existence of circumstances pointing to an alleged breach of the competition rules. The latter was, apart from requests for information (Article 27 of the ZPOmK-1), the only means that was available to the Office to determine the veracity of these circumstances and to search for facts and evidence.

14. [...] it should be noted that serious doubts about the (subjective) impartiality of the head of the Office or other officials should exist in order to justify its exclusion. Given the low level of subjective assessment of the circumstances on the basis of which the proceedings are instituted and the investigation commenced, the plaintiff should state the facts, which already at this stage of the proceedings justify questioning of the impartiality of J. S., with high degree of concretisation. The mere allegation that J. S. had advised the plaintiff in the proceedings, subsequently investigated before the Office, and that he was "infected" with the knowledge of the internal operations of the plaintiff, is therefore estimated not to be sufficient for the court to conclude that there was a serious doubt in the impartiality of J. S. Neither the conclusion of the investigation indicates that there were any other circumstances relevant for the decision taken other than those to which the Office has come on the basis of independent sources.

DECISION-MAKING OF THE ORDINARY COURTS

Regulations that enable the violations of constitutional rights to be resolved within the regular court proceedings would contribute substantially to unburdening the Constitutional Court, to ensuring the effective protection of human rights and fundamental freedoms on all instances and to establishing a relationship between the Constitutional Court and the Supreme Court as stated in the Constitution. The European system of human rights protection cannot be successful if national courts do not assume the role they are entrusted with by the Convention.

ADMINISTRATIVE DISPUTES ACT

DIRECT PROVISION ON THE EXERCISE OF HUMAN RIGHTS is contained in the Administrative Disputes Act (hereafter also ZUS-1)¹⁸². Paragraph 1 of Article 4 states: *"In an administrative dispute the court will decide on the legality of individual acts and actions of the authorities [e.g. Agencies and Offices of state regulators] that interfere with human rights and fundamental freedoms of individuals, if there is no other judicial protection [principle of subsidiarity, i.e. sub subsidiarity]."*

Paragraph 3 of Article 30 of the ZUS-1 provides: *"If the lawsuit seeks a declaration that the act unlawfully interfered with human rights or fundamental freedoms of the plaintiff or a prohibition of the implementation of individual actions that affect the human rights and fundamental freedoms of the plaintiff, the application shall state the offence, where and when it was done, authority or official person who did this, evidence and request that interference with human rights and fundamental freedoms is found, removed or prohibited."*

Paragraph 2 of Article 33 of the ZUS-1 provides: *"The action for violations of human rights and fundamental freedoms under this Act shall claim: the abolition, the issuance or change of a single act; finding that the act interfered with the human right or fundamental freedom of the plaintiff; prohibition against continuing operations; or elimination of the consequences of actions."*

Article 66 of the ZUS-1 provides: *"(1) In an administrative dispute referred to in paragraph 1 of Article 4 of this Act, the court may declare the illegality of the act or operations, prohibit the continuation of an individual act, decide on the plaintiff's claim for damages and determine what needs to be done to eliminate interference with human rights and fundamental freedoms and restore the legal condition. (2) The court shall decide on the prohibition against further acts and measures for the restoration of legal condition, if an illegal act is still on going, without delay - with conclusion with possibility of an appeal within three days. The Supreme Court shall decide on the appeal within three days of its receipt. (3) If the court in the case referred to in the preceding paragraph cannot decide without delay, it may ex officio grant a temporary injunction in accordance with Article 32 of this Act."*

Case law of the Supreme Court (the core of the selected decisions):

Corruption – Human Rights

Conclusion of SC RS, No I Up 223/2013 of 5 9 2013

Commission for the Prevention of Corruption - the draft findings on the specific case - participation in the procedure for gathering the evidence

"Legal interest in bringing an action in an administrative dispute for the finding of a violation of constitutional rights under Article 4 of the ZUS-1 is not equal to the legal

182. Official Gazette of the Republic of Slovenia, No. 105/06-ZUS-1.

interest of the plaintiff in the process led by the defendant. In other words, legal interest in bringing an action in an administrative dispute for the finding of a violation of constitutional rights cannot be conditional on the existence of a legal interest, or on the improving the plaintiff's legal position, in the process led by the defendant."

*Conclusion of SC RS, No I Up 200/2013 of 9 5 2014
Control over the assets of officials - final report*

The judgment under appeal has no grounds on the relevant facts, i.e. on allegations and objections on which the action is based. This is a violation of the procedural rule in point 14 of paragraph 2 of Article 339 of the Code of civil procedure (hereinafter also ZPP), which is (based on the explicit provision of paragraph 3 of Article 75 of the ZUS-1) always considered to be a material breach of the procedural rules in an administrative dispute.

In the new proceedings, it will be necessary for the court of first instance to specifically and clearly define the relevant objections, to evaluate and concretely and clearly explain whether (and where) there is the legal basis for the adoption, issuance and publication of the final report, considering its format and contents, and, consequently, whether this report had interfered with the plaintiff's constitutional rights, as claimed by the action that was filed.

*Judgment of SC RS, No I Up 256/2014 of 18 2 2015
Article 15 of the Constitution (Exercise and limitation of rights)
Article 22 of the Constitution (Equal protection of rights)
Article 25 of the Constitution (Right of appeal)
Integrity and Prevention of Corruption Act (ZIntPK)
Commission for the Prevention of Corruption
Control over the assets of officials – final report*

15. In the present case, the plaintiff brought an action under paragraph 1 of Article 4 of the ZUS-1, which provides that in the administrative dispute proceedings, the court also decides on the legality of individual acts and the acts of the authorities infringing upon human rights and fundamental freedoms of the individual, if there is no other judicial protection. This provision regulates the so-called subsidiary judicial protection in an administrative dispute, which is provided to parties in cases, in which they bring forward the infringements upon their human rights and fundamental freedoms, by the acts or operations of the authorities and when there is no other judicial protection. [...]

17. It is the assessment of the Supreme Court that the plaintiff's and appellant's objections regarding the violation of the rights (of paragraph 4) of Article 15 and Article 25 of the Constitution are unfounded. Namely, paragraph 4 of Article 15 of the Constitution provides for the legal proceedings in which precisely the question of the implementation or the protection of human rights will be the caput

controversum. This provision is supplemented by the provision of paragraph 2 of Article 157 of the Constitution, which is elaborated in Article 4 of the ZUS-1 which served as the legal basis on which the plaintiff brought the action. The plaintiff's action has been discussed and decided upon by a judgment that is under appeal filled by the plaintiff and subject to review before the Supreme Court. The plaintiff therefore has the judicial protection and guaranteed right to appeal.

35. The provision on equal protection of rights under article 22 of the Constitution is a specific expression of the right to equality before the law. Equal protection of rights in the proceedings can be conceptually ensured only in such a manner that the procedural rules the authorities should follow when deciding on the rights, duties and legal interests, are pre-specified and, of course, respected. The requirement of an adversarial procedure is an expression of the right to equal protection of the rights and must be respected in all procedures and all stages of the procedure. The parties should be guaranteed the right to state the facts and evidence and to make a statement on the allegations of the counterparty and on the outcome of the evidentiary procedure. In the procedure under Article 13 of the Integrity and Prevention of Corruption Act (ZIntPK) this right is guaranteed to a party (person subject to a certain duty) by providing it with a draft (report) to comment on it and to give it an opportunity to become acquainted with the findings [of the Commission for prevention of corruption] before issuing and publishing the report and an opportunity to express its opinion.

37. It is the assessment of the Supreme Court that the plaintiff's objection, that there was a violation of plaintiff's procedural rights, is founded. As consequence of a failure to comply with the procedural rights, there was also a violation of plaintiff's constitutional right guaranteed by the Article 22 of Constitution, i.e. equal protection of rights in proceedings before a court and before other state authorities, local communities' bodies and public authorities, who decide on their rights, duties or legal interests.

38. The plaintiff asserted violation of Article 22 of the Constitution, which contains constitutional procedural guarantees and not the guarantee for a correct substantive decision. Thus, as the equal protection of the rights is the constitutional right of a procedural nature, the Supreme Court simply found a violation of those rights and did not specifically determine whether that breach also affect the accuracy of the facts. That was the reason for the Supreme Court not to deal with the objection to the assessment or the accuracy of the facts.

Bankruptcy – Human Rights

Conclusion of SC RS, No I Up 490/2013 of 3 4 2014

Report of the Supervisory Commission of the Slovenian Chamber of Administrators (trustees) - a subsidiary judicial protection

Report of the Supervisory Commission of the Slovenian Chamber of Administrators is not an administrative act or an act which can be challenged in an administrative dispute.

As, in respect of breaches identified in the present report of the Supervisory Commission of the Slovenia Chamber of Administrators, the plaintiff has the legal protection in the "regular" administrative dispute against the decision of the Disciplinary Board (if the imposition of a disciplinary procedure does occur), the conditions for the court to decide in an administrative dispute under Article 4 of the ZUS-1 (a subsidiary judicial protection) are not fulfilled and the action on that legal basis is not permitted.

Protection of Competition – Human Rights

Conclusion of SC RS, No I Up 358/2013 of 2 10 2013

Abuse of dominance - investigation order - a subsidiary judicial protection in an administrative dispute

Since (other) judicial protection against the investigation order is provided under paragraph 3 of Article 55 of the Prevention of Restriction of Competition Act [ZPOMK-1], it is the assessment of the Supreme Court that the procedural condition (i.e. the absence of other judicial protection) for the court to decide in an administrative dispute based on Article 4 of the ZUS-1 (a subsidiary judicial protection) is not complied with in the present case. So, the action on that legal basis is not permitted.

Judgment of SC RS, No I Up 481/2012 of 18 12 2013

Professional secret - private property - a subsidiary administrative dispute

By submitting information representing a professional secret the defendant interfered with the constitutional right to private property.

CIVIL PROCEDURE ACT

Besides the constitutional complaint, there is a possibility for individuals to rely on the provisions of the Convention before any judge in the course of litigation. Human rights and fundamental freedoms are in fact exercised directly on the basis of the Constitution (paragraph 1 of Article 15). Such a system allows allegations of violations of human rights to be resolved already before the first instance courts and to be reviewed by the Appellate Courts and, where necessary, by the Supreme Court. Namely, judges are bound by the Constitution and the laws (second sentence of Article 125 of the Constitution).

INDIRECT PROVISION ON THE EXERCISE OF HUMAN RIGHTS is contained in the Civil Procedure Act (ZPP), in point 8 of paragraph 2 of Article 339. It provides: *"It is always a material violation of the procedural provisions if due to an unlawful proceeding the party was not given an opportunity to be heard before the court."* On an appeal and revision instance, a violation of human rights is enforced on the basis of this provision, particularly the violation of constitutional procedural

guarantees provided for in Article 22 (Equal protection of rights)¹⁸³, Article 23 (Right to judicial protection) and Article 24 (Public hearing), resulting from the right to a fair trial under Article 6 of the ECHR. Thus, the Appellate Court and the Revision Court are deciding on violations of human rights and fundamental freedoms, provided that the violations were related to conventional or constitutional procedural guarantees which were formally and substantially exhausted (it is not permissible to skip the remedies).

In order for the ordinary court procedure to constitute an effective remedy in the sense of Article 13 of the Convention (Right to an effective remedy) it must guarantee effective decision-making and provide effective redress for a violation. The ordinary court should therefore be equipped with a range of appropriate powers (i.e. to declare the existence of a violation; to remit the case to the relevant authority for further proceedings, based on the findings of the ordinary court; to quash the impugned decision, measure or act; to order *restitution in integrum*; to order payment of compensation) . These powers must not only exist in theory but also be effective in practice.

The judicial protection of human rights and fundamental freedoms and the right to redress for the violation are guaranteed by the Constitution (paragraph 4 of Article 15). Thus, by the Constitution, the right to compensation is also guaranteed (Article 26) (and based on the case law of the Supreme Court linked to the provisions of the general tort law). The liability for damages caused by, or in connection with, the performance of services or any other activity of a state authority, a local community body or a holder of public office, if a person or a body performing such function or activity acts unlawfully, lies on the state (paragraph 1) or directly on the person who caused the damage (paragraph 2).

THE REVIEW OF CONSTITUTIONALITY

Paragraph 2 of Article 162 of the Constitution provides: “*Anyone who demonstrates legal interest may request the initiation of proceedings before the Constitutional Court.*”

Moreover, Article 156 of the Constitution provides: “*If a court, deciding some matter, deems a law, which it should apply, to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The*

183. *Constitution of the Republic of Slovenia*, adopted on 25 June 1991 (Official Gazette of the Republic of Slovenia, Nos. 1-4/91-I and 19/91)

proceedings in the court may be continued after the Constitutional Court has issued its decision."This is an assessment of compliance of laws and regulations with the Constitution.

Case law of the Supreme Court (*relevant parts of the reasoning of the selected decisions*)

Conclusion of SC RS, No G 6/2011 of 24 5 2011

The review of constitutionality of second sentence

of paragraph 2 of Article 75 of the Takeovers Act (ZPre-1)

6. Second sentence of paragraph 2 of Article 75 of ZPre-1 provides that people who meet or exceed the takeover threshold specified in Article 7 of this Act (which is equal to a 25 percent share of voting rights in the target company) but do not reach or exceed the final takeover threshold (which is equal to 75 percent share of voting rights in the target company) should give "the takeover bid in accordance with this Act if after the enactment of this Act [11 8 2006] intend to acquire securities or other rights to be taken into account in determining the share of voting rights under Article 6 of this Act and if this increases the share of their voting rights, unless they do not achieve the takeover threshold specified in Article 7 of this Act any more".

7. The Supreme Court found that provision to be unclear, which also stems from the adopted authentic interpretation. However, the assessment of the Supreme Court (in real time and view) is that the provision is vague to the extent that its constitutionally coherent application is not possible even with the application of authentic interpretation as an integral part of the law.

Resolution of SC RS, No G 23/2010 of 25 1 2012

Article 8 of the ECHR (Right to respect for private and family law)

The review of constitutionality of Articles 28 and 29 and 54 to 61

of the Prevention of Restriction of Competition Act (ZPomK-1)

Inviolability of the home - protection of the confidentiality of correspondence

The investigation in the process of preventing the restriction of competition

5. According to the Articles 28 and 29 of the [so-called] Competition Act the legal basis for conducting the investigation in a company is the investigation order issued by the Office, which may be challenged in judicial protection proceedings against the final decision. In order to conduct an investigation in the company, a court order is not required.

6. According to the assessment of the Supreme Court the regime of investigation laid down in the ZPomK-1 is inconsistent with Articles 36 and 37 of the Constitution of the Republic of Slovenia and Article 8 of the ECHR.

7. The Supreme Court considers that the regulation of the procedure for judicial protection against the decision of the Office laid down in Articles 54 to 61 of the

Competition Act is also inconsistent with the Constitution. The mentioned regulation is inconsistent with the right to a remedy under Article 23 of the Constitution.

8. The Supreme Court, therefore, in accordance with Article 156 of the Constitution and paragraph 1 of Article 23 of the Constitutional Court Act (ZUstS) stayed the proceedings of judicial protection due to the start of proceedings to review the constitutionality of the provisions of Articles 28 to 29 and 54 to 61 of the ZPOMK-1.

OTHER CASE LAW OF THE SUPREME COURT

(Relevant parts of the reasoning of selected decisions):

Judgement of SC RS, No III Ips 55/2008 of 22 2 2011

Article 35 of the Constitution (Protection of rights of privacy and personality rights)

Article 37 of the Constitution (Protection of confidentiality of letters and other means)

Illegal (not legally obtained) secret bugging

7. Although the "(un)demonstrated evidence" is a question of appraisal (weighing) of evidence and thus the findings of fact cannot be challenged by the revision (paragraph 3 of Article 370 of the ZPP), it is necessary to answer the allegation on the use of illegal (illegally obtained) secret bugging, in connection with the alleged violation of applicant's rights under Articles 35 and 37 of the Constitution of the Republic of Slovenia. So, the Supreme Court agrees with the view that under the rule of civil procedure (Note no. 3) the evidence that was obtained illegally (specifically with illicit interception of telephone conversations) may not be used. However, in the present case, the courts of first and second instance (the first in determining and the second in testing the findings of fact) did not use magnetographic records that were obtained by "secret bugging" by the defendant (Note no. 5). Therefore, the present (civil) procedure did not lead to interference with the right of privacy with regard to the implementation of evidence obtained in the violation of this right. Telephone tapping Z. S. with carriers was only mentioned in the reasons of judgment of first instance as one of the (several, mutual independent) ways in which the defendant convinced itself about the cause of the resulting deficit of meat.

Note no. 3: As a rule, because it is possible that another right (e.g. the right to private property under Article 33 of the Constitution respectively the right to protection of property, to respect the property under Article 1 of Protocol No. 1 to the Convention on human rights) outweighs the right to privacy!

Note no. 5: Even if the magnetographic records were used, regardless of the reasons of the European Court of Human Rights in the case of Karin Köpke against Germany (No 420/07 of 5.10.2010), especially in the light of the circumstances of

the present case, when the defendant began to control and investigate the conduct and behaviour of certain employees that caused him the damage with the interception of telephone conversations "for confirmation of suspected unlawful conduct of the plaintiff and his colleagues"; it would not on itself cause undue infringement of the plaintiff's right to privacy!

Conclusion of SC RS, No III Ips 49/2011 of 15 11 2011

Article 6 of the ECHR (Right to a fair trial)

The principle of audiatur et altera pars

The proposal and the decision on the admission of the revision as an attachment to the revision

8. [...] the formal requirement that the applicant of revision is obliged to attach a proposal to admit the review and decision on the admission of the revision, all in a sufficient number of copies for the court and the opposing party, featured primarily as a means of protection of procedural rights of counterparties that are a reflection of the right to equal protection of the rights before the courts under Article 22 of the Constitution and its subsequent principle of adversarial process and the right to a fair trial under Article 6 of the European Convention on Human Rights [ECHR]. Only in this way, the counterparty can effectively exercise its right to be heard in the revision proceedings.

Judgment and Conclusion of SC RS, No III Ips 9/2013 of 26 4 2013

Article 6 of the ECHR (Right to a fair trial)

The trial without undue delay

Liability of a state

14. [...] the criteria for the assessment of illegality is subject to the case law established by the European Court of Human Rights (ECHR) and adopted by The protection of the Right to Trial without Undue Delay Act (ZVPSBNO – Official Gazette RS, No 49/2006) while the assessment of causal relationship and the existence and amount of property damage is linked only to the provisions of general tort law - in this case Articles 154 and following of the Obligations Act (ZOR).

16. The Supreme Court has, taking into account the case law of the ECtHR that has interpreted Article 6 of the European Convention on Human Rights (ECHR), in addition to the duration of the procedure itself, generated the following criteria for assessing whether, in a particular case, the trial lasted an unreasonably long time - and therefore, if the assumption of unlawful practice of the state is fulfilled: the complexity of the case, the conduct of state authorities, the applicant's conduct and the importance of the case for the complainant. For the action to be well founded, for justifying the breach of the right to a trial without undue delay, the plaintiff must, therefore, specify the (positive) facts relevant to determine the existence of an infringement, in addition to the length of proceedings: the action of the court, its behaviour, efforts of the plaintiff to speed up the process, and the importance of

the case, for the plaintiff. The plaintiff does not need to specify the negative facts in favour of his claim (that the case was not complex and that its conduct did not delay the process).

Judgment of SC RS, No G 24/2011 of 27 1 2014

Article 6 of the ECHR (Right to a fair trial)

The right to a fair hearing in the proceedings

Compliance of judicial protection under the Preventing of Restriction of Competition Act (ZPOmK-1) with the Constitution

(2) With regard to non-compliance with the provisions of Articles 56, 57, 58, 59 and 61 of the so-called Competition Act (ZPOmK-1) with the Constitution

16. The plaintiff argues that regulation of the procedure of judicial protection in the so-called Competition Act does not comply with the provisions of Articles 2, 22 and 23 of the Constitution. He argues that the Competition Act deals with comparable situations differently as the General Administrative Procedure Act (ZUP) and the Administrative Disputes Act (ZUS-1), so that the parties to the proceedings under the Competition Act are not provided with the same legal protection as a party in the ordinary course of the administrative proceedings following the general administrative procedure rules. Unequal position of the parties to the proceedings under the Competition Act is reflected in the regulation of the rights of the parties to specify the new facts and propose the new evidence (Article 57 of the ZPOmK-1); reasons feared by the Supreme Court of its own motion (Article 58 of the Competition Act); and obligation to held hearings (Article 59 of the Competition Act).

17. The Constitutional Court has already held (in point 4 of the Decision No UI-40/12) that the provisions of Articles 54, 56, 57, 59 and 61 of the Competition Act are not inconsistent with the Constitution. Therefore, the plaintiff cannot succeed with the complaint.

(3) With regard to non-compliance of the provisions of paragraph 4 of Article 28 and paragraph 3 of Article 55 of the Competition Act with the Constitution

18. In the second preparatory application of 20 6 2011, the plaintiff asserted the illegality of the investigation order and consequently the illegality of obtained documentation. He argued that the provision of paragraph 4 of Article 28 and of paragraph 3 of Article 55 of the Competition Act, according to which the investigation order is only admissible to challenge in judicial protection proceedings against the final decision, violates Article 6 of the European Convention on Human Rights (ECHR).

19. The Supreme Court, in accordance with the provision of Article 58 of the Competition Act, examines the decision of the Office within the limits of the claim and within the limits of the grounds specified in the application. The plaintiff has not brought an action against the investigation order, so the order eludes the substantive assessment of the Supreme Court. In addition, the plaintiff has raised

the illegality of the investigation order and of the consequently obtained evidence for the first time in the preparatory application of 20 6 2011, i.e. after the deadline for submission of the application, expired on 11 5 2011. After the expiration of that period, the plaintiff cannot assert the substantive new pleas, so the Supreme Court did not review that complaint.

Judgment of SC RS, No II Ips 70/2010 of 8 11 2012

Article 41 of the ECHR (Just satisfaction)

Compensation - limitation of compensation claims

10. As in other similar cases, it also turned out in this case that the injured party's claim for damages, based on non-issuance of a personal work permit, to be unfounded from the perspective of the existing legislation. There is no legal basis (yet) to enable the plaintiff's success to the circumstances of the case in spite of the defendant's plea of statute of limitations. This issue has been handed down by the European Court of Human Rights (ECtHR), which in the similar case (Note no. 4), stated, inter alia, that the legal system of the Republic of Slovenia has a defect which prevent the entire category of the persons the access to compensation for violation of their fundamental human rights. In this sense, it agreed with the complainants who founded their inability to claim damages under existing regulations primarily on statute of limitation. The Republic of Slovenia has therefore been ordered to establish an ad hoc compensation scheme to redress the wrongs to affected persons within one year. Only when the legislature has fulfilled its duty, the courts will be allowed to make a different assessment of these claims. The domestic courts in these cases also cannot award the just satisfaction under Article 41 of the European Convention on Human Rights [ECHR]. Namely, just satisfaction under Article 41 of the ECHR is of the nature of the international state liability for breach of the provisions of international treaties. Therefore a claim under this provision only exists at the international level and it is linked to the procedure before the ECtHR and may be enforced exclusively in this process. Direct application of these provisions before the Slovenian court is therefore not possible.

Note no. 4: Pilot judgment of the Grand Chamber of the ECtHR in Case Kurić and Others v Slovenia, No 26828/06 of 28 6 2012

Judgment of SC RS, No III Ips 129/2011 of 23 5 2014

Article 26 of the Constitution (Right to compensation)

Articles 147 and 148 of the Code of obligations (OZ)

*Violation of the right to a trial without undue delay -
trial within a reasonable time – responsibility of a state
Legal basis*

9. The right to a trial within a reasonable time is an integral part of the right to a fair trial (Article 23 of the Constitution) and the legislature provided its protection in a separate, special law (ZVPSBNO). In the present case, the alleged breach of the

right to a trial without undue delay ceased before the enforcement of the ZVPSBNO. The jurisprudence was solving the position of such victims with the compensation recognized under Article 26 of the Constitution and [due to not adequately determined constitutional provisions] on the basis of the general rules of tort law (i.e. the provisions of the Code of Obligations, OZ). This meant that the injured party could claim compensation according to the classical criteria of the civil liability for pecuniary and (or) non-pecuniary damage. However, it was not possible to succeed with a claim for payment of the so-called just satisfaction. Deciding on such a claim has been prescribed under Article 41 of the European Convention on Human Rights (ECHR) as a right and competence of the ECtHR.

11. The revision court agrees with the position of the courts of second and first instance that, in assessing the liability of the defendant in situations such as the present, one must derive from the provisions of Article 26 of the Constitution, which provides that everyone has the right to compensation for damage caused to him by unlawful acts of state authority, local community body or holder of public office, i.e. by a person or body performing such function or activity. The responsibility of the state provided in the Constitution is not adequately determined, therefore, in accordance with the settled case law, one must rely on specifically elaborated provisions on liability of legal persons from Articles 147 to 148 of the Code of Obligations. In addition to the assumptions set out in Article 26 of the Constitution, other general assumptions for the liability for damages must be fulfilled.

Judgment of SC RS, No II Ips 37/2012 of 13 11 2014

Article 26 of the Constitution (Right to compensation)

The right to a trial without undue delay - trial within a reasonable time - responsibility of the state for the performance of the court

9. [T]he Constitutional Court stated in its decision No Up-695/11 of 10 1 2013 that the state is liable for the violation of the right to a trial without undue delay not only in the situation of improper handling of a court but also in the situation where the unreasonably long trial was a result of an objective situation of backlogs of a court. In this situation, the state is also liable, because it has not organized its judicial system in such a manner to implement the requirements of Article 6 of the European Convention on Human Rights (ECHR) and paragraph 1 of Article 23 of the Constitution.

*Article 26 of the Constitution covers all forms of unlawful conduct of the state causing damage to the individual in the most general way. So, in this respect this provision is of *lex generalis* nature. Therefore, the state is responsible for its failure relating to an identified or identifiable natural person, as well as for the system based backlog of court cases. From paragraph 1 of Article 26 of the Constitution it can be concluded on the sole basis of a grammatical interpretation that the state is responsible only for those forms of unlawful activity that can be attributed to a specific person or a specific authority in relation of performing service or other activity of the national authority, local community body or holder of public office. However, such a strict*

interpretation would have the result that the state would not be responsible for the unlawful conduct, that cannot be attributed to a specific person or a specific authority, but to the state and its apparatus as such, as well the situations where there is no individualized relationship between the bearer of authority and affected individual. That is also the case in securing a trial without undue delay, which is the responsibility not only of the courts but of all three branches of government, namely also the executive, in particular through the organization of judicial administration, and legislative, in particular through the adoption of appropriate legislation. Therefore, in such a case it is not possible to equate unlawful conduct of the state with unlawful conduct of an individual judge in an individual case

Applying the ECHR in Courts in Bosnia and Herzegovina: Main Challenges and Problems

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The study of the ECHR in the light of the practice of the ECtHR is an important segment in strengthening the work of the national judiciary, bearing in mind that the courts of the member states of the European Union and the member states of the Council of Europe, in the procedures carried out, are obliged to respect the rights and freedoms under the ECHR.

Bosnia and Herzegovina, as a Council of Europe member state, is obliged to bring its legislation into line with the legal standards of the ECHR. Furthermore, in the process of European integration, one of the key segments is to ensure the rule of law, by strengthening the judiciary components, especially in the field of protection of human rights.

Although the primary responsibility for the protection of rights under the ECHR is in the hands of the legislative and executive institutions of the signatory states, the obligation of national courts is to deal with all the cases, while addressing the issues of some rights under the ECHR, in accordance with the standards and practices developed by the ECtHR.

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It is therefore very important to carry out the planned professional training of judicial personnel in the field of human rights.

In this regard, the Court of Bosnia and Herzegovina (the BiH Court) was established with the support of the international community, to ensure the effective exercise of the jurisdiction of the state of Bosnia and Herzegovina, and respect for human rights and the rule of law on its territory. In the cases of Section I for War Crimes and Section II for Organised Crime, during the first years of the Court's existence, local judges worked within judicial panels together with international judges, which greatly contributed to the strong establishment of high standards in the application of the ECHR, i.e. the ECtHR's practice.

It is important to emphasize the central place of the ECHR in the legal system of Bosnia and Herzegovina. It has been incorporated into the Constitution of Bosnia and Herzegovina, which in Article II/2 stipulates that the ECHR and its Protocols shall apply directly in Bosnia and Herzegovina, and have priority "*over all other law*".

It is the direct applicability of the ECHR in Bosnia and Herzegovina that allows the direct application of the rights contained therein by the courts in Bosnia and Herzegovina, without the adoption of subsequent acts, needed for their implementation.

As an example of direct application of the ECHR, it is worth mentioning the judgment of the BiH Court, No. X-KRŽ-07/419, as of 28 January 2011, in which the appellate panel, deciding on the appeal against the first-instance judgment, in addition to the relevant provisions of the Criminal Procedure Code, in the pronouncement of the second-instance judgment, directly applied Paragraphs (1) and (3) of Article 6 of the ECHR, and passed a second-instance judgment, dismissing the charges. In this case, the appellate panel, deciding on the appeal of the defence counsel, noted the procedural situation that was not regulated in the national law on criminal procedure, and bridged that gap with reference to Article II/2 of the Constitution of Bosnia and Herzegovina, directly applying the provisions of the ECHR.

When considering the legal issues, the Court relies largely on the jurisprudence of the ECtHR, bearing in mind that the decisions of the ECtHR contain legal arguments that apply the standards of the ECHR, and exercise its power in the domestic legal order.

It must also be noted, that in proceedings held before the BiH Court, the defence counsels, both in the first-instance and in appeal proceedings, in addition

to the relevant provisions of the national procedural law, apply the specific provisions of the ECHR, so that the judicial panels, in addition to assessing the violation of domestic laws, decide on the possible violation of the ECHR.

Of course, in addition, individuals who believe that some of their rights, guaranteed by the ECtHR, have been violated, can, after exhausting the remedies of the ordinary courts, submit an appeal to the Constitutional Court, and, ultimately, the ECtHR.

Although the BiH Court passes judgments in civil matters too, where the application of the ECHR has its place, the presentation below will focus on the area of criminal law, namely war crime cases.

The most common issues in the area of human rights, raised and considered in appeal proceedings before the BiH Court, are issues of violation of the rights under Article 6 and Article 7 of the ECHR, which have also been standardised in the local legislature.

Article 6 of the ECHR concerns the rights of a procedural nature, so, in the event of the violation concerning the right to a fair trial, it would constitute a substantial violation of the criminal procedure provisions, or, if it is an absolutely essential violation, that would result in a revocation of the first-instance judgment. On the other hand, if the Court finds that there has been an incorrect application of the guarantee under Article 7 of the ECHR, it will determine the violation of the criminal law and remedy the violation in such a way to overturn the judgment contested in this respect. This happens because it shall assume that the facts have been established fully and properly, and that the procedure has been properly conducted, and that there has been a misapplication of the substantive law.

In its practice, the BiH Court in 2013 and 2014, faced problems and challenges put before us precisely in connection with the above-mentioned articles, in particular Article 7 of the ECHR, with an emphasis on war crime cases.

Article 7 of the ECHR contains a basic principle, being *nullum crimen sine lege, nulla poena sine lege*, which says that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”.

The second paragraph reads: “This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was

committed, was criminal according to the general principles of law recognised by civilised nations”.

Analysis of the application of Article 7 of the ECHR by the ECtHR is a very important issue for the judiciary in Bosnia and Herzegovina, because, given that in Bosnia and Herzegovina war crime trials take place at both state and entity levels, the problem of interpretation of the period of validity of the law has come up, because it is obvious that, after the criminal offence, multiple amendments to the law have occurred.

An inevitable question is whether in a situation when a case or several cases have been completed before the Constitutional Court, (in which the Court has found violation of the rights under the ECHR, by interpreting the ECHR and referring to the decision of the ECtHR, but in a way that has brought to conflicting practices of the Constitutional Court of BiH and ordinary courts) national courts may invoke in the future Protocol No. 16, which the Committee of Ministers adopted in 2013, and request the interpretation of Article 7 from the Strasbourg judges. Such a need may arise regarding this or any other specific issue relating to the interpretation of the ECHR.

In the war crime cases before the BiH Court, this issue was first discussed in the *Maktouf* case¹⁸⁵, which is the first case adjudicated by the BiH Court for the criminal offence of war crimes against civilians under Article 173 of the Criminal Code of Bosnia and Herzegovina (the BiH Criminal Code), considering that, in this type of case, one should depart from the principles referred to in Article 7.1 of the BiH Criminal Code. According to the Criminal Code of the Socialist Federal Republic of Yugoslavia (the SFRY Criminal Code), war crimes against the civilian population were punishable by five to fifteen years, and, for the mildest forms, the punishment could possibly be reduced to up to one year. The gravest forms were punishable by capital punishment, which could exceptionally be substituted by imprisonment not exceeding 20 years. According to the 2003 the BiH Criminal Code, the same criminal offence was punishable by a sentence of at least ten to twenty years, i.e. most serious crimes were punishable by long-term imprisonment of 21 to 45 years. For the mildest forms, imprisonment may be reduced to up to five years. The BiH Court imposed on Maktouf a sentence that could be imposed within the range of punishments prescribed under both laws.

185. *Prosecutor's Office of Bosnia and Herzegovina v. Abduladhim Maktouf*, KPŽ 32/05 (K-127/04), Court of Bosnia and Herzegovina, Section I for War Crimes, Appellate Division, Bosnia and Herzegovina, 4 April 2006.

The position of the the BiH Court in the above-mentioned case has been confirmed by the Constitutional Court of Bosnia and Herzegovina, refusing Abduladhim Maktouf's appeal, so that the Constitutional Court found no violation of Article 7 of the ECHR. The BiH Court followed the same attitude in subsequent cases as well.

It would be interesting to quote one part of the decision of the Constitutional Court for further analysis. Paragraphs 78 and 79 of the decision state: "*It is clear that the concept of individual responsibility for acts committed in contravention of the Geneva Convention, or the relevant national legislation, is very close to the concept of protection of human rights, since the human rights and conventions that protect them relate to the right to life, the right to physical and psychological integrity of the person, prohibition of slavery, torture, discrimination, and the like, and their violation constituted the reason for the legal regulation of these most serious crimes. Disabling the protection of the victim, i.e. inadequate sanctioning of the perpetrators, does not seem, in the opinion of the Constitutional Court, to satisfy the principles of fairness and the rule of law, which Article 7 of the ECHR is, which, in Paragraph 2, allows this exception to the rule referred to in Paragraph 1 of that Article.*"

In 2013, the ECtHR decided on the appeal, filed by Abduladhim Maktouf against the decisions of the BiH Court and the Constitutional Court of Bosnia and Herzegovina, together with the appeal by Goran Damjanović (who was, before the BiH Court, sentenced to a prison term of 10 years under the BiH Criminal Code, as of 2003), finding a violation of Article 7 of the ECHR¹⁸⁶, in part that relates to the application of the more lenient law.

It is important to point out that the ECtHR ruled on the appeals of the applicants, Abduladhim Maktouf and Goran Damjanović, and that the judgment applied only to these two specific persons.

These were individuals who were found guilty of a crime which was provided for both in the Criminal Code at the time when the crime was committed and in the Criminal Code at the time of the trial. The essence of the analysis of this problem is which of these two criminal codes is more lenient for the perpetrator, which was assessed *in concreto*.

The applicable Criminal Code of Bosnia and Herzegovina stipulates that the perpetrator will always be subject to the law that was in effect when the

186. *Maktouf and Damjanović v. Bosnia and Herzegovina*, Nos. nos. 2312/08 and 34179/08, 18 July 2013

crime was committed, and in the case of the adoption of new legislation, the subsequent legislation too, if it is more favourable for the perpetrator, whichever is more favourable to the perpetrator, and the choice depends on multiple criteria relevant to opinion in relation to each particular case, according to its specifics.

This is exactly what is stated in the decision of the ECtHR, *"...that its task is not to consider the case in abstracto, whether the retroactive application of the Law as of 2003 on war crime cases is in itself incompatible with Article 7 of the Convention. This issue must be assessed for each case individually, taking into account the particular circumstances of each case and, in particular, whether the national courts applied the law whose provisions are most favourable to the accused"*. It, therefore, means that the Court has clearly left open the possibility of application of both laws, depending on the circumstances of the case.

Furthermore, the ECtHR has at no times called into question the existence of the guilt of the two applicants, i.e. the legality of convictions against them, and it was noted that, in the present case, the law in force at the time of the offence should have been applied, i.e. the SFRY Criminal Code. The ECtHR even emphasised that this decision should not be interpreted as meaning that the applicants should have received more lenient sentences, but only that the SFRY Criminal Code should have been applied.

The decision unequivocally points to the conclusion that the ECtHR had in mind that these were minor offences, i.e. offences without mortal consequences. Therefore, the decision states: *"As neither of the applicants was guilty of the loss of life, the crimes for which they were sentenced clearly did not fall into this category" (the most serious crimes)*.

On the other hand, the ECtHR did not give opinion on the terms of the serious forms of this offence, nor in terms of the fact of which law would be more lenient in relation to the prescribed maximum, and it cannot be inferred that the Court would conclude that the SFRY Criminal Code, which was in force at time of the offence, was more lenient in the case where the panel tended towards the legal maximum of the prescribed sentence.

The BiH Court repeated the process in both cases, in a way that it acted in accordance with the decision of the ECtHR, and sentenced Maktouf to the same 5-year sentence, under the SFRY CC. In relation to Damjanović, the Court, in the repeated trial, which related in the same way only to the application of the substantive law, imposed a sentence of 6.5 years, under the SFRY Criminal Code.

Following the above-mentioned decision of the ECtHR, the Constitutional Court passed decisions in 16 cases.

It is interesting that some appeals were pending for several years before resolution, and the Constitutional Court resolved them immediately upon the decision of the ECtHR.

Appeals decided upon by the Constitutional Court after the ECtHR decided on the *Maktouf* case did not only apply to the criminal offence of war crime against the civilian population, but also to the criminal offence of genocide, which was also prescribed by both laws, even in cases with more serious consequences than the case dealt with by the ECtHR.

It is quite clear that the position taken in the *Maktouf* judgment did not apply to all cases resolved by the Constitutional Court after this decision, but could be considered in cases with less severe consequences, and where the BiH Court panels tended towards the statutory minimum. However, even in each of these cases, it is necessary to analyse which law is more lenient, since any difference in treatment would lead to the application of principles of assessment of a more lenient law *in abstracto*.

However, this decision did have an impact on all the cases which the Constitutional Court subsequently decided upon, although that was not the purpose and intention of the ECtHR.

Specifically, the Constitutional Court, in cases in which persons were sentenced to lengthy prison sentences, as opposed to cases brought before the ECtHR, referred to the *Maktouf/Damjanović* judgment. It followed the principle that the punishment direction determines whether to observe minimum or maximum prescribed punishment, and noted that, in other cases which it decided upon; there was not the same factual substrate or legal qualification. When selecting the more lenient law, the maximum prescribed punishments were considered in the sentence.

In all such cases, in which the BiH Court panels tended towards the maximum penalty prescribed during the sentencing, the Constitutional Court in the same manner reached the same conclusion, that the SFRY Criminal Code was more lenient, explaining that, at the time of the trial, capital punishment could be neither theoretically nor practically applied.

The Constitutional Court was guided only by the severity of the sentence in the proceedings before the BiH Court, completely ignoring the gravity of the offence, as one of the key facts that the ECtHR had in mind in the *Maktouf and*

Damjanović case, which, as previously stated above, the Constitutional Court had in mind, considering the appeal of the convicted Maktouf for the first time.

Consideration of Article 7 of the ECHR was, after the *Maktouf and Damjanović* case, considered by the Constitutional Court, in respect of the other appellants, which were, before the BiH Court, found guilty of actions with much graver consequences. For example, one appellant was found guilty before the Court of killing 71 people and injuring about 200, and was sentenced to a long-term imprisonment of 25 years, it being a criminal offence of war crime against the civilian population. It further decided on the appeals of persons that were found guilty of aiding and abetting genocide, for the murder of 1,000 people in one day, they were sentenced to lengthy imprisonment, ranging from 30 to 43 years.

Thus, in the first case, it is the same crime for which Maktouf and Damjanović were convicted, with the difference that the person was convicted for more serious actions within that crime, as evidenced by lengthy prison sentence, which falls under the most severe penalty under the BiH Criminal Code, as of 2003. In the second case, it is a criminal offence of genocide with severe consequences, bearing in mind that it refers to the murder of 1,000 people, who were detained in the hangar and killed the same day.

The Constitutional Court came to the more lenient law in all these cases by comparing imprisonment of 45 years, punishable under the BiH Criminal Code as of 2003, with imprisonment of 20 years under the SFRY Criminal Code, which could be imposed as an alternative to capital punishment, and there was no comparison with capital punishment. In the previous section it has been mentioned that more severe forms of the above-mentioned criminal offence were punishable, under the SFRY Criminal Code in force at the time of the offence, by capital punishment, which could be replaced by a prison term of 20 years.

The reasoning of the Constitutional Court notes that, bearing in mind that the adoption of Protocol 13 abolished capital punishment in all circumstances, ratified by Bosnia and Herzegovina in 2003, during the decision-making process (2008 and 2009), there was neither theoretical nor practical possibility that the appellant be sentenced to capital punishment for the criminal offence.

In this respect, another key issue should be reviewed, and it is the issue of interpretation of Article 7 of the ECHR in comparing the maximum punishment possible.

The purpose of this article is a guarantee that the perpetrator cannot be punished more severely in relation to the punishment which was at the time of the offence applicable, not in relation to the punishment that could, at the time of execution, not be imposed or carried out.

With regard to Article 7 of the ECHR, here one could only compare the law at the time of execution and all penalties that have been prescribed.

In the legislation of Bosnia and Herzegovina, there are different practices and opinions regarding the time of abolishing capital punishment, and even international bodies, such as the Organization for Security and Co-operation in Europe, the UN Commission on Human Rights, and the Venice Commission of the Council of Europe expressed concern about inconsistencies due to this state of affairs.

In earlier decisions, the Constitutional Court considered it unacceptable that the criminal law removes a sanction and applies more lenient sanctions, and thus practically leave the most serious crimes inadequately sanctioned, which the Constitutional Court, in its most recent decisions did.

The role of the BiH Court should be emphasized in order to act upon orders from all decisions of the Constitutional Court, because it is required by the legal system. A certain legal uncertainty has now risen both due to the manner of interpretation of Article 7 of the Convention after the decision of the ECtHR and because of the dispersed practice of the Constitutional Court when resolving appeals.

Thus, in solving some of the appeals, the Constitutional Court dealt exclusively with the issue of the violation of Article 7 of the ECHR, while appeals for other violations were not even considered.

Furthermore, at first, the Constitutional Court in these cases overturned the first-instance and second-instance decisions of the BiH Court, followed by the overturn of second-instance decisions in their entirety.

These decisions resulted in the release of the persons who were, based on legally binding decisions, sentenced to prison, for 35 or 30 years. The reason for this is that the abolition of the judgments has ceased to exist as the grounds for the execution of the sentence, and such action is in accordance with the provisions of Item a) of Paragraph 1 of Article 5 of the ECHR.

The latest practice of the Constitutional Court involves partial abolition of second-instance decisions of the BiH Court, in the part relating to the application of the more lenient criminal law, i.e. the application of substantive law.

These decisions of the Constitutional Court did not call into question the correctness of the judgments of the BiH Court, in the part pertaining to the crime and the guilt of the accused. Following the instructions of the Constitutional Court, the BiH Court annulled the violation only in terms of substantive law, i.e. the decision on punishment. Therefore, the BiH Court panels, based primarily on the fact that the Constitutional Court, ordered the BiH Court to reach a new decision in an expedited procedure, in relation to sentencing, attempted to find the most efficient way for dealing with such situations in each particular case, even though domestic law does not prescribe such a legal situation. It has been previously noted that the BiH Criminal Procedure Code does not provide for the abolition of the judgment when violation of substantive law, i.e. violation of Article 7, is confirmed, but the same is overturned.

In this regard, it should be noted that the decisions in which the Constitutional Court and the ECtHR found a violation of a right under the ECHR should follow national legislation, i.e. be imposed in a way that they comply with the procedural and substantive laws, so that the competent national court could carry out that decision. In respect of the *Maktouf and Damjanović* decision, it was just as well done, so that the ECtHR confirmed violation, and then the national court, in accordance with national legislation, annulled the violation.

Owing to the importance of this issue, the ECtHR in the *Maktouf* judgment, should have given their opinion and presented their attitude in relation to implementation of Article 7 of the ECHR, in respect of the crimes with serious consequences.

This interpretation of Article 7 by a national court can highlight the following consequences. Comparison of the long-term imprisonment, arising from the BiH Criminal Code as of 2003, with a 20-year imprisonment, rather than capital punishment, pointed to the situation of easier punishment of war crimes than ordinary murder.

This indirectly lead to *in abstracto* and *pro futuro* conclusion, that the SFRY Criminal Code is more lenient and that war crimes and genocide cannot be punishable by a sentence longer than 20 years, so it seems that such actions defeat the purpose of sentencing for crimes that represent the harshest violation of international humanitarian law.

Also, there was an absurd situation in which crimes against humanity, an act that is prescribed by the BiH Criminal Code as of 2003, and applied in accordance with Paragraph 2 of Article 7 of ECHR, for which there is a justification for its implementation through the decisions of the ECtHR, can be punishable by 45 years in prison, and for genocide, not longer than 20 years.

There are numerous possibilities of manipulation to simply avoid accusations of genocide, so that, through the accusations of crimes against humanity, a longer sentence could be obtained, and vice versa.

Regarding the purpose of punishment and adequate punishment of perpetrators of the most serious crimes, it can also be mentioned the Guidelines of the Committee of Ministers of the Council of Europe to eradicate impunity for serious violations of human rights, stating the following: respecting the independence of the courts, when gross violations of human rights are proven, there should follow the imposition of appropriate penalties. The penalties shall be effective, proportionate, and appropriate to the crime committed.

Professor William A. Shabas claims that punishment for offences of general crimes cannot be the basis for sentencing perpetrators of serious violations of international humanitarian law. In this sense, he points out: *"In any case, whether it be the case on Yugoslavia or Rwanda, the basing of criminal practices on the factors contained in basic crimes is wrong, because it takes into account the crucial and fundamental aggravating circumstance, i.e. that criminal offences which are processed before the ad hoc tribunals indeed constitute crimes against humanity or war crimes. Tribunals were established precisely in order to deal with the crimes which are themselves more serious than the basic criminal acts committed in peacetime. If crimes are not the same, why should the punishment be the same?"*

Furthermore, although the ECtHR, in the case *Scopolla vs. Italy*, stressed the importance of Article 7 within the meaning of the prohibition of retroactive application of more stringent laws, as well as the principle of retroactive application of the more lenient law, where on the other hand, in the case *Strelez, Kessler, and Krenz*, as of 2001, concluded that the right to life is *"inviolable attribute of human beings, and represents the highest value in the hierarchy of human rights"*, which raises the question as to how would the ECtHR interpret the provision of Article 7 of the ECHR that the considered case is the case with far graver consequences than the *Maktouf/Damjanović* case.

Finally, a special emphasis should be put on the fact that it is important that the ECHR is available to all individuals, and that national courts, through regular procedure and legal remedies, should ensure the proper application of the ECHR, because it is a faster and easier way to protect the human rights of individuals.

In addition, the continuous interpretation of the Convention by the ECtHR will continue to be an important guide for national courts when taking positions on key issues concerning the application of the ECHR.

This publication provides an overview of the existing domestic remedies in the countries of the Western Balkans to ensure that the rights and freedoms secured by the European Convention on Human Rights are effectively protected at national level. It also provides best practices on how to make these remedies more available and how to strengthen the implementation of the Convention at national level, notably through judicial dialogue and legal education and training.

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