EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

23 September 2019

Istanbul Conference

Review and Way Forward for the Individual Application System before the Turkish Constitutional Court, Seven Years On

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Honorable President, Zühtü Arslan,
Distinguished Members of the Turkish Constitutional Court,
Dear colleagues, dear friends, Ladies and Gentlemen,

1. It is a great honour and a pleasure to be with you here today in the historic city of Istanbul on the occasion of the 7th anniversary of the individual application system before the Turkish Constitutional Court. On behalf of my colleagues and friends, Judges Bosnjak and Yuksel, who are with me present, I thank you very much for your invitation.

2. Allow me to begin by expressing my sincere gratitude to Constitutional Court President Arslan. His efforts in developing good relations between the Constitutional Court of Turkey and the European Court of Human Rights are highly appreciated. To further these relations, he paid a visit to Strasbourg early this year on 4 March along with a delegation of justices, including the vice-president, of the Constitutional Court. It was the very first time that the Judges

of the Strasbourg Court, examining cases coming from Turkey, had direct contact and a constructive dialogue with Justices of the Constitutional Court on issues of mutual interest and concern.

3. In his intervention on that occasion President Arslan emphasised that it was important to maintain and develop effective judicial dialogue between the European Court and the supreme courts in Europe. I am in full agreement. It is my strong wish to maintain this dialogue in the future. It is after all an essential element for the effectiveness of the Convention system that the Strasbourg Court's case-law is preserved and enforced by our judicial brothers and sisters at national level.

4. As you are all aware, Turkey is one of the founding members of the Council of Europe and has contributed to the establishment of the human rights protection mechanism under the Convention. I consider it important firstly to underline the crucial role played by the national courts in safeguarding fundamental human rights by reason of their direct and continuous contact with the vital forces of their countries. For the situation domestically in Turkey it is of course of great importance that under Article 90 § 5 of the Constitution, international human rights agreements, duly put into effect, shall prevail in this regard.

5. At the inter-governmental conferences, on the reform of the Convention system, that have taken place since 2010, the Ministers have adopted political declarations that emphasise the national pillar of the Convention system. In particular, the text and spirit of the Declarations of Interlaken, Izmir, Brighton, and Brussels and, more recently, the Copenhagen Declaration, make it clear that the Convention system for the protection of fundamental rights is now in a new

phase in its development, a phase that I have termed “the age of subsidiarity” in an Article published in 2014.

6. The principle of subsidiarity is implicit in the structure of the Convention. Subsidiarity encapsulates a norm of the distribution of labor between the Court and the member States with the ultimate aim of securing to every person who finds himself or herself within the jurisdiction of a State the rights and freedom guaranteed by the Convention. In other words, it is not the Strasbourg Court that is entrusted with the day-to-day responsibility of securing Convention rights, it is the member States. In accordance with Article 1 of the Convention, it is the national authorities which are the primary guarantors of human rights, subject to the supervision of the Court. When the member States fulfil their Convention role by applying in good faith general principles in the Court’s case-law, the principle of subsidiarity implies that the Court may defer to their findings in a particular case.

7. However, and let me clear on this: subsidiarity is not realistic without strong, independent and impartial domestic courts embedded within a national system that is governed by the rule of law. It flows from this that member States demonstrate with their actions whether deference is due under the principle of subsidiarity. In particular, the reasoning provided by national courts in their judgments must secure and protect their independence vis-à-vis the executive and legislative branches. Also, it is incorrect to assume that the principle of subsidiarity in any way limits the Strasbourg Court’s competence to ultimately review substantive findings at the national level at the stage of the application of Convention principles embedded in the domestic legal systems.

8. In this context, I would like, once again, to underline the importance of the individual application system before the Turkish Constitutional Court.

9. Following the introduction of the individual application mechanism in Turkey, the European Court rendered its first decision on the availability and accessibility of this new remedy in the case of *Hasan Uzun v. Turkey* delivered in 2013.[1] In its decision the Court reiterated that the rule of exhaustion of domestic remedies was an indispensable part of the functioning of the Convention mechanism. Having examined the main aspects of the new remedy before the Turkish Constitutional Court, the Court found that the Turkish Parliament had entrusted that court with powers that enabled it to provide, in principle, direct and speedy redress for violations of the rights and freedoms protected by the Convention. It accordingly declared the application inadmissible for non-exhaustion of domestic remedies.

10. The Court next examined the effectiveness of that remedy in the context of a complaint raised under Article 5 of the Convention, in particular in the case of *Koçintar v. Turkey* from 2014.[2] In that case, the Court found that an individual application to the Constitutional Court was capable of affording appropriate redress for the applicant's complaint under Article 5 of the Convention and that it did offer reasonable prospects of success. In reaching that finding, the Court noted that the Constitutional Court had jurisdiction to find violations of Convention provisions and was vested with appropriate powers to secure redress for violations by granting compensation and/or indicating the means of redress. Taking into account the binding nature of the Constitutional Court's decisions in accordance with Article 153 § 6 of the Constitution, the Court found that the question of compliance in practice with that court's decisions on individual applications should not in principle arise in Turkey and that there was no cause

[1] *Hasan Uzun v. Turkey*, (dec.), no. 10755/13, 30 April 2013.

[2] *Koçintar v. Turkey* (dec.), no. 77429/12, 1 July 2014.

to doubt that the judgments in which the Constitutional Court found a violation would be effectively implemented.

11. However, you will recall that regrettably the Strasbourg Court's findings and conclusions in the *Koçintar* case were called into question in the case of *Mehmet Hasan Altan v. Turkey*, in which we delivered judgment in February 2018.[3] In the *Altan* case, the Court ruled that the applicant's continued pre-trial detention, after the Constitutional Court's clear and unambiguous judgment of 11 January 2018 finding a violation of Article 19 § 3 of the Constitution, could not be regarded as "lawful" and "in accordance with a procedure prescribed by law" as required by the right to liberty and security under Article 5 of the Convention. The Court observed that the reasons given by the Istanbul 26th Assize Court in rejecting the application for Mr Altan's release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, could not be regarded as satisfying the requirements of Article 5 § 1 of the Convention.

12. In our judgment the Court emphasised in particular that for another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness. The Strasbourg Court further held that Mr Altan's continued pre-trial detention, after the Constitutional Court's judgment, raised serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention. However, as matters stood, the Court did not depart from its previous finding

[3] *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 February 2018.

that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty. Nevertheless, it reserved the right to examine the effectiveness of the system of individual applications to the Constitutional Court in cases brought under Article 5 of the Convention, especially in view of any subsequent developments in the case-law of the first-instance courts, in particular the assize courts, regarding the authority of the Constitutional Court's judgments.

13. I want to be clear at this point: It transpires from the current case-law of the Strasbourg Court that it continues to place emphasis on the work of the Constitutional Court. Indeed, since the introduction of this new remedy, on 23 September 2012, the Constitutional Court has rendered a significant number of important judgments which have provided a remedy and, where appropriate, reparation to the complainants. It has also played a pivotal role in giving guidance to the lower courts by harmonising the Convention principles with those of the national law. In sum, it is of great importance for the effective protection of human rights and the future development of Turkey as a democratic state governed by the rule of law, that the Constitutional Court provides a credible and speedy remedy to justified allegations of violations perpetrated at national level. In this regard, and as I have previously made clear, it is also of vital importance that national courts adopt reasoning in their rulings which is, as far as possible, in conformity with the methodological approach taken in the Strasbourg Court's case-law.

14. Mr President, if I may, I would, before I conclude, make three further remarks.

15. First, we are fully aware of the difficulties and challenges faced by the Constitutional Court in terms of the volume and sensitivity of cases with which

it deals, particularly after the events of 15 July 2016. The European Court also had its share of these difficulties, as we received more than 36,000 applications following the various measures taken under the state of emergency legislation. Although a large part of these applications were declared inadmissible for non-exhaustion of domestic remedies, there are still more than 4,000 applications pending before our Court on a variety of issues, such as detention of judges, civil servants, journalists or members of parliament.

16. Secondly, as you know, 2019 marks the sixtieth anniversary of the European Court of Human Rights. Throughout this sixty-year period, the Court has met the challenges resulting from international and domestic conflicts, migratory flows and the threat of terrorism. Notwithstanding these difficulties, the Court has contributed to the harmonisation of European standards concerning the rights and freedoms of more than 830 million Europeans. Our Court enjoys close and cordial relations with the superior courts of Europe. This interaction has gained a new momentum with the creation of the Superior Courts Network which enables the European Court to strengthen judicial dialogue and closer cooperation with these courts, thereby enhancing shared implementation of the Convention. The Court is proud to have the membership of the Turkish Constitutional Court, Court of Cassation and Council of State.

17. My third and final remark is this: An independent judiciary is the cornerstone of the rule of law and is vital to the functioning of democracy and the observance of human rights. The Strasbourg Court has generated a body of case-law on this subject along with the right to a fair trial by an ‘independent and impartial tribunal established by law’. Those men and women that are privileged to be bestowed with judicial power must exercise this power in a manner that is conducive to upholding the rule of law and democratic principles. That endeavour often necessitates a sober mind and a brave heart, in particular

in difficult times when our core principles are being challenged. But that is our role; that is our mission.

18. Thank you for your attention.