The ECtHR on Constitutional Complaint as Effective Remedy in the Hungarian Legal Order

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Abstract

Since 2012 a new regulation of the constitutional complaint was introduced to the Hungarian legal system that since then also includes the full constitutional complaint against final court decisions. Besides this new remedy , two other exist: a complaint against a legal provision applied in court proceedings (in force since 1990), and an exceptional form of the complaint against a legal provision, when there are no real and effective remedies available. Before 2012 the ECtHR did not consider the constitutional complaint to be an effective domestic remedy that needs to be exhausted. In two decisions taken in 2018 and 2019 the ECtHR declared that – under the respective conditions and circumstances – all three kinds of constitutional complaints may offer an effective remedy to the applicants at domestic level. The case note presents the two cases summarizing the main arguments of the ECtHR that led to this conclusion.

Keywords: ECHR, Constitutional Court of Hungary, constitutional complaint, exhaustion of domestic remedies, subsidiarity.

1. Introduction – Exhaustion of Domestic Remedies

An important question was pending as undecided for years before the ECtHR: whether the constitutional complaint in the Hungarian legal system is an effective remedy to be exhausted before applying to the Court or not?[1] Article 35(1) ECHR clearly defines the admissibility criteria:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken."

According to the principle of subsidiarity it is the responsibility of the contracting states to remedy violations of the ECHR. Therefore, all domestic remedies should be exhausted, including the constitutional complaint if it is considered by the

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1 As this paper was written by a judge participating in the cases, the aim of this article is the mere presentation of the decisions, and I abstain from making further comments, explanations to those judgments, furthermore, I cannot enter into discussions on the evaluation of these cases.

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ECtHR an effective remedy. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 ECHR, with which it has close affinity – that there is an effective remedy available in respect of the alleged breach. The rule is therefore an indispensable part of the functioning of this system of protection.[2]

In more general terms, it is a principle of international law that the protection of human rights should be carried out by national governments. National remedies are perceived as more effective than international ones because they are easier to access, proceed more quickly and require fewer resources than making a claim before an international body. The range of domestic remedies is quite broad from making a case in court to lodging a complaint with administrative agencies.

Under Article 35 ECHR this requirement regarding the exhaustion of domestic remedies is based on the assumption that the domestic legal order will provide an effective remedy for violations of ECHR rights. The ECtHR applies the rule with flexibility and without 'excessive formalism'. The effectiveness of a domestic remedy such as the constitutional complaint is not an eternal category, but for the sake of legal certainty the case-law of the ECtHR should be consistent.

Applicants are only required to exhaust domestic remedies that are available and effective. In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case. Account must be taken not only of formal remedies available, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant.

As regards the burden of proof where the Government claims non-exhaustion, the defendant State bears the burden of proving that the applicant has not used a remedy that was both effective and available at the relevant time. The availability of any such remedy must be sufficiently certain in law as well as in practice. According to the terminology used by the ECtHR it should offer 'reasonable prospects of success'.

Once the Government has proved that there was an appropriate and effective remedy available to the applicant, it is for the latter to show that the remedy was in fact exhausted. Alternatively, the applicant may prove that the domestic remedies were inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. In these cases, there is no need to first address the national mechanisms if it can be convincingly demonstrated that there are, in effect, no local remedies available.[3]

The ECtHR examines the accessibility and effectiveness of the domestic remedy following a case by case approach. Based on the ECtHR's own

2 *Vučković and others v. Serbia (preliminary objection) (GC)*, Nos. 17153/11 and 29 others, 25 March 2014, para. 69.

3 The exhaustion requirement principle is summed up in the ECtHR's *Practical Guide on Admissibility Criteria*, at www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf, paras. 71-102.

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requirements as to effectiveness of national remedies in protecting these rights, it was found that substantive access to justice requires that such justice is delivered in timely, transparent, independent and flexible manner (that is, without excessive formalism), and with sufficient legal certainty.[4]

It took a long road to answer the question whether the constitutional complaint in Hungary is an effective remedy, partly due to the specific legal framework operating within the Hungarian legal system.

2. Changing Competencies of the Constitutional Court of Hungary Regarding Individual Complaints

The introduction of judicial review into the Hungarian legal system in 1989 followed the European model with a mixture of competences taken from various examples of other constitutional courts. From among the proceedings, the one that became most prominent during the transition period was the *ex post* constitutional review of legislation initiated by individuals (*actio popularis*). Anyone could submit such requests without a need to show personal injury, which led to a great number of cases before the Constitutional Court.

Under this regulation concrete cases could come before the Constitutional Court in two ways. *(i)* Firstly, ordinary judges could suspend the proceedings and initiate the procedure before the Constitutional Court when they considered a legal norm applicable to the case to be unconstitutional. *(ii)* Secondly, anyone could turn to the Constitutional Court with a constitutional complaint after having unsuccessfully tried all other means to gain legal remedy, when they considered their rights had been violated by the application of an unconstitutional legal provision. Such constitutional complaints also represented *ex post* norm control, since the Constitutional Court only reviewed the constitutionality of the statutes applied by ordinary courts and not the question of whether the specific decision of a court or an administrative authority violated a constitutional right of the claimant or not. The Constitutional Court could provide as the sole remedy to such injuries the prohibition of further application of the statute found to be unconstitutional in the claimant's case.

This situation changed with the new legal framework for the Constitutional Court enacted in 2011. The Hungarian Parliament adopted the new Constitution (called Fundamental Law[5]) in 2011 which entered into force on 1 January 2012. The reforms also made changes to constitutional justice.

Among others, the *actio popularis* was abolished. On the other hand, the reform introduced a procedure for individual constitutional complaint against individual acts of public authorities. As we have seen, until 2012 the Constitutional Court could provide remedy against a judicial decision if the underlying statute was unconstitutional. If ordinary court decisions violated due

4 Janneke H. Gerards & Lize R. Glas, 'Access to Justice in the European Convention on Human Rights System', *Netherlands Quarterly of Human Rights,* Vol. 35, Issue 1, 2017, p. 29.

5 *See* at http://hunconcourt.hu/uploads/sites/3/2018/11/thefundamentallawofhungary_20181015_fin.pdf.

process but the underlying statute was constitutional, the Constitutional Court could not review the decisions. This 'limited' constitutional complaint was kept even in the Fundamental Law but the so-called 'genuine' constitutional complaint was also introduced against judicial decisions.

Three different types of constitutional complaints are available under the new regulation. *(i)* Section 26(1) of the Act on the Constitutional Court (CC Act)[6] regulates the complaint against a legal provision applied in court proceedings (one may call it the 'old-type' complaint); *(ii)* Section 26(2) of the CC Act provides for an exceptional form of the complaint under Section 26(1) of the CC Act against a legal provision, when there are no real and effective remedies available ('exceptional' complaint); and *(iii)* Section 27 of the CC Act, allowing for a full constitutional complaint against final court decisions (in other words a 'genuine' constitutional complaint that may also be referred to as a German-type constitutional complaint).

The authorization to quash judicial decisions based on unconstitutional laws or on the unconstitutional interpretation of laws provided powers for the Constitutional Court that are fundamentally different from those before 2012.

The admissibility criteria set forth in the law are twofold. *(i)* Firstly, a violation of the complainant's rights under the Fundamental Law is required. *(ii)* Secondly, as an expression of the subsidiary character of the constitutional complaint, all legal remedies must have been exhausted beforehand. Section 26(2) of the CC Act introduces an additional qualification to the violation of the complainant's rights, stating that it must occur directly, which is defined as 'without a judicial decision'. An additional filter for the admissibility of constitutional complaints is laid down in Section 29 of the CC Act. Complaints shall only be admissible, if "a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance." This provision seems to have been modelled on Article 93a of the Federal Constitutional Court Act of Germany. The focus of Section 29 seems to lie with the question, whether a successful complaint will in fact alter the situation of the applicant.

3. Hungarian Cases Concerning the Effectiveness of a Complaint Before the Constitutional Court

The constitutional complaint, as it operated in the Hungarian legal system under the rules on the Constitutional Court in place until the end of 2011, was declared an ineffective remedy by a decision of the ECommHR.[7] The ECommHR was of the view that under the rules then in place the Constitutional Court could not "quash or modify specific disciplinary measures taken against an individual by State officials." A similar approach was adopted later by the ECtHR in *Csikós*,[8] where, in

6 Act CLI of 2011 on the Constitutional Court, *see* in English at http://hunconcourt.hu/act-on-the-cc.

7 *Vén v. Hungary (ECommHR dec.)*, No. 21495/93, 30 June 1993.

8 *Csikós v. Hungary*, No. 37251/04, 5 December 2006, paras. 17-19.

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the circumstances of the particular case, a constitutional complaint was not considered to be an effective remedy because it did not provide a guarantee for successful complainants to have the criminal proceedings at issue reviewed. In *K.M.C. v. Hungary*[9] the ECtHR found that the theoretical avenue of having brought a court action for the only purpose of enabling the labor court to potentially refer the case to Constitutional Court was too speculative to be required of the applicant.

After that the domestic legal context changed significantly in 2012 with the enactment of the Fundamental Law and the new Constitutional Court Act, the ECtHR examined only a few applications. In *Hálózati Gyógyszertárak Szövetsége*[10] it held that the applicant's constitutional complaint introduced in the new scheme could not possibly extend the six-month time-limit for the purposes of Article 35(1) ECHR because it had been rejected partly as falling outside the scope of the Constitutional Court's jurisdiction and partly as concerning matters essentially the same as in previously adjudged cases. In *Magyar Keresztény Mennonita Egyház and others*[11] the ECtHR noted that the Constitutional Court had annulled the original form of the legislation under scrutiny with retrospective effect, but this ruling had not provided the applicant churches with any redress with regard to the ability to receive donations and subsidies, which was an aspect of 'crucial importance' for them; consequently, the constitutional complaint was not considered to be an effective remedy. In *Vékony*[12] the ECtHR did not examine the effective nature of the constitutional complaint as such, but held that the non-pursuit of an action in compensation against the lawmaker – as and when underpinned by a successful constitutional complaint – could not be reproached to the applicant. In *Karácsony and others*[13] the ECtHR expressly refrained again from giving a general ruling in the matter while holding, with respect to the specific circumstances of that case, that

> "A successful outcome of [constitutional complaint] proceedings did not offer the applicants a possibility to request any form of rectification of the disciplinary decisions since there were no regulations in Hungarian law to that effect."[14]

Finally, in *Király and Dömötör*[15] the ECtHR did not require the applicants to have approached the Constitutional Court for the reason that

9 *K.M.C. v. Hungary*, No. 19554/11, 10 July 2012, para. 28.
10 *Hálózati Gyógyszertárak Szövetsége v. Hungary (dec.)*, No. 66925/12, 14 May 2013.
11 *Magyar Keresztény Mennonita Egyház and others v. Hungary*, Nos. 70945/11 and 8 others, 8 April 2014, para. 50.
12 *Vékony v. Hungary*, No. 65681/13, 13 January 2015, para. 24.
13 *Karácsony and others v. Hungary (GC)*, Nos. 42461/13 and 44357/13, 17 May 2016.
14 Id. paras. 81-82.
15 *Király and Dömötör v. Hungary*, No. 10851/13, 17 January 2017.

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> "The Government has failed to prove that there is a constitutional right or a domestic judicial practice allowing an individual to seek, with any prospect of success, the intervention of the police for the protection of private life."[16]

If take a look closer at these cases we find that the ECtHR has not addressed the effective character of the constitutional complaint in the new system in general, it limited itself to assessing specific and particular aspects linked closely to the particular cases instead. In *Hálózati Gyógyszertárak Szövetsége*, the constitutional complaint was simply incapable of producing the desired legal effect and therefore an analysis of its effectiveness in general terms was not provided. In *Magyar Keresztény Mennonita Egyház and others*, it was the specific issue of failure to restore the applicant churches' ability to be subsidized that led the ECtHR to hold that the constitutional complaint was ineffective. In *Vékony* and in *Karácsony and others*, the ECtHR forewent the general assessment of effectiveness of a constitutional complaint and limited its findings to the specific circumstances. Lastly, in *Király and Dömötör*, the reason for absolving the applicants from approaching the Constitutional Court was that the Government had not demonstrated the presence, in the Hungarian constitutional system, of the very specific right referred to and sought by the applicants.

4. The Mendrei Case Finding the Constitutional Complaint to Be an Effective Remedy[17]

An application gave the ECtHR the opportunity to examine a specific aspect of the necessity of exhausting the constitutional complaint as an effective remedy. The applicant complained that compulsory chamber membership for teachers like him – that is to say, teachers employed in public schools – was discriminatory and amounted to an infringement of his rights. The applicant submitted that he, as a teacher serving in public education, was obliged by the National Public Education Act to be a member of the Chamber. In his view, this was discriminatory and in breach of his rights under Article 10 ECHR read alone and in conjunction with Article 14 ECHR. In essence, the ECtHR had to examine whether the remedy indicated by the Government, namely, a constitutional complaint under Section 26(2) of the CC Act was accessible, effective and capable of offering sufficient redress.

The Constitutional Court, as explained above, may examine constitutional complaints under Section 26(2) of the CC Act, if the grievance occurred directly as a result of the taking effect of a legal provision, provided that there is an absence of any other remedies. The applicant's case felt into this category, his grievance being precisely the *ipso iure* compulsory membership in the Chamber due to the enactment of the National Public Education Act. Moreover, none of the parties argued that there were any other local remedies to be exhausted. It is true that

16 Id. para. 49.
17 *Mendrei v. Hungary (dec.)*, No. 54927/15, 19 June 2018.

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Section 41 of the CC Act contemplates the quashing of a legal provision in breach of the Fundamental Law but provides no possibility of compensation or other measures of redress. However, the removal of the challenged provisions of the law would have terminated the compulsory membership complained of. Therefore, the ECtHR concluded that a successful constitutional complaint under Section 26(2) of the CC Act would have been capable of putting an end to the grievance, restoring the *status quo ante*, *i.e.* the situation preceding the adoption of the National Public Education Act. Indeed, had the applicant availed himself of a constitutional complaint shortly after the enactment of the law, a positive outcome may have secured him redress of an essentially preventive nature, rendering a compensatory remedy unwarranted.[18]

The applicant argued that the revoked constitutional complaint is not an effective remedy both because of the length of the Constitutional Court's procedure and the very low success rate of complainants. In this regard the ECtHR noted that these arguments were largely of speculative and empirical nature and not capable as such of proving that the remedy in question would not be effective in practice in the circumstances of the applicant's case.

The ECtHR took into consideration that the wording of Section 26(2) of the CC Act contemplates that the procedure described can only be initiated 'exceptionally'. From the legislator's point of view this is logical, since the abstract norm control by *actio popularis* was abolished, and the possibility of abstract norm control without previous judicial procedure should be limited to exceptional cases when an unconstitutional law may also directly cause grievance, that is to say, without any judicial intervention. However, this does not restrict in any manner a complainant's right to approach the Constitutional Court. This situation is also subjected to constitutional scrutiny, namely under Section 26(2), although the typical remedy by constitutional complaint remains the one questioning the constitutionality of the application of the law by the authorities.[19]

In light of the above considerations, after examining the earlier cases concerning the constitutional complaint available in the Hungarian legal system as it has been presented in the above, the ECtHR concluded that in the particular circumstances of the applicant's case a constitutional complaint under Section 26(2) of the CC Act against the National Public Education Act was an accessible remedy offering reasonable prospects of success. Furthermore, the ECtHR did not recognize any circumstances exempting the applicant from having lodged such a complaint in the present case. However, the applicant failed to do so. It follows that the applicant had not exhausted the domestic remedies as required under Article 35(1) ECHR and the application was to be rejected, pursuant to Article 35(4) ECHR. For these reasons, the ECtHR, unanimously, declared the application inadmissible.[20]

Mendrei thus solved one part of the challenge regarding constitutional complaints. The 'exceptional' character of the constitutional complaint under

18 Id. paras. 33-35.
19 Id. para. 40.
20 Id. para. 43.

Section 26(2) of the CC Act notwithstanding, it may offer a successful remedy and must therefore be exhausted in the respective cases. The next task was to decide whether the 'genuine constitutional complaint under Section 27 of the CC Act provides effective remedy or not.

5. The Szalontay Case[21] – The 'Genuine' Constitutional Complaint as an Effective Remedy

Another application gave the ECtHR an opportunity to develop its case-law regarding the other types of constitutional complaints. In *Szalontay* the applicant was the managing director of a company which leased and sub-leased the premises called West Balkan at a shopping mall in Budapest to hold musical events. In particular, the company sub-leased the premises for a musical event held on 15 January 2011 to another company that had previously organized concerts at the same venue.

On the evening of the event, panic broke out in the crowded stairway of the music hall. People tripped and fell, and in the resultant stampede three young people were crushed to death. On 27 June 2012 the applicant was found guilty by the Pest Central District Court of the crime of "danger caused by negligent professional misconduct leading to fatal mass casualties in the course of employment". The court sentenced the applicant to two years and eight months of light-regime imprisonment and banned him from event organization activity for two years. Two organizers and the security chief were also sentenced to imprisonment in the case.

On 12 April 2013 the Budapest-Capital Regional Court, acting as a court of appeal, increased the sentence imposed on the applicant to three years and four months' imprisonment but suspended the execution of half of it for a two-year probationary period. In addition to the result of the defendant's actions, which had led to a large number of people being injured, the court deemed it an aggravating circumstance that the applicant, on account of his knowledge of the limited capacity of the premises, had also been grossly negligent. The court took into account, for the benefit of all the defendants, the fact that more than two years had passed since the event and that a great deal of regret had been demonstrated by the applicant throughout the proceedings.

The court of second instance completed its findings of fact by noting the irregularities previously found by the Budapest Firefighting Headquarters which had established on 5 May 2010 that only 307 people could be safely evacuated from the venue. On 10 December 2010 there was no record of any evacuation calculations (on the evening of the tragedy 2883 persons attended the event). Meanwhile, on 29 November 2010, the applicant had notified the commercial department of the local government of a catering activity for 300 people. Refuting the defense counsel's arguments, the Regional Court held that the court of first instance had duly fulfilled its obligation to provide reasoning.

21 *Szalontay v. Hungary (dec.)*, No. 71327/13, 12 March 2019.

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In relation to the procedural shortcomings claimed by the defense counsel, the Regional Court stressed that "the records or other documents did not contain any indications suggesting a significant limitation of defense rights." As to the expert opinions and the alleged procedural errors relating to the questioning of the experts, the court of second instance ruled that they had not had any significant impact on the judgment and that the defendant's further applications for evidence to be taken had been immaterial in terms of the liability of the defendants. During the proceedings, the applicant did not challenge any of the trial judges for bias. The applicant did not lodge a constitutional complaint against the final judgment.

Subsequently, the applicant turned to the ECtHR and complained under Article 6 ECHR that his right to a fair trial had been violated in the criminal proceedings instituted against him and submitted in particular that the principle of equality of arms had not been observed and that the courts had not been impartial. The applicant complained that he had been convicted following a trial which had not been in compliance with the requirements of Article 6 ECHR. Article 6 provides that "In the determination of [...] any criminal charge against him, everyone is entitled to a fair [...] hearing [...] by [a] [...] tribunal."

The Government submitted that the applicant had had the possibility of lodging a constitutional complaint under Section 26(1) or Section 27 of the CC Act, which could have provided an effective remedy in respect of his grievances. The applicant disagreed. As regards the possibility of lodging a constitutional complaint, he submitted that the Government had not referred to any decisions of the Constitutional Court showing that the remedy suggested would have been effective in the circumstances, as required by the ECtHR's case-law. He made reference to the case of *Király and Dömötör*.[22]

The ECtHR first examined the Government's objection that domestic remedies have not been exhausted because of the applicant's failure to submit a constitutional complaint. In *Mendrei,* analyzed above, the ECtHR had held that the application was inadmissible for non-exhaustion of domestic remedies, because a constitutional complaint against the respective legislation under Section 26(2) of the CC Act could have been an effective remedy. By contrast, in the present application the Government relied on the procedures outlined in Section 26(1) and Section 27 of the CC Act. The ECtHR is therefore called upon to ascertain whether, having regard to the particular circumstances of the applicant and the nature of his complaint, the remedy indicated by the Government was accessible, effective and capable of offering sufficient redress.

The ECtHR noted that the applicant's case may fall into one of two categories of constitutional complaints: his grievances concerned *(i)* the application of a provision of the Code of Criminal Procedure barring him from submitting a challenge for bias in an effective manner; or *(ii)* his conviction and sentence resulting from the first- and second-instance judgments had demonstrated a lack of impartiality on the part of the courts and a failure to observe the principle of equality of arms. In the ECtHR's view, the first of these issues may relate to the

22 *Király and Dömötör*, paras. 4-28.

constitutionality of the relevant provision [that is to say, to Section 26(1) of the CC Act], whereas the second one may relate to the constitutionality of the application of the law by the courts (that is to Section 27 of the CC Act).[23]

According to the ECtHR the applicant's complaints fall entirely within the ambit of the right to a fair trial, which is enshrined in the Fundamental Law. This is an important difference from the case of *Király and Dömötör* where the ECtHR did not require the applicants to have applied to the Constitutional Court, for the reason that

> "The Government have failed to prove that there is a constitutional right or a domestic judicial practice allowing an individual to seek, with any prospect of success, the intervention of the police for the protection of private life."[24]

In the present case, however, Article XXVIII of the Fundamental Law is dedicated to the right to a fair trial in terms very similar to those of Article 6 ECHR; therefore, the ECtHR concluded that a relevant constitutional right exists.[25]

The ECtHR addressed also the issue of the compensation for the injury. Sections 41 and 43 of the CC Act contemplate, respectively, the striking down of a legal provision or the quashing of a court decision if they are in breach of the Fundamental Law; nevertheless, these rules provide for no possibility of compensation. However, in the ECtHR's view, this does not preclude the effectiveness of the remedies at issue in the present case. A successful constitutional complaint, relying either on a combination of Sections 26(1) and 27 of the CC Act or on Section 27 alone, would have been capable of putting an end to the grievance by prohibiting the application of the challenged rule and ordering new proceedings regarding the applicant's case. Had the applicant availed himself of a constitutional complaint after the final and binding second-instance judgment, a positive outcome might have secured him redress in the form of the resumption of the criminal case, this time devoid of the procedural irregularities complained of. The statutory sixty-day time-limit starting from the day when the applicant became aware of the final judgment provided an adequate opportunity for him to lodge a constitutional complaint.

A threshold requirement under Section 29 of the CC Act for the admissibility of a constitutional complaint is that a conflict with the Fundamental Law must have significantly affected the judicial decision in question. In the ECtHR's view, this could have been an arguable claim on the applicant's part, given the nature of the allegations he made in the present application. These revolve in essence around the assertion that the non-observance of the principle of equality of arms and the lack of impartiality on the part of the courts resulted in his wrongful conviction in an unfair trial.

In light of the above considerations, the ECtHR concluded that in the applicant's case either a constitutional complaint under Section 26(1) coupled

23 *Mendrei,* paras. 29-33.
24 *Király and Dömötör,* para. 49.
25 *Szalontay,* para. 34.

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with a complaint under Section 27 against the challenged legislation (that is to say, Section 285 of Act XIX of 1998 on the Code of Criminal Procedure), or a constitutional complaint made solely under Section 27 against the judgments given in allegedly unfair proceedings, were accessible remedies offering reasonable prospects of success. The ECtHR found no circumstances exempting the applicant from having to lodge such complaints in the present case. The ECtHR also pointed out that it is ready to change its approach as to the potential effectiveness of the remedies in question should the practice of the domestic authorities indicate the contrary.

It follows that the applicant has not exhausted domestic remedies as required by Article 35(1) ECHR and that the application had to be rejected, pursuant to Article 35(4) ECHR. For these reasons, the ECtHR, unanimously, declared the application inadmissible.[26]

6. Conclusion

In accordance with its case-law regarding other countries with a similar system of constitutional complaint, the ECtHR declared the constitutional complaint introduced into the Hungarian legal system an effective remedy in terms of the ECHR.

The decision taken on the effective remedy character of the constitutional complaint was not only important for Hungarian lawyers but also for the countries having a similar kind of remedy. Legal experts of those countries were wondering why the ECtHR is so hesitant in deciding in respect of Hungary while similar legal institutions in countries like Germany, Slovenia, Serbia, Bosnia and Herzegovina, Slovakia,[27] Montenegro,[28] *etc.* were declared without hesitation to be effective remedies. This situation created certain expectations even within the ECtHR itself.

The two unanimous Chamber judgments, and the newly established principle that the constitutional complaint is an effective remedy, may have a strong influence on applications submitted against Hungary. After almost three decades of a case-law consequently denying that the constitutional complaint was an

26 Id. paras. 38-40.

27 In Slovakia a constitutional amendment introduced the individual complaint as of 1 January 2002, The ECtHR declared the newly established constitutional remedy to be an effective already in the same year. *Omasta v. Slovakia (dec.),* No. 40221/98, 10 December 2002.

28 With regard to Montenegro, the constitutional complaint was not considered to be an effective remedy by the ECtHR. In 2015 the Constitutional Court Act was amended, broadening the possibility to turn to the Constitutional Court by way of individual complaint. In the case *Siništaj and others v. Montenegro* (Nos. 1451/10, 7260/10 and 7382/10, 24 November 2015) the ECtHR declared that the new form of constitutional complaint can be regarded as an effective remedy.

effective remedy, applicants must now be aware that they have to exhaust this domestic instance.[29]

The material consequences of the two decisions will obviously be elaborated by the practice of the domestic Constitutional Court, and the ECtHR, respectively. What can be said for certain is that when there is a constitutional right enshrined in the Fundamental Law, the constitutional complaint as an effective remedy should be exhausted. By contrast, where no such constitutional right exists, applicants may turn directly to the ECtHR, *e.g.* the high number of length of procedure cases falling beyond its scope.

There is an ongoing debate within the ECtHR itself and in the academic literature on the application of the exhaustion principle and its constitutive elements such as accessibility and effectiveness.[30] As the ECtHR put it earlier, "the exhaustion rule may be described as one that is golden rather than cast in stone."[31]

29 Although inadmissibility decisions are rarely cited, let me refer here to a case that illustrates how they implement the principle that the constitutional complaint is regarded as an effective remedy: "The Court has already held that a constitutional complaint under section 26(1) and/or section 27 of the Constitutional Court Act is an effective remedy normally to be exhausted for the purposes of Article 35 § 1 of the Convention in situations where the application concerns Convention rights equally protected by the Fundamental Law of Hungary (see *Szalontay v. Hungary (dec.)*, No. 71327/13, 12 March 2019)." "Moreover, there was an effective remedy available to the applicant, namely a labour litigation followed, in case of unfavourable outcome, by a constitutional complaint. It follows that the complaint under Article 13 of the Convention must be rejected as manifestly ill-founded, according to Article 35 §§ 3(a) and 4 of the Convention." *See Karsai v. Hungary (dec.)*, No. 22172/14, 27 June 2019, paras. 14 and 17. Let me point out that in this case the applicant did not exhaust even the labor court remedy.

30 Judges of the ECtHR who had themselves on the exhaustion principle, among others: Nicolas Bratza & Alison Padfield, 'Exhaustion of Domestic Remedies under the European Convention on Human Rights', *Judicial Review*, Vol. 3, Issue 4, 1998, pp. 220-226; Guido Raimondi, 'Reflections on the Rule of Prior Exhaustion of Domestic Remedies int he Jurisprudence of the European Court of Human Rights', *Italian Yearbook of International Law*, Vol. 20, 2010, p. 163; Tim Eicke, 'The Court's Approach to Exhaustion of Domestic Remedies in the Age of Subsidiarity', *in* Linos-Alexandre Sicilianos *et al.* (eds.), *Intersecting Views on National and International Human Rights Protection. Liber Amicorum Guido Raimondi,* Wolf Legal Publishers, Tilburg, 2019, pp. 231-254. For academic contributions *see e.g.* Silvia D'Ascoli & Kathrin Maria Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection', *Italian Yearbook of International Law*, Vol. 16, 2006, pp. 117-138; Silvia D'Ascoli & Kathrin Maria Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection', *EUI Working Paper*, LAW No. 2007/02; Cesare P. R. Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures', *in* Nerina Boschiero *et al.* (eds.), *International Courts and the Development of International Law*, T.M.C. Asser Press, The Hague, 2013, pp. 561-573.

31 *Practical Guide on Admissibility Criteria,* para. 75.

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