ROUND TABLE ON "REOPENING OF PROCEEDINGS FOLLOWING A JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS"

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Comments on Reopening Proceedings in the Civil Matters after the ECtHR Judgments before the Constitutional Court of the Czech Republic

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1. Introductory Remarks

The procedure on reopening cases after the judgments of European Court of Human Rights (ECtHR) was introduced in the Czech Republic in 2004 (Act No. 83/2004 amending the Constitutional Court Act). It has been intended by the Government as a universal instrument for retrial of any case held previously by the Constitutional Court in which the international tribunal later came to the conclusion about the breach of fundamental rights and freedoms (however, practically the legal regulation aimed exclusively at the powers of the Strasbourg court).

Paradoxically, when the bill has been dealt within the Parliament a group of MPs suggested a change and the final act limited the retrial before the Constitutional Court only to criminal matters. It has been argued the criminal matters deal only with the relation between an individual and the state power, therefore any third party will not be negatively influenced, the *restitutio in integrum* in these cases will have an effect only to the position of the state power, there is no need to take the legal certainty into considerations etc.

The reopening procedure has been vested to the hands of the Constitutional Court as the most appropriate institution. The reasons were as follows: a) the Constitutional Court should have been the last domestic court that dealt with the matter before the international tribunal, b) the subject of the proceeding on the constitutional complains is the same as the subject before the ECtHR, i.e. the protection of fundamental rights and freedoms and c) it has been considered as practical as the case-law concerning the petitions for reopening would be centralised, in hands of one court, instead of dispersed case-law when the retrial would be granted to ordinary courts.

The procedure on reopening has two stages: in the first the plenum of the Constitutional Court decides about the petition for retrial (for rehearing the case), i.e. whether to allow the reopening; if it is allowed and the procedure on constitutional complain really opened, the original (the former) petition is dealt again; in the new opened procedure, the court decides as being bound by the legal conclusions made by the ECtHR.

However, even at that time the domestic legal regulation brought a plenty of questions. First of all, what matters shall be regarded as criminal ones (only those dealt according to the criminal code before criminal courts, or the administrative punishing shall be ranked under these provisions, too)?

The legal regulation stipulates that the petition for reopening the case is admissible only in the situation when the consequences of the infringement of the right or freedom no longer exist and

have been sufficiently redressed by granting the just satisfaction by the international court's decision or if the redress has been achieved by other means; this precondition for the reopening the case is very difficult to interpret as it is connected with the very core of the whole issue, with the three crucial categories: what is the relation between the compensation, satisfaction and restitution of the case and in what proportion shall be they granted to the person whose rights have been breached? The Czech lawgiver decided that the restitution should be applied only if the compensation and satisfaction seem to be insufficient. In other words: is it not necessary in all the cases that the restitution principle shall be applied beside the compensation and just satisfaction. Therefore the central questions posed in all the cases dealt before the Constitutional Court so far have been the following: what is the proportional relation between the compensation and the need for *restitutio in integrum* and is it up to the Constitutional Court to decide this question in the situation when the ECtHR decision has been silent about this question.

More practically, in all the cases the first question is whether it is enough when the complainant has been granted just satisfaction according to the ECtHR judgment, or what is the proper and balanced relation between particular amount of just satisfaction that has been found by the ECtHR and the conditions for restitution, i.e. for the reopening of the case on domestic level. That is why it is very helpful when the ECtHR started to put into its judgments the so-called reopening clauses, i. e. to mention in the final judgements that it decides the case with the knowledge the domestic legal order enables the retrial after the ECtHR judgement; this could serve as a kind of affirmation for the domestic courts the ECtHR decided with the expectation the infringement will be redressed not only by the monetary compensation, but with the retrial next to it.

What has been now said about the retrial in criminal matters applies to civil and other matters even more intensively.

2. Retrials in Civil (and Other Non-criminal) Matters

In 2013 the Czech lawgiver extended the retrial procedure to all the cases irrespective of the field of domestic law – it has been done by a very simple change that replaced the wording "in the criminal matters" by the wording "in all the matters in which the international tribunal found a breach of fundamental rights…" Since that time it is possible to reopen the case after the ECtHR judgments in any case, let it be criminal, civil, commercial, administrative etc.

It has been stipulated that such a regulation better reflects the requirements of Strasbourg judgements implementation and will remove the difficulties in interpretation what is a criminal matter.

However, in the civil matters it brings new questions, which are not solved in the law (in the act) itself; I have in mind the question of legal certainty as concerns the rights or legitimate expectations of the third party beside the state power and the complainant whose fundamental rights have been found breached.

When the case covers only the complainant and the state power the problem is not so intensive; however, as any other individual and his/her rights are included to the decision scheme, additional problems can arise: it deals not only with finding the proportion between the principles of compensation, satisfaction and restitution, but one must take into account the legal certainty, foreseeability, the doctrine of *jura quaesita*, legitimate expectations of the third party etc. (by the

way, this all happens in the situation when the third party has not been a participant of the procedure before the ECtHR).

When we compare it with the petitions for retrial in domestic civil procedures, the law brings time limit of three years period of time, after which the reopening of the case is absolutely excluded; however it is not the case of reopening after the Strasbourg judgements – there is no time limit, but even no other requirements in the Czech law that would protect the legal certainty of the third party; the question is whether the breach of fundamental rights (usually fair trial rights) is such a strong reason for reopening the case without any limits.

As concerns particular figures, since the 1st January 2013 we already decided 6 petitions for rehearing in civil or commercial matters (the overall number of petitions since 2004 has been 23).The first two cases dealt with the issue of squeeze-outs of minority shareholders (Pl. ÚS 32/13 and 33/13) and show that the only result of reopening in those procedural situations can be granting additional monetary compensation (the squeeze-outs have been already finished and the domestic legal order does not allow to make a restitution, i. e. the minority shareholders could regain their shares).

I consider particularly important the cases No. Pl. ÚS 6/14 and Pl. ÚS 10/14 in which the court assessed situation when the breach of fundamental rights (here the right to access to the Constitutional Court) has not been declared by the Strasbourg decision, but acknowledged by the Czech Government in its unilateral declaration; the Constitutional Court while assessing the admissibility of the petition came to the conclusion that despite the explicit wording in the domestic Act that speaks about decisions of an international tribunal, the situation in which the Czech government acknowledged the violation unilaterally, does not exclude the case to be heard in the reopened procedure (the court interpreted the law in favour of the petitioner).

The last ones still pending are the cases decided by the ECtHR in the judgments *Heldenburg against the Czech Republic*, *Delta Pekárny vs. Czech Republic* and *Havelkovi vs. Czech Republic*. As these cases are pending I am not authorised to mention detailed pieces of information that have been under considerations of the Constitutional Court. For example the case of Heldenburg family, in which the ECtHR have decided only about the violation of Art 1 of the Protocol No. 1 so far and the judgment on the just satisfaction is expected to be released, manifests another procedural difficulty: the Czech law enables the petitioner to send the motion for reopening after the delivery of a judgment on violation of fundamental rights and freedoms. He/she is not obliged to wait for the just satisfaction verdict of the ECtHR; however, the Constitutional Court while deciding must take into considerations whether the amount of just satisfaction is sufficient to redress the violation. It cannot decide without the knowledge of particular compensation the petitioner has been awarded before the ECtHR.

3. Conclusions

These few cases illustrated the relation between the amount of compensation and opening procedures is in the civil matters even more complicated, but simultaneously more important than in the previous criminal cases: actually, it can even lead to paradoxical situation when the complainant can get more money than he had at stake in the former civil procedure and the other participant can then loose more as he could be obliged to pay the compensation of all the procedural costs.

I admit it should not be the main criterion to bear in mind, but there is one more risk for the state to reopen the trial: the state can be called for legal responsibility to all the parties of the civil

procedure and can be found responsible for financial compensation to both, to the complainant that "won" the case in Strasbourg and to the other plaintiff of defendant as well.

The Constitutional Court is aware of all these troubles connected with the retrials in civil matters, however there has been little time since this new tool was established in our legal order to solve them in the case law. However, if I can use the opportunity to be heard on this floor I would like to express two explicit suggestions to conclude with: a) ECtHR should continue its good practice and to put into all its judgments the clause it decides about the satisfaction with the knowledge the state party allows reopening the trial on domestic level, and b) it should be debated whether there is not proper time for extending the definition of the participants of procedure and to include the participants from the domestic proceedings into the Strasbourg Court proceeding scheme to give them at least the possibility to be heard and to protect their rights directly.