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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT
(DH-GDR)

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Compilation of written contributions on the provision in the domestic legal order for re-examination or reopening of cases following judgments of the Court /

Compilation de contributions écrites sur les possibilités dans l'ordre juridique interne pour le réexamen ou la réouverture d'affaires à la suite d'arrêts de la Cour

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ALBANIA / ALBANIE

Criminal Proceedings

I. How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

The reopening of criminal proceedings in the Republic of Albania is provided for in Article 449 and Article 450 of the Code of Criminal Procedure of Albania. Article 449 provides for the decisions that are subject for review, stipulating that "The reconsideration of final sentences is permitted in any time for cases provided by law, even when the punishment is executed or ceased." and that "The decisions of acquittal rendered for crimes may be reviewed on demand of the prosecutor, provided that from the rendering of the decision shall have not passed five years."

Article 450 of the CCP on the other hand provides for the cases when such a reconsideration is permitted, among which:

a) when the facts of the grounds of the sentence do not comply with those of another final sentence;
b) when the sentence is relied upon a civil court decision which after has been revoked;
c) when after the sentence new evidence have appeared or have been found out which solely or along with those ones evaluated prove that the sentenced is not guilty;
d) when it is proved that the conviction is rendered as a result of the falsification of the acts of the trial or of another fact provided by law as a criminal offence.

Currently, the Albanian codified criminal procedural legislation does not provide for the reopening of criminal proceedings following a decision of the European Court of Human Rights. However the judgments of the ECtHR have direct effect in the domestic legal system, based on article 122[1] and article 17/2 of the Constitution, also pursuant to Article 46 of ECHR. This being said, the ECtHR's judgments finding a violation of Article 6/1 of the Convention on grounds of lack of guarantees to the right for a fair trial of the applicants, are automatically part of the Albania case law and legal framework, binding and obligatory to all the relevant and competent institutions.

The reopening of the proceedings in this type of cases is conducted under the ruling of the Constitutional Court through judgment no. 20, dated 01.06.2011 that recognized the jurisdiction of the Supreme Court to provide reconsideration of final criminal decisions,

[1] Article 122 "1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.
2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.
3. The norms issued by an international organization have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organization is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein."

which are based on ECtHR findings. Such jurisdiction has been accorded on the interpretation of articles 450 and Article 10[2] of the Criminal Procedural Code.

The practice of reopening of criminal proceedings following a decision of the ECtHR finding a violation has been consolidated through the numerous decisions of the Supreme Court, most recently the decision on the case of the applicant Elidon Kotorri[3], providing among others that "*...in its analysis the Supreme Court considers that, despite the lack of a formally expressed, direct, easily readable by anyone legal reference, the review and address of these issues by the judiciary cannot be frozen and fossilized in the past. Rather, it is and should be creative and visionary, contemporary with the sole purpose of delivering justice and upholding human rights. In this regard, the Supreme Court considers the hierarchy of legal norms and judicial decisions, giving in this way the decisions of the European Court of Human Rights an important higher standing, considering it in this regard, the peak of the pyramid. One such concept comes primarily from the Constitution, which in Articles 116 and 122 has sanctioned the direct application of ratified international agreements by considering them part of the domestic legal system".*[4]

The Supreme Court of the Republic of Albania has further expanded upon this practice through the following decisions:

i. Decision no. 01388/2010, dated 07.03.2012[5]
ii. Decision no. 01130/2010, dated 15.02.2012[6]
iii. Decision no. 00-2014-1107, dated 09.04.2014[7]
iv. Decision no. 01468/2010, dated 07.03.2012[8]

It is necessary to emphasized that in the various aforementioned decisions of the Supreme Court, the Criminal Chamber of the Court has argued in detail the causes that lead to the acceptance of the application for reconsideration, as the power of the decisions of the ECtHR stems from the very nature of the Convention and the Constitution of the Republic of Albania, where the latter in Articles 116 and 122 has sanctioned the direct application of ratified international agreements and considers them part of the domestic legal system.

[2] Which explicitly imposes to the courts the duty to implement the provisions of international treaties where Republic of Albania is a High Contracting Party.
[3] Case ***Kaçiu & Kotorri v. Albania***, application no. 33192/07 and 33194/07, judgment of 25/06/2013, final on 09/12.2013.
[4] Decision no. 00-2014-1107, dated 09.04.2014, of the Supreme Court on the request of the applicant Elidon Kotorri for reopening of criminal proceedings.
[5] Decision concerning the case ***Caka v. Albania*** application no. 44023/02, judgment of 08/12/2009, final on 08/03/2010.
[6] Decision concerning the case ***Berhani v. Albania*** application no. 847/05, judgment of 27/05/2010, final on 04/10/2010.
[7] Decision concerning the case ***Shkalla v. Albania*** application no. 26866/05, judgment of 10/05/2011, final on 10/08/2011.
[8] Decision concerning the case ***Laska & Lika v. Albania*** application no. 12315/04, judgment of 20/04/2010, final on 20/07/2010.

II. What practical or procedural difficulties have been encountered in practice? How have they been overcome?

The reopening of criminal proceedings, following a decision of the ECtHR finding a violation of the rights of the applicants for a fair trial, have not encountered in practice any difficulties in their implementation. These procedures have proven proper and effective domestic remedies to the findings of the Court, without any unreasonable delays or procedures to the detriment of the applicants.

III. Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?

Albania has not so far had any experience concerning the reopening of criminal proceedings following friendly settlements or unilateral declarations and the subsequent decisions of the European Court of Human Rights.

Civil Proceedings

I. How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?

– What were the obstacles / How have they been overcome?
– What are the positive outcomes and remaining gaps?

II. If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

The reopening of civil proceedings following a decision of the European Court of Human Rights is provided for in article 494/ë of the Code of Civil Procedure of the Republic of Albania. This article stipulates, "The request for reconsideration is the act requesting the review of a final decision of the court. The interested party may request reconsideration of a decision that has become final, when…" On the matter of reconsideration of a final domestic decision following a decision of the ECtHR, finding a violation of the Convention:

…
"ë) when the European Court of Human Rights finds a violation of the European Convention "On the protection of human rights and fundamental freedoms" and its Protocols, ratified by the Republic of Albania."

This subsection was added to the Code of Code of Civil Procedure through Law No. 10052, dated 29.12.2008 "*On some amendments and additions to Law no. 8116, dated 29.03. 1996 "Code of Civil Procedure of the Republic of Albania", as amended*".

The Code of Civil Procedure further stipulates the deadlines for the presentation of a request for reconsideration in Article 496, which provides that:

"The request for reconsideration may be filed within 30 days from the day that the party is made aware of the cause of revision, but in any case not later than one year from the day the cause of the revision became apparent…"

Regarding the presence of examples of successful reopening in such cases in the domestic system and relevant examples of the practice, there have not been so far such examples which to share with the Steering Committee for Human Rights.

AUSTRIA / AUTRICHE

Criminal Proceedings

1. How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

According to sections 363a-363c of the Austrian Code on Criminal Procedure (Strafprozessordnung 1975-StPO) the Austrian Supreme Court may reopen criminal cases after an ECtHR's ruling that an Austrian criminal court (including the Austrian Supreme Court ruling on criminal matters) has violated provisions of the ECHR or one the Protocols thereto. When deciding on whether to reopen a case the Austrian Supreme Court has to strictly adhere to the ECtHR's reasoning. The procedure pursuant to sections 363a-363c StPO can be initiated either by the victim or by the Procurator General. If the Supreme Court allows a reopening, it will either rule on the case or refer the case to the court of first or second instance responsible for the violation of the ECHR.

2. What practical or procedural difficulties have been encountered in practice? How have they been overcome?

From a practical point of view the reopening of criminal cases pursuant to sections 363a-363c StPO has proven a proper and effective domestic remedy for violations of the ECHR, though the ECtHR has not yet issued specific case-law to that effect.

3. Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?

Pursuant to the wording of sections 363a-363c StPO a case is to be reopened only on the basis of a final judgment of the ECtHR. Hence, a reopening must not draw upon friendly settlements or unilateral declarations. However, according to the Supreme Court's constant case-law criminal cases may also be reopened if they the following criteria are met:

- the applicant has suffered a violation of the ECHR by an Austrian criminal court;
- all effective means of appeal have been exhausted;
- the respective request for reopening is submitted to the Austrian Supreme Court within six months from the date on which the final judgment was taken.

Civil Proceedings

1. How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?

- *What were the obstacles / How have they been overcome?*
- *What are the positive outcomes and remaining gaps?*

2. If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

Bearing in mind the effects a reopening of civil proceedings might have on third parties, there are no specific provisions providing for a reopening of civil proceedings in consequence of a judgment of the ECtHR. Nonetheless, the setting aside of a judgment of a criminal court or the outcome of a reopened criminal proceeding based on a judgment of the ECtHR may lead to the reopening of a related civil proceeding under the general provisions of the Code of Civil Procedure on reopening of proceedings.

Administrative Proceedings

Likewise, there are no specific provisions allowing a reopening of administrative proceedings as a consequence of an ECtHR's judgment. The pertinent general provisions on the reopening of proceedings according to the General Administrative Procedure Act 1991 apply.

BELGIUM / BELGIQUE

Il y a lieu de préciser que les développements ci-dessous se rapportent uniquement à la possibilité d'atteindre la *restitutio in integrum* dans une affaire pénale suite à un constat de violation par la Cour européenne.

Il n'existe pas encore à l'heure actuelle en Belgique de possibilité de réouverture de la procédure en matière civile et administrative. L'on note toutefois en ces matières l'existence d'autres recours judiciaires tels qu'une action en responsabilité de l'Etat (pour mauvaise administration de la justice). Une jurisprudence constante permet par ailleurs l'indemnisation de la perte d'une chance qui contribue, elle aussi, à la réparation intégrale de la violation constatée par la Cour.

1. Moyens autres que la réouverture des procédures pénales assurant l'existence de possibilités adéquates pour atteindre, autant que possible, la *restitutio in integrum*.

Il a quelques fois été fait usage du recours particulier que constitue la dénonciation d'un jugement ou d'un arrêt sur ordre du Ministre de la justice (art. 441 Code d'instruction criminelle).

L'art. 441 C.I.C. prévoit que le procureur général peut, sur instruction du Ministre de la Justice, se pourvoir devant la Cour de cassation contre une décision d'une juridiction nationale contraire à la loi. L'annulation de la décision profite au condamné dans la mesure où elle lui est favorable.
La Cour de cassation n'a autorisé les pourvois au titre de l'art.441 que lorsque la demande de réouverture de la procédure se fonde sur des faits dont elle ne pouvait avoir connaissance lors de son examen initial.

La révision constitue un recours exceptionnellement ouvert au condamné contre les décisions de condamnation ou d'internement passées en force de chose jugée, qui pourraient constituer des erreurs judiciaires, en raison de certaines circonstances limitativement déterminées par l'art. 443 du Code de procédure pénale (preuve de l'innocence résultant d'une contrariété de décisions; condamnation passée en force de chose jugée pour faux témoignage contre le condamné; preuve de l'innocence résultant d'un fait nouveau). Cette procédure vise exclusivement à réparer l'injustice pouvant résulter de la prononciation d'un internement ou d'une peine-indépendamment de l'exécution de celle-ci.

2. La procédure de réouverture en matière pénale ne diffère pas en fonction du fait que ce sont les procédures en cause qui ont été inéquitables ou que c'est leur résultat qui a violé la Convention.

L'article 442quinquies inséré dans le Code d'Instruction criminelle par la loi du 1er avril 2007 prévoit que la Cour de cassation ordonne la réouverture de la procédure lorsqu'il ressort de l'examen de la demande soit que la décision attaquée est contraire sur le fond à la Convention, soit que la violation constatée est la conséquence d'erreurs ou de défaillances de procédure d'une gravité telle qu'un doute sérieux existe quant au résultat de la procédure attaquée et pour autant que la partie condamnée continue à souffrir des conséquences négatives très graves que seule une réouverture peut réparer.

3. Règles de procédure s'appliquant pour la réouverture des procédures pénales :

a. L'Etat supporte le coût de la procédure, sauf si la demande formée par requête est déclarée irrecevable.

b. L'aide judiciaire peut être accordée pour une demande de réouverture.

c. Selon l'art.442sexies C.I.C., l'arrêt de la Cour de cassation, rendu après qu'elle a ordonné la réouverture de la procédure, produit les mêmes effets qu'un arrêt rendu sur un pourvoi en cassation.

d. Règles régissant la détention une fois la demande acceptée :

La loi prévoit qu'une indemnité peut être octroyée au condamné mis en détention injustement en exécution de la décision modifiée, conformément à l'art.28, §§2 à 5, et 29 de la loi du 13/3/73 relative à l'indemnité en cas de détention préventive inopérante.

e. La demande de réouverture entraîne la suspension d'autres procédures, par exemple une expulsion ordonnée par le premier arrêt contesté.

4. Le réexamen peut-il avoir lieu dans le contexte d'une procédure pour dommages et intérêts faite à l'encontre de l'Etat sur la base de la constatation de la violation de la Convention ?

Selon la jurisprudence de la Cour de cassation, une action en responsabilité civile (art. 1382-1383 Code civil) à cause d'erreurs causées par une décision judiciaire ne peut être introduite qu'après que la décision judiciaire a été annulée. Vu l'état actuel de la législation et de la jurisprudence, une telle action n'est dès lors pas le moyen approprié pour donner exécution à un arrêt de condamnation de la Cour.

La réouverture de la procédure pénale suite à un règlement amiable ou à une déclaration unilatérale n'est pas encore prévue par la législation actuelle. Toutefois, un projet de texte modifiant l'article 442 du Code d'instruction criminelle a été approuvé par le Conseil des Ministres belge le 25 juin 2015.

Il prévoit que :

L'article 442bis du Code d'instruction criminelle, inséré par la loi du 1er avril 2007, est complété par deux alinéas rédigés comme suit :

« Il en est de même en cas de détention ou d'arrêt par lequel la Cour européenne des droits de l'homme prend acte du règlement amiable auquel sont parvenues les parties et aux termes duquel le Gouvernement belge reconnaît pareille violation, conformément à l'article 39 de la Convention européenne, ou par lequel elle prend acte de la déclaration unilatérale de reconnaissance de ladite violation, conformément à l'article 37,§1er, de la Convention européenne, et décide, par voie de conséquence, de rayer l'affaire du rôle.

La demande en réouverture est irrecevable lorsque le gouvernement rapporte la preuve que le condamné a marqué son accord sur une réparation amiable, que cet accord a été exécuté et que le constat de violation n'est pas de nature à créer un doute sérieux quant au résultat de la procédure attaquée ».

BOSNIA AND HERZEGOVINA / BOSNIE-HERZÉGOVINE

Questions of reopening in civil and criminal proceedings at domestic level in Bosnia and Herzegovine concerning the implementation of the Convention and execution of the Court's judgments , including examples of practice to the reopening , had been addressed as follow :

- **Criminal proceedings**

The original text of the Criminal Procedure Code of BiH, adopted in June 2003, provides for the reopening of the criminal proceedings in favour of the convicted person in cases where the European Court of Human Rights found human rights violation and where the domestic court judgment was based on that violation (Article 327 § 1 f)). No time-limit for reopening is prescribed.

In addition, lower levels of government in Bosnia and Herzegovina also provide for the possibility of reopening where the European Court of Human Rights found a violation of human rights and where the domestic court judgment was based on that violation (Criminal Procedure Code of the Federation of BiH, Article 343 § 1 f); Criminal Procedure Code of the Republika Srpska, Article 342 § 1 đ); Criminal Procedure Code of Brčko District, Article 327 § 1 f).

Following the European Court judgment in *Maktouf and Damajnović v. BiH* of 18 July 2013, the State Court so far reopened criminal proceedings and rendered new judgments in *Damjanović* – final judgment of 6 March 2014, and in *Maktouf* – first instance judgment of 11 July 2014, and the appellate proceedings are on-going before the Court of BiH.

Speaking about practical and/or procedural difficulties, we should mention the implementation of the judgment in *Muslija v. Bosnia and Herzegovina*, as the case has not been reopened yet. Namely, the applicant's representative addressed the Constitutional Court of BiH requesting the reopening. However, the Constitutional Court of BiH has no jurisdiction to decide about reopening of criminal proceedings. The applicant should have requested the relevant Cantonal Court, which conducted the criminal proceedings, to reopen the case following the judgment in *Muslija v. BiH*.
Thereupon, the Office of the Agent of BiH sent a letter to the authorised prosecutor requesting that he file a motion to reopen the proceedings, having in mind that Article 345 of the CPC of FBiH provides as follows:

Persons Authorized to File a Motion
(1) *A motion to reopen the criminal proceedings may be filed by the parties and the defense attorney, and following the death of the accused the motion may be filed in his favor by the prosecutor and by the persons referred to in Article 308, Paragraph 2, of this Code.*

(2) *A motion to reopen criminal proceedings in favor of a convicted person may be filed even after the convicted person has served his sentence and regardless of the statute of limitations, amnesty or pardon.*

(3) *If the court learns that a reason for reopening criminal proceedings exists, the court shall so inform the convicted person or the person authorized to file the motion on his behalf.*

- **Civil proceedings**

Statutory ground for reopening of cases in civil proceedings following the judgment of the European Court of Human Rights, was prescribed for the first time in the Brčko District, by the Non-contentious Proceedings Act of the Brčko District, introduced on 18 March 2009. This Law stipulates in Article 364 § 1 that *where the European Court of Human Rights finds a violation of human rights or fundamental freedoms guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols ratified by Bosnia and Herzegovina, the party may, within 30 days from the day on which the judgment of the European Court of Human Rights became final, apply to the First Instance Court, so as to have the impugned decision amended. The new proceedings shall be conducted with proper application of statutory provisions on retrial. In the new proceedings the court shall abide by the legal positions expressed in the final judgment of European Court of Human Rights that found a violation of the fundamental human right or freedom*.

On State level, the Non-contentious Proceedings Act of BiH was amended on 23 July 2013, by adding a new provision of Article 231a. It now stipulates that *where the European Court of Human Rights finds a violation of human rights or fundamental freedoms guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols ratified by Bosnia and Herzegovina, the party on whose right the European Court of Human Rights decided may, within 90 days from the day on which the judgment of the European Court of Human Rights became final, apply to the court that had ruled in the first instance in the proceedings resulting in a decision that violated the relevant human right or fundamental freedom, so as to have the impugned decision amended. The new proceedings shall be conducted with proper application of statutory provisions on retrial. In the new proceedings the court shall abide by the legal positions expressed in the final judgment of European Court of Human Rights that found a violation of the fundamental human right or freedom.*

The BiH entity of Republika Srpska amended its Non-contentious Proceedings Act in July 2013, with the same provision as prescribed by the Non-contentious Proceedings Act of BiH.

The other BiH entity, the Federation of BiH, has still not amended its Non-contentious Proceedings Act so as to provide for the reopening of civil proceedings.

Until the present day, in practice, there have been no cases of reopening of civil proceedings following the judgment of the European Court of Human Rights.

- **Reopening proceedings before the Constitutional Court of BiH**

Following the judgment in *Avdić et al. v. BiH* the Constitutional Court of BiH was obliged to reopen proceedings upon the constitutional appeals of the applicants. In this respect, in May 2014 the Constitutional Court of BH amended its Rules and prescribed that if the European Court finds a violation of the right of access to a court in the proceedings before the Constitutional Court, the affected party shall be entitled to request the Constitutional Court within three months and in any event within six months at the latest, to reopen the proceedings and reconsider its decision.

CYPRUS / CHYPRE

Cyprus law provides for the re-opening/re-examination of criminal proceedings only. The re-opening of criminal proceedings is provided in a law that was recently passed by the House of Representatives. The Law allows the applicant to apply for a re-opening of the proceedings and an annulment of his criinal conviction. The main provisions of the law are summarised as follows: (a) a person convicted of any criminal offence, may make a written request to the Supreme Court to examine his conviction following a final judgment by the European Court that his right to a fair trial or any other fundamental right/freedom was violated in the criminal case, due to his conviction, or due to serious errors or shortcomings related to his conviction regarding any procedure of the criminal case, or due to other serious violations related to his conviction. The request must be made within 3 months from the date on which the European Court judgment became final, or if the judgment became final before the Law came into force, within 3 months from its date of entry into force. (b) The Supreme Court may examine the conviction and issue a judgment, order or directions, where in the light of the Court´s judgment and findings, it appears that the case raises an issue of affording restitution to the applicant by domestic courts which cannot be achieved without a judgment, order or directions. (c) The Supreme Court may annul the final judgment convicting the applicant, annul the said final judgment and order the domestic court which had issued it, to try the case anew, taking into account the Court´s judgment and findings so as to achieve applicant´s restitution or annul the final judgment and try itself the case anew.

There have not been any requests to the Supreme Court by virtue of this law thus far. It is noted that this law was enacted for complying with the Court´s judgments in two instances (*Kyprianou v Cyprus and Panovitz v Cyprus*). The 3 months within which the applicants may make a request for re-opening of criminal proceedings in the light of the European Court´s judgments are due on 25 May 2015.

CZECH REPUBLIC / RÉPUBLIQUE TCHÈQUE

Pour la clarté de l'exposé, il convient de répondre en même temps aux questions relatives au régime juridique de la réouverture, pour ajouter ensuite quelques remarques sur la pratique de la réouverture, les lacunes ou problèmes identifiés.

LE RÉGIME JURIDIQUE DE LA RÉOUVERTURE

Comme, d'une part, le recours constitutionnel est normalement le dernier recours à épuiser avant de saisir la Cour de Strasbourg, et, d'autre part, la Constitution dispose que la Cour constitutionnelle est compétente pour décider, entre autres, des mesures nécessaires à la mise en œuvre d'une décision d'une juridiction internationale qui lie la République tchèque s'il est impossible de la mettre en œuvre autrement, la réouverture des procédures a été introduite dans l'ordre juridique interne par une modification de la loi sur la Cour constitutionnelle, et ceci en deux temps, d'abord en 2004 pour les affaires pénales, ensuite en 2012 pour toutes les autres affaires, le régime de la réouverture étant toutefois identique :

- Si dans une affaire dont la Cour constitutionnelle avait été saisie la Cour de Strasbourg se prononce en faveur du requérant, ce dernier peut demander la réouverture de la procédure devant la Cour constitutionnelle dans les six mois suivant la finalité de l'arrêt de la Cour de Strasbourg. Il peut également demander de manière incidente l'abrogation d'une norme législative ou infra-législative qui a servi de base à la décision initiale, et ceci pour non-conformité à l'ordre constitutionnel ou à la loi, selon le cas.
- La demande de réouverture est irrecevable si les conséquences de la violation du droit de l'homme ou de la liberté fondamentale concernés ne perdurent plus et ont été suffisamment réparées par l'octroi de la satisfaction équitable par la Cour de Strasbourg ou si le redressement a été obtenu autrement, à moins que l'intérêt public à la réouverture dépasse substantiellement l'intérêt propre du requérant.
- La Cour constitutionnelle statue sur la demande en assemblée plénière sans tenir d'audience. Si son arrêt (ou décision) initial est contraire à la décision de la Cour de Strasbourg, la Cour constitutionnelle l'annule ; elle examine alors de nouveau le recours constitutionnel initial et prend comme point de départ dans son nouvel arrêt l'opinion juridique de la Cour de Strasbourg.
- Si la Cour constitutionnelle annule les décisions précédentes soumises à son examen, les autorités compétentes pour décider de nouveau sont tenues de respecter le principe – exprimé dans le code de procédure civile – voulant que la nouvelle décision en l'affaire ne puisse pas porter atteinte aux relations juridiques des personnes autres qu'une partie à la procédure.

LA PRATIQUE DE LA RÉOUVERTURE

- La Cour constitutionnelle s'est montrée plutôt libérale dans sa façon de juger si les conditions de recevabilité, notamment celles relatives à l'effacement des conséquences de la violation, sont réunies. La réouverture a donc jusqu'à maintenant toujours été accordée à moins que le demandeur n'ait été autorisé par

la loi à faire la demande (en particulier si le demandeur n'était pas partie à la procédure devant la Cour de Strasbourg), la demande n'ait souffert de vices ; la Cour constitutionnelle a décidé dans un seul cas d'opposer au demandeur de réouverture l'effacement des conséquences de la violation couplée avec l'octroi de la satisfaction équitable par la Cour de Strasbourg, ne partageant pas le point de vue du demandeur que l'intérêt public exige l'examen de son recours constitutionnel initial. À une exception près, il est possible de dire que la Cour constitutionnelle ne s'est pas vraiment penchée sur cette question.

- Elle a accordé la réouverture tant des affaires pénales que civiles. Sur les treize affaires ré-ouvertes,[9] il a été fait droit au recours constitutionnel initial dans sept cas et l'affaire renvoyée aux tribunaux ordinaires. Nous n'avons pas connaissance du résultat de ces procédures, mais il est connu qu'en l'affaire *Melich et Beck c. République tchèque*, la réouverture a, certes, abouti à l'annulation des décisions des tribunaux ordinaires et au réexamen de l'affaire pénale au fond, mais le procès s'est terminé de la même manière qu'avant, au mécontentement des intéressés (voir affaires n° 35450/04, arrêt du 24 juillet 2008, et n° 18136/11, décision du 4 juin 2013).
- Il est à noter que la Cour constitutionnelle a même appliqué le principe de *beneficium cohaesionis* en décidant de la réouverture d'une affaire pénale également au bénéfice du co-accusé du requérant. Le recours constitutionnel initial a ensuite été déclaré manifestement mal fondé.
- Étant une fois saisie après l'arrêt au principal, mais avant celui sur la satisfaction équitable, la Cour constitutionnelle a déclaré irrecevable la demande de réouverture comme prématurée (affaire n° 65546/09, couverte par l'arrêt au principal rendu dans les affaires nos 37926/05 et autres, *R & L, s.r.o et autres c. République tchèque*).
- En ce qui est de la réouverture après règlement à l'amiable ou déclaration unilatérale du Gouvernement, cette possibilité semblait exclue par la loi modifiée. Récemment saisie de deux demandes de réouverture après déclarations unilatérales du Gouvernement, la Cour constitutionnelle s'est néanmoins penchée en faveur des requérants. Leurs recours constitutionnels initiaux ont toutefois été nouvellement déclarés irrecevables pour défaut manifeste de fondement.
- Il est possible de dire que la demande de réouverture est devenue une pratique courante, même dans des affaires où il est permis de douter de l'utilité d'une telle démarche.
- Il convient de noter que dans bien des affaires concernées la Cour de Strasbourg a relevé les vices de procédure commis par la Cour constitutionnelle elle-même. Il n'est donc guère surprenant qu'une fois ces vices réparés, les recours constitutionnels fassent leur chemin habituel, le plus souvent celui menant vers une décision d'irrecevabilité.

LES LACUNES OU PROBLÈMES

Nous avons identifié trois points dans cette rubrique, mais il n'est guère possible d'exclure l'existence d'autres éléments de ce type.

[9] Situation à la date du 14 avril 2015.

- D'abord, pour les raisons spécifiées plus haut, le système de la réouverture est greffé sur le recours constitutionnel initialement déposé devant la Cour constitutionnelle. Or, il se peut que la Cour de Strasbourg déclare recevable une requête dans une affaire qui n'a pas été préalablement examinée par la Cour constitutionnelle (p. ex. *Bucheň c. République tchèque*, n° 36541/97, arrêt du 26 novembre 2002). Dans cette hypothèse la réouverture semble exclue, sauf créativité de la Cour constitutionnelle.
- Ensuite, il paraît que la loi ne consacre pas assez clairement la protection des droits acquis de bonne foi. Il est, certes, fait référence au principe précité, prévu dans le code de procédure civile, voulant que la nouvelle décision en l'affaire ne puisse pas porter atteinte aux relations juridiques des personnes autres qu'une partie à la procédure. Mais la réouverture crée précisément le risque d'une remise en cause des droits acquis par une partie à la procédure initiale devant les tribunaux ordinaires. La loi ne dit pas clairement comment aborder la pondération des intérêts privés en jeu. Ce constat ne signifie pas forcément l'impossibilité de trouver une solution équilibrée qui ne serait pas au détriment des droits acquis de bonne foi.
- Enfin, une tension existe entre, d'un côté, la portée du recours constitutionnel nouvellement examiné, telle qu'initialement définie (voire la portée des griefs soumis à la Cour de Strasbourg dont elle n'a accueilli souvent qu'une mince partie), et, de l'autre côté, la portée de l'examen après la réouverture, car il y a souvent une attente bien plus grande chez les requérants par rapport à ce qui découle objectivement de l'arrêt de la Cour de Strasbourg. Cette tension est une source de malentendus.

DENMARK/DANEMARK

Criminal proceedings

Under section 977 (1), of the Administration of Justice Act (retsplejelov) a convicted person can request reopening of criminal proceedings in the following situations:

1) new information (nye oplysninger) emerges which, if it had been available during the first proceedings, could have led to acquittal or to the application of a considerable more lenient penalty provision;

2) false testimony was given or fraudulent documents used during the first proceedings, or a criminal offence aiming at influencing or deciding the case has been committed by the convicted person or by anyone who by virtue of his office or public function assisted in trying the case, which could have affected the judgment;

3) if *special circumstances* (særlige omstændigheder) strongly indicate that evidence has not been rightly judged;

A request for reopening of criminal proceedings under section 977 must be submitted to the Special Court of Indictment and Revision (Den Særlige Klageret).

One judgment of the European Court of Human Rights has led to the reopening of proceedings by virtue of being considered "special circumstances" under section 977 (1) (3).

Example:

Jersild (judgment of 23.09.1994, Resolution DH (95) 212)
The European Court of Human Rights held the conviction of the applicant, a journalist who contributed to the dissemination of racist statements, to be in violation of Article 10 of the Convention. Subsequently, the impugned criminal proceedings were reopened by virtue of section 977 (1) (3) of the Administration of Justice Act. One judge expressed a concurring opinion on the basis of section 977 (1) (1) to the effect that the Court's judgment constituted "new information" permitting the reopening of proceedings.

Result in the new proceedings: By judgment of 4 June 1996 the Court of Appeal of Eastern Denmark (Østre Landsret) acquitted the applicant and ordered the state to pay all his costs both in the old and the new proceedings.

Civil proceedings

When a judgment in a civil case is final the content of the judgment can only be changed if the case is reopened in accordance with Section 399 of the Administration of Justice Act.

Section 399 (1) of the Administration of Justice Act (retsplejeloven) permits the Supreme Court to reopen proceedings if:

1. there is a predominant chance that, through no fault of the applicant, the case was wrongly elucidated and that the result after a reopening will be substantially different.

2. it is obvious, that this is the only way for the applicant to avoid substantial damage or to have substantial damage compensated.

3. the *circumstances* greatly recommend reopening.

Section 399 (1) applies only to cases that have been judged by the Supreme Court. However, according to section 399 (2) the Supreme Court may, under the same circumstances, permit appeal of judgments pronounced by a High Court or a city court after expiry of the time-limit.

A judgment or decision from the European Court of Human Rights is likely to be considered a circumstance that recommends reopening. However, none judgments against Denmark at the European Court of Human Rights has led to a need to reopen a civil case.

ESTONIA / ESTONIE

First it should be noted that in Estonia, there are legal basis for reopening (review procedure) all court proceedings: criminal, civil and administrative court proceedings.

1. Criminal proceedings

Legal basis

According to § 365 (1) of the Code of Criminal Procedure (**the CCP**) a review procedure means hearing of a petition for review by the Supreme Court in order to decide on the resumption of proceedings in a criminal matter in which the decision has entered into force.

In accordance with § 366 7) of the CCP one of the grounds for review is a satisfaction of an individual application filed with the European Court of Human Rights (**ECtHR**) against a court judgment or ruling in the criminal matter subject to review filed with the ECtHR, due to violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or a Protocol belonging thereto if the violation may have affected the resolution of the matter and it cannot be eliminated or damage caused thereby cannot be compensated in a manner other than by review.

§ 367 (2) of the CCP lists the persons who are entitled to submit a respective petition. Namely, on the basis provided for in clause 366 7) of the CCP, the criminal defence counsel, who is an advocate, of the person who filed an individual appeal with the ECtHR, and the Office of the Prosecutor General, as well as the criminal defence counsel of such person, who is an advocate who has filed an individual appeal with the ECtHR in a similar matter and on the same legal basis or who has the right to file such appeal in a similar matter and on the same legal basis, taking into account the terms provided for in Article 35(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms have the right to submit petitions for review.

A petition for review can be submitted to the Supreme Court within 6 months after the ECtHR judgment. According to § 370 of the CCP, first the Supreme Court has to decide whether to accept the petition. If it accepts the petition, it may either (i) dismiss the petition for review or (ii) if a petition for review is justified, the Supreme Court shall annul the contested decision by a judgment and send the criminal matter for a new hearing by the court which made the annulled decision or to the Office of the Prosecutor General for a new pre-trial proceeding to be conducted (§ 373 (1)-(2)). In the latter case, criminal proceedings shall be conducted pursuant to the general procedure (§ 374). Additionally, if there is no need to ascertain new facts in the criminal matter subject to review, the Supreme Court may make a new judgment after the review of the criminal matter without aggravating the situation of the convicted offender (§ 373 (3)).

Case-law

This right has been confirmed in the case-law of the Supreme Court. Following examples (it is not an exhaustive list) **have been successful for the applicants**:

- The Supreme Court judgment of 20 November 2006 in criminal case no. 3-1-2-6-06

The Supreme Court referred to the judgment of the ECtHR of 22 November 2005 (application no. 13249/02, *Taal vs. Estonia*) in which it had been found that the accused person's right to fair trial, namely the applicant's defence rights were restricted to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention. The Supreme Court agreed that as the violations found could have had impact on the criminal proceedings and their outcome, these violations cannot be eliminated by any other means than by the review of the criminal proceedings. The Supreme Court granted the petition for review, annulled the earlier judgments of the lower instance courts and referred the case back to Harju County Court for a new hearing. The case was resolved by Harju County Court's judgment of 13 June 2007 in criminal case no. 1-06-15031, in which the court found that as the acts incriminated to the accused person were not supported by evidence, he should be acquitted of the charge.

- The Supreme Court judgment of 9 May 2012 in criminal case no. 3-1-2-2-12

A state appointed legal counsel of a convicted person missed the deadline of cassation appeal and as a result the cassation proceedings were not initiated. The ECtHR found in its judgment of 22 November 2011 (application no. 48132/07, *Andreyev v. Estonia*) that the counsel's non-compliance with his obligations resulted in a violation of the convicted person's right to a fair trial. The Supreme Court found that as the rights of the convicted person were violated because the cassation proceedings were not initiated, its own previous ruling must be annulled and the case to be sent to the Supreme Court for new preliminary proceedings.

- The Supreme Court judgment of 14 March 2013 in criminal case no. 3-1-2-3-13

In addition, the Supreme Court has also granted a petition of a person who personally had not had recourse to the Strasbourg Court but whose case was similar to the case where the ECtHR had found a violation (the above referred case no. 3-1-2-2-12 where the omissions of the defence lawyer were established). Proceeding from § 367 (2) of the CCP and from the previous case-law, the Supreme Court found that the defence counsel's non-compliance with his obligations is a substantial violation of criminal law and decided to annul the rulings of the lower instance courts and required the court of appeal to accept and review the appeal of the accused person's counsel regardless of the fact that it was not submitted within the time limits foreseen in law.

Meaning of friendly settlements (unilateral declarations)

Regarding cases where friendly settlements have been accepted by the Strasbourg Court the position of the Estonian Supreme Court has been expressed by the Constitutional Review Chamber of the Supreme Court in its judgment of 22 February 2011 in a constitutional review case no. 3-4-1-18-10. The petitioner in this case argued that it is contrary to the Estonian Constitution that it is not possible to request a reopening of a criminal case after the ECtHR have stroke a case out of its list of applications under Article 37 of the Convention on Human Rights. The Supreme Court first noted that neither the Constitution nor the Convention include a fundamental right requiring that a judgment which has entered into force could be reviewed based on a friendly settlement reached in compliance with the Convention. The Supreme Court underlined that the objective of a friendly settlement is the final resolution of the case (as can be seen from

the text of respective declarations). The Supreme Court also noted that if the ECtHR has found the conditions of a settlement to be sufficient for the resolution of the case, the ECtHR does not expect the state to do anything additional (including re-hearing the case) for ensuring the fundamental rights of an applicant.

2. Civil (and administrative) proceedings

Legal basis

According to § 702 (1) of the Code of Civil Procedure if new facts become evident in a matter, a new hearing of a court decision which has entered into force may be organised pursuant to the procedure for review on the basis of a petition filed by a party in the case of an action […].

In accordance with § 702 (2) 8) of the Code of Civil Procedure one of the grounds for review is that the ECtHR has established a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, or Additional Protocols belonging thereto in the making of the court decision, and the violation cannot be reasonably corrected or compensated in any other manner than by review.

According to § 204 (1) of the Code of Administrative Procedure on the basis of an application from a participant of the proceedings or any other person whom the court should have joined to the proceedings when dealing with the matter, judgments and court rulings which have become final may be reviewed in review proceedings provided new facts have come to light.

In accordance with § 240 (2) 8) of the Code of Administrative Procedure one the grounds for review is the grant, on account of infringement of the European Convention for the Protection of Fundamental Rights and Freedoms or of any protocol to that convention, of an application lodged with the ECtHR against a judgment or ruling entered in an administrative matter, provided the infringement may have affected the determination of the matter and cannot reasonably be cured, and the harm that it caused cannot be compensated, otherwise than by means of review.

Respective petitions in both civil and administrative proceedings should be filed within 6 months of the ECtHR judgment to the Supreme Court which first decides on whether to accept the petitions and thereafter either dismisses the petition or annuls the former judgments and either returns the matter for a new hearing or enters a new judgment or ruling in the matter.

Case-law

Estonia has had only few civil/administrative cases where the ECtHR has found a violation which could bring along a reopening of a domestic case. Therefore we have not faced real obstacles so far (although it is obvious that reopening civil cases would affect the rights of third persons directly and that might be problematic).

There is one case-law example regarding the administrative proceedings. The Supreme Court in its judgment of 8 June 2011 in administrative case no. 3-3-2-2-10 has referred to

the judgment of the ECtHR of 8 October 2009 (application no. 10664/06, *Mikolenko v. Estonia)* where it had been found that the applicant's detention with a view to expulsion was extraordinarily long. The Supreme Court found that the violation could not be eliminated with any other measure than by the review of the case. The Supreme Court granted the petition for review partially, i.e. to the extent the ECtHR had found a violation, and annulled respective earlier rulings of the domestic courts. In addition the Supreme Court explained that the petitioner had the right to apply to the Police and Border Guard Board for the review of the administrative proceedings regarding recovery of the costs of his detention in the expulsion centre and if necessary, the reversal of an administrative act.

FINLAND / FINLANDE

Criminal proceedings

Legal basis

Code of Judicial Procedure (4/1734)

Chapter 31 - Extraordinary Channels of Appeal (109/1960)

Complaint

Section 1 (109/1960)

(1) On the basis of a complaint on the basis of procedural fault, a final judgment may be annulled:

(1) if the court had no quorum or if the case had been taken up for consideration of the merits even though there was a circumstance on the basis of which the court should have dismissed the case on its own motion without considering the merits;
(2) if an absent person who had not been summoned is convicted or if a person who had not been heard otherwise suffers inconvenience on the basis of the judgment;
(3) if the judgment is so confused or defective that it is not apparent from the judgment what has been decided in the case; or
(4) if another procedural error has occurred in the proceedings which is found or can be assumed to have essentially influenced the result of the case.

(2) Deciding the main claim in a court that does not have territorial jurisdiction is not a basis referred to in subsection 1 to annul a final judgment. (135/2009).

Section 2 (109/1960)

(1) If a person wants to file a complaint on the basis of procedural fault, he or she shall deliver the letter of complaint to the proper Court of Appeal or, if it pertains to a judgment of a Court of Appeal or the Supreme Court, to the Supreme Court.
(2) If the complaint is based on the circumstances mentioned in Section 1(1) or (4), the complaint shall be filed within six months of the date when the judgment became final. In the case referred to in Section 1(2), the period shall be calculated from when the person filing the complaint received notice of the judgment.
(3) If a law enforcement or supervisory body competent in the supervision of international human rights obligations notes a procedural error in the consideration of a case, a complaint may regardless of subsection 2 be made within six months of the date when the final judgment of the supervisory body in question was given. (666/2005).

Reversal of a final judgment

Section 8 (109/1960)

A final judgment in a criminal case may be reversed to the benefit of the defendant:

(1) if a member or official of the court, the prosecutor or a representative or counsel of a party has, in connection with the case, been guilty of criminal conduct that may be assumed to have influenced the result of the case;
(2) if a document that has been used as evidence was false or its contents did not accord with the truth and the person who gave the document was aware of this, or if a witness or expert witness has deliberately given a false statement and it may be assumed that the document or the statement has influenced the result; (732/2015)
(3) if reference is made to a fact or piece of evidence that has not been presented previously, and its presentation would probably have led to the acquittal of the defendant or to the application of less severe penal provisions to the offence, or there are compelling reasons, with consideration to what is referred to here and to what otherwise is found, to reconsider the question of whether or not the defendant had committed the offence for which he or she has been convicted; or
(4) if the judgment is manifestly based on misapplication of the law.

Section 8a (360/2003)

A final judgment on a confiscatory sanction in a criminal case may be reversed to the benefit of the defendant:

(1) if the conditions referred to in Section 8(1), (2) or (4) exist;
(2) if reference is made to a fact or piece of evidence that had not been presented previously, and its presentation would probably have led to rejection of the request for confiscation or to the imposition of an essentially lighter confiscatory sanction, or there are otherwise compelling reasons, with consideration to what is referred to here and to what otherwise is found, to reconsider the question of the confiscatory sanction; or
(3) if the charge for the offence on the basis of which the confiscatory sanction was imposed has subsequently been rejected as unproven, or otherwise as a result of the rejection of the charges there would not have been grounds for imposing the confiscatory sanction.

Section 9c (1290/2003)

(1) A final judgment on a confiscatory sanction in a criminal case may be reversed to the detriment of the respondent:

(1) if the circumstances referred to in section 8(1) or 8(2) exist and can be assumed to have influenced the fact that a confiscatory measure had not been imposed or that it had been imposed essentially more lightly than how it should have been imposed; or
(2) if reference is made to a fact or a piece of evidence that had not been presented previously, and its presentation would probably have led to the imposition of a confiscatory measure or to the imposition of an essentially more severe confiscatory sanction.

(2) The judgment may not be reversed on the grounds referred to in subsection 1(2), unless a probability is established that the party could not have referred to the fact or piece of evidence before the court which passed the judgment or on appeal, or that he or she had another justified reason not to do so.

Section 10 (109/1960)

(1) A request for the reversal of a judgment in a civil case and to the detriment of the defendant in a criminal case or in the case referred to in Section 9c to the detriment of the respondent in a criminal case shall be made within one year of the date on which the requester became aware of the circumstance upon which the request is based or, if the request is based on the criminal conduct of another, on the date on which the pertinent judgment became final. However, the period referred to above shall not be calculated from a date earlier than when the judgment whose reversal is requested became final. If the request in a civil case is based on the circumstance referred to in Section 7, subsection 1(4), the period shall be calculated from when the judgment became final. (1290/2003)
(2) A request for the reversal of a judgment in a civil case may no longer be made after five years have passed from the time when the judgment became final, unless compelling reasons are presented in support of the request.

Examples of relevant case-law

Decision of the Supreme Court *(KKO:1998:33)*

Following the Court's judgment of 25 February 1997 in case *Z v. Finland* (22009/93), the Agent of the Government sent a letter to the Deputy Chancellor of Justice asking him to consider taking action by requesting the partial annulment of the domestic judgment in order to implement the Court's judgment. The Deputy Chancellor of Justice made such a request.

On 19 March 1998, the Supreme Court decided, referring to Article 8 of the Convention, to reverse the relevant domestic judgments to the extent they concerned the classification period of the applicant's medical documents and ordered the documents to be kept classified for a longer period of time (40 years instead of 10). In addition, the names and social security numbers of the parties may not be disclosed to third parties during the classification period. The Supreme Court relied on Chapter 31, Section 8, subparagraph 4 and Section 14, subsection 1 of the Code of Judicial Procedure as well as the Convention and the relevant domestic legislation concerning the openness of judicial procedure and found that the domestic judgment was manifestly based on misapplication of the law.

Decision of the Supreme Court *(KKO:2008:24)*

On 14 March 2008, the Supreme Court (by 4 votes to 1) ruled, with respect to the Court's judgment of 16 November 2004 in case *Selistö v. Finland* (56767/00) finding a violation of Article 10 of the Convention that the domestic court's judgment was not to be annulled. The Supreme Court took note of the passing of time. It found that the consequences of the domestic judgment had disappeared as a result of the Court's judgment and that the applicant did no longer seem to suffer from the negative effects resulting from the domestic judgment. Thus, no such weighty reasons required by Chapter 31, Section 8 of the Code of Judicial Procedure for the reversal of a final judgment existed.

Decision of the Supreme Court *(KKO:2009:84)*

On 27 October 2009, the Supreme Court (by 3 votes to 2) ruled, with respect to the Court's judgment of 12 April 2007 in *Laaksonen v. Finland* (70216/01) finding a violation of Article 6 of the Convention, that as the applicant had not been given the opportunity to defend himself against his charges in the Court of Appeal, the judgement of the Court of Appeal was to be partly annulled. The Supreme Court found that such a procedural error referred to in Chapter 31, Section 1, subsection 1, sub-paragraph 4 of the Code of Judicial Procedure had occurred, which can be assumed to have essentially influenced the result of the case.

Decision of the Supreme Court *(KKO:2011:100)*

The Supreme Court decided to examine a request for annulment of a judgement of 25 April 2006 by the Court of Appeal of Vaasa although it had been made after the time limit of one year, prescribed in Chapter 31, Section 10 of the Code of Judicial Procedure. The European Court of Human Rights had in its judgment of 6 July 2010 in case *Mariapori v. Finland* (37751/07) found a violation of Article 10 of the Convention. The Supreme Court found that the literal application of the above provision may lead to a situation which does not guarantee legal safety for the party, nor meet the legal obligations set by the Convention. The Supreme Court applied the time-limit rule so that it in practice allows the examination of a request following a judgment of the Court as it was done without delay, *i.e.* three months after the Court's decision The Supreme Court annulled the judgement given by the Court of Appeal with regard to the imposed punishment (but not as far as the applicant had been found guilty of defamation).

Decision of the Supreme Court *(KKO:2012:52)*

On 24 May 2012, the Supreme Court (Plenary) ruled that its own judgement of 13 June 2002 (*KKO:2002:51*) was to be annulled, following a request made by the Chancellor of Justice. The request was based on the Court's judgment of 12 January 2010 in *Suuripää v. Finland* (43151/02), in which it found a violation of Article 6 § 1 as, *i.e.,* in the circumstances of the present case the Supreme Court could not adequately resolve the applicant's case without holding an oral hearing. The applicant, who had been reserved the possibility to give a statement following the request of the Chancellor of Justice, had joined the request.

The Supreme Court referred, *inter alia,* to the Recommendation No. R (200)2 by the Council of Europe on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights and found that sufficient grounds for annulling its aforementioned judgment on the basis of Chapter 31, Section 1, subsection 1, sub-paragraph 4 did exist.

Decision of the Supreme Court *(KKO:2014:94)*

A had been convicted by a final judgment of the Court of Appeal on 23 December 2010 for aggravated tax fraud, as well as certain other crimes. On 20 May 2014, the European Court of Human Rights stated in its judgment in the case of *Glantz v. Finland* (37394/11)

that the trial had violated the *ne bis in idem* prohibitions under Article 4 of Protocol No. 7 to the Convention, because criminal proceedings were continued even after the tax increase based on the same proceedings had become final.

The Supreme Court (Plenary) did not find (by 12 votes to 7) that a procedural error based on Chapter 31, Section 1, subsection 1 had occurred and did not justify annulment of the Supreme Court's final judgment on aggravated tax fraud.

Civil proceedings

Legal basis

Code of Judicial Procedure
(4/1734)

Chapter 31 - Extraordinary Channels of Appeal (109/1960)

Complaint

Section 1 *See above under Criminal proceedings*

Section 2 (109/1960) *See above under Criminal proceedings*

Reversal of a final judgment

Section 7 (109/1960)

(1) A final judgment in a civil case may be reversed:

(1) if a member or official of the court or a representative or counsel of a party has, in connection with the case, been guilty of criminal conduct that may be assumed to have influenced the result of the case;

(2) if a document that has been used as evidence was false or its contents did not accord with the truth and the person who gave the document was aware of this, or if a witness or expert witness has deliberately given a false statement and it may be assumed that the document or the statement has influenced the result; (732/2015)

(3) if reference is made to a circumstance or piece of evidence that has not been presented earlier, and its presentation would probably have led to a different result; or

(4) if the judgment is manifestly based on misapplication of the law.

(2) A judgment shall not be reversed on the grounds referred to in subsection 1(3), unless the party can establish a probability that he or she could not have referred to the fact or piece of evidence in the court that passed the judgment or on appeal, or that he or she has had another justified reason not to do so.

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Section 10 (109/1960) *See above under Criminal proceedings*

Examples relevant of case-law

Decision of the Supreme Court *(*KKO, 12 December 1996, no. 4823*)*

On 12 December 1996, the Supreme Court ruled that a breach of the Convention regarding the notification of some documents is not a ground upon which a final judgment in a civil case may be reversed pursuant to Chapter 31, Section 7 of the Code of Judicial Procedure. In case *Kerojärvi v. Finland* (17506/90) of 19 July 1995, the European Court of Human Rights had found a violation of Article 6, paragraph 1, for

non-communication of certain documents. The following request under Chapter 31, Section 1, of the Code of Judicial Procedure, which provides for reopening of a civil case if the judgment in question was based on a "manifestly incorrect application of the law", was rejected on the ground that the time-limit for lodging such an application had expired.

Decision of the Supreme Court *(KKO:2011:100)*

In this case cited already above under criminal proceedings, the Supreme Court found that there existed no grounds for reversing the domestic judgment in terms of the damages. According to the Supreme Court the amounts of the damages ordered to be paid by the applicant that were not covered by the judgment of the European Court of Human Rights, could not be considered very high. It further found that the domestic decision was not clearly in contradiction with the case-law of the Court at the time of the decision and the decision could thus not be deemed to have been manifestly based on misapplication of law, as is required by the Code of Judicial Proceedings for the reversal of a judgment in a civil matter. The Supreme Court found also that the damage ordered to be paid could not be considered a very serious negative result.

Decision of the Supreme Court *(KKO:2014:35)*

A, who was born before the Paternity Act (700/1975) came into force, had filed action in order to confirm that B was his father. The Supreme Court had on 17 November 2003 (*KKO:2003:107*) rejected the request. The European Court of Human Rights had stated in its judgment of 6 July 2010 in *Grönmark v. Finland (17038/04)* that the applicant's right to respect of her private life had been violated. The applicant requested the annulment of the Supreme Court's decision. The Supreme Court (Plenary) found (by 9 votes 8) that the objective of the pending legislative project for the reform of the Paternity Act (11/2015, in force as of 1 January 2016) is to also allow retroactive effect to solve these problems. It therefore left the application for reversal to rest until the legislative project was finished.

Administrative proceedings

Legal basis

Administrative Judicial Procedure Act
(586/1996)

Chapter 1 - Scope and precedence

Section 1 - Scope

(1) This Act shall apply to judicial procedure in general administrative courts.
(2) This Act shall also apply where an administrative decision is challenged by way of appeal or extraordinary appeal in an administrative authority, an appellate board or another comparable special authority.

Chapter 11 - Extraordinary appeal

Section 58 - Means of extraordinary appeal

An administrative decision that has become final may be subject to extraordinary appeal by means of procedural complaint, restoration of expired time or annulment.

Section 63 - Annulment

(1) A decision may be annulled:
(1) if a procedural error which may have had a relevant effect on the decision has been committed;
(2) if the decision is based on manifestly erroneous application of the law or on an error which may have had an essential effect on the decision; or
(3) if new evidence which could have had a relevant effect on the decision appears
and it is not the fault of the applicant that the evidence was not presented in time.
(2) The decision shall not be annulled, unless it violates the right of an individual or unless it is deemed that it is in the public interest that the decision be annulled.
(3) No annulment shall be applied for if a material tax appeal or a procedural complaint can be lodged against the decision on the same basis.

Section 64 - Application for annulment

(1) The annulment of a decision shall be applied for from the Supreme Administrative Court. In connection of the resolution of a matter pending before the Supreme Administrative Court the pertinent decision may be annulled without an application or a proposal.
(2) Annulment shall be applied for within five years of the date when the decision became final. Annulment without application or proposal shall take place within the same time limit. For very significant reasons the decision may be annulled also after that time.

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Section 65 - Appeal document

(1) An extraordinary appeal shall be lodged in writing.
(2) The appeal document, which shall be addressed to the authority making a resolution on the appeal, shall state the demand and the grounds for it. The relevant decision shall be appended to the document in the original or as a copy, as shall the other documents on which the appeal is based.
(3) The appeal document shall be delivered to the authority making a resolution on the appeal or to the authority that made the original decision.

Section 66 - Order on execution

An authority considering an extraordinary appeal may issue an order on execution applying, correspondingly, the provisions in Section 32 on orders on execution by appellate authorities.

Section 67 - Decision on extraordinary appeal

(1) A decision restoring expired time shall at the same time indicate how the applicant is to observe the restored time limit.
(2) The decision may be annulled or, as a result of a procedural complaint, set aside as a whole or to the extent deemed necessary. If the case needs to be reconsidered, it shall be returned to the deciding authority. If that authority does not have jurisdiction, the case may be transferred to the correct authority.
(3) As a result of a procedural complaint or when annulling a decision, the authority may make an immediate amendment of the decision, if the matter is found to be clear.

Section 68 - Application of the provisions on appeal to extraordinary appeal

Otherwise the provisions on appeal in this Act shall apply, to the extent appropriate, to procedure in extraordinary appeal.

Examples of relevant case-law

Decision of the Supreme Administrative Court *(KHO 2008:45)*

On 12 June 2008, upon A's request, the Supreme Administrative Court annulled a decision made by the Insurance Court, due to a procedural error in the Insurance Court's proceedings. The Insurance Court had not provided an oral hearing as demanded by A, nor given A the opportunity to give a rejoinder to two statements of the Social Insurance Institution of Finland. The Supreme Administrative Court did not find the need for a hearing manifestly unnecessary, as required under Section 34 of the Administrative Judicial Procedure Act for the matter to be resolved without a hearing of the party. Hence, the Supreme Administrative Court annulled the decision by the Insurance Court and remitted the case to the Insurance Court for reconsideration.

Decision of the Supreme Administrative Court (*KHO 27.2.2015*)

On 27 February 2015, the Supreme Administrative Court did not find any such very significant reasons that would have allowed annulment pursuant to Sections 63 and 64 of the Administrative Judicial Procedure Act, although on 3 July 2012 the European Court of Human Rights had in case *X v. Finland* (34806/04) found a violation of the Convention, and the Court's ruling resulted in a need for renewal of national legislation. The European Court of Human Rights found that the Supreme Administrative Court had wrongfully accepted coercive treatment and medication of the applicant. Due to these defects, the Court argued that the decisions must be annulled, despite the general rule that annulment shall be applied for within five years of the date when the decision became final, pursuant to Section 64 of the Administrative Judicial Procedure Act.

Decision of the Supreme Administrative Court *(KHO 2015:29)*

The Finnish Immigration Service requested the annulment of two of its decisions from 2004 and 2005 on the grounds that citizenship had been applied for and was granted based on personal data belonging to the applicants' relatives. The Supreme Administrative Court held (by 4 votes to 4) that Section 5, Subsection 2 of the Constitution of Finland (731/1999), according to which no one can be divested of or released from his or her Finnish citizenship except on grounds determined by an act, did not limit the possibility to seek reversal to the final citizenship decision. The citizenship decisions had become non-appealable more than five years before the Immigration Service submitted a request for reversal to the Supreme Administrative Court. The decisions were thus only annullable for very significant reasons, according to Section 64 of the Administrative Judicial Procedure Act. The Immigration Service did not in its request bring up any facts with respect to backgrounds or persons of the applicants' erroneously obtained citizenships that would not otherwise meet the requirements for obtaining citizenship. The Supreme Administrative Court rejected the request for annulment.

FRANCE

1) Procédures pénales

1) Comment la réouverture des procédures pénales a-t-elle été abordée dans votre droit interne et existe-t-il des exemples réussis de réouverture dans de tels cas ?

a) Sur le droit existant

Le réexamen d'une décision pénale consécutif au prononcé d'un arrêt de la Cour européenne des droits de l'homme (CEDH) a été **introduit par l'article 89 de la loi n° 2000-516 du 15 juin 2000 renforçant la présomption d'innocence et les droits des victimes.**

Jusqu'à la loi n° 2014-640 du 20 juin 2014, le régime de cette voie de recours extraordinaire figurait dans un **titre distinct de celui de la révision, aux articles 626-1 à 626-7 du code de procédure pénale** (livre III, chapitre III du code de procédure pénale).

Aux termes de ces dispositions, ***le réexamen d'une décision pénale définitive pouvait être demandé au bénéfice de toute personne reconnue coupable d'une infraction lorsqu'il résulte d'un arrêt rendu par la Cour européenne des droits de l'homme que la condamnation a été prononcée en violation des dispositions de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ou de ses protocoles additionnels, dès lors que, par sa nature et sa gravité, la violation constatée entraîne pour le condamné des conséquences dommageables auxquelles la « satisfaction équitable » allouée sur le fondement de l'article 41 de la convention ne pourrait mettre un terme.***

Le réexamen pouvait être demandé par le ministre de la justice, le procureur génal près de la Cour de cassation, le condamné ou, en cas d'incapacité, son représentant légal et les ayants droits du condamné, en cas de décès de ce dernier.

La demande devait être adressée à une commission composée de sept magistrats de la Cour de cassation et dans un délai d'un an à compter de la décision de la Cour européenne des droits de l'homme.

A l'issue d'une audience publique, la commission se prononçait sur le caractère justifié de la demande.

Si elle estimait la demande justifiée, la commission procédait ainsi :

– Si le réexamen du pourvoi du condamné était de nature à remédier à la violation constatée par la Cour européenne, la commission renvoyait l'affaire devant la Cour de cassation statuant en assemblée plénière ;
– Dans les autres cas, la commission renvoyait l'affaire devant une juridiction de même ordre et de même degré que celle ayant rendu la décision litigieuse.

La loi n° 2014-640 du 20 juin 2014 a introduit **plusieurs modifications** :

Les conditions du réexamen ne sont pas modifiées.

Cependant, la ***liste des demandeurs à un tel recours est élargie***, en cas de décès ou d'absence déclarée du condamné, à son conjoint, au partenaire lié par un pacte civil de solidarité, à son concubin, ses enfants, ses parents, ses petits-enfants ou arrière-petits-enfants, ou ses légataires universels ou à titre universel.

Par ailleurs, ***l'organe compétent est modifié. Une cour unique de révision et de réexamen*** a en effet été créée, composée de dix-huit magistrats émanant de chacune des six chambres de la Cour de cassation, pour trois ans renouvelables une fois. Elle est présidée par le président de la chambre criminelle. Cinq membres de cette cour sont désignés pour composer la ***Commission d'instruction des demandes en révision et en réexamen*** ; celle-ci instruit les demandes, la formation de jugement étant donc composée des treize autres magistrats.

Lorsque la commission d'instruction des demandes en révision et en réexamen est saisie d'une demande en réexamen, son président statue par ordonnance. Il saisit la formation de jugement de la cour de révision et de réexamen des demandes formées dans le délai d'un an à compter de la décision de la Cour de Strasbourg, pour lesquelles il constate l'existence d'un arrêt de celle-ci établissant une violation de la convention applicable au condamné.

S'il est possible de procéder à de nouveaux débats contradictoires, la formation de jugement de la cour de révision et de réexamen renvoie le requérant devant une juridiction de même ordre et de même degré, mais autre que celle dont émane la décision annulée. Toutefois, en cas de demande en réexamen et si le réexamen du pourvoi du condamné, dans des conditions conformes à la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, est de nature à remédier à la violation constatée par la Cour européenne des droits de l'homme, elle renvoie le requérant devant l'assemblée plénière de la Cour de cassation.

S'il y a impossibilité de procéder à de nouveaux débats, notamment en cas d'amnistie, de décès, de contumace ou de défaut d'un ou de plusieurs condamnés, d'irresponsabilité pénale, en cas de prescription de l'action ou de la peine, la formation de jugement de la cour de révision et de réexamen, après l'avoir expressément constatée, statue au fond en présence des parties civiles, s'il y en a au procès, et des curateurs nommés par elle à la mémoire de chacun des morts ; dans ce cas, elle annule seulement celles des condamnations qui lui paraissent non justifiées et décharge, s'il y a lieu, la mémoire des morts.

Sur les demandes de suspension de l'exécution de la condamnation, l'article 625 du code de procédure pénale dispose que : « *La commission d'instruction et la formation de jugement peuvent saisir la chambre criminelle d'une demande de suspension de l'exécution de la condamnation. Le condamné peut également demander la suspension de l'exécution de sa condamnation à la commission d'instruction et à la formation de jugement, qui transmettent sa demande à la chambre criminelle. Les membres de la chambre criminelle qui siègent au sein de la cour de révision et de réexamen ne prennent*

pas part aux débats ni à la décision. /La chambre criminelle, lorsqu'elle ordonne la suspension de l'exécution de la condamnation, peut décider que cette suspension est assortie de l'obligation de respecter tout ou partie des conditions d'une libération conditionnelle prévues aux articles 731 et 731-1, y compris, le cas échéant, celles résultant d'un placement sous surveillance électronique mobile./ Elle précise dans sa décision les obligations et interdictions auxquelles est soumis le condamné, en désignant le juge de l'application des peines sous le contrôle duquel celui-ci est placé. Le juge de l'application des peines peut modifier les obligations et interdictions auxquelles est soumis le condamné, dans les conditions prévues à l'article 712-6./ Ces obligations et interdictions s'appliquent pendant une durée d'un an, qui peut être prolongée, pour la même durée, par la chambre criminelle./ En cas de violation par le condamné des obligations et interdictions auxquelles il est soumis, le juge de l'application des peines peut saisir la chambre criminelle pour qu'il soit mis fin à la suspension de l'exécution de la condamnation. Il peut décerner les mandats prévus à l'article 712-17 et ordonner l'incarcération provisoire du condamné en application de l'article 712-19. La chambre criminelle doit alors se prononcer dans un délai d'un mois. Si elle ne met pas fin à la suspension de l'exécution de la condamnation, elle peut modifier les obligations et interdictions auxquelles le condamné est soumis./ Si la formation de jugement de la cour, statuant en réexamen, annule la condamnation sans ordonner la suspension de son exécution, la personne qui exécute une peine privative de liberté demeure détenue, sans que cette détention puisse excéder la durée de la peine prononcée, jusqu'à la décision, selon le cas, de la Cour de cassation statuant en assemblée plénière ou de la juridiction du fond. Cette décision doit intervenir dans le délai d'un an à compter de la décision d'annulation de la cour de révision et de réexamen. Faute de décision de la Cour de cassation ou de la juridiction du fond dans ce délai, la personne est mise en liberté, à moins qu'elle ne soit détenue pour une autre cause. Pendant ce même délai, la personne est considérée comme placée en détention provisoire et peut former des demandes de mise en liberté dans les conditions prévues aux articles 148-6 et 148-7. Ces demandes sont examinées dans les conditions prévues aux articles 148-1 et 148-2. Toutefois, lorsque la formation de jugement de la cour de révision et de réexamen a renvoyé l'affaire devant l'assemblée plénière de la Cour de cassation, les demandes de mise en liberté sont examinées par la chambre de l'instruction de la cour d'appel dans le ressort de laquelle siège la juridiction ayant condamné l'intéressé ».

b) Affaires parmi les plus significatives ayant fait l'objet d'un réexamen (suite des condamnations prononcées par la Cour européenne des droits de l'homme) :

N.B : la Commission de réexamen s'est prononcée en tout à 25 reprises depuis 2003.

– Cour de cassation – Commission de réexamen, 25 septembre 2014, Jean-Jacques Morel

L'intéressé a déposé sa demande le 21 mars 2014 tendant au réexamen de la décision définitive en date du 15 janvier 2009 par laquelle la cour d'appel de Paris l'a déclaré coupable de diffamation publique envers M. Santoni et l'a condamné à mille euros d'amende ainsi qu'à des réparations civiles.

Pour rappel, par arrêt du 10 octobre 2013, la Cour européenne des droits de l'homme, estimant qu'un juste équilibre n'avait pas été ménagé entre la nécessité de protéger le droit du requérant à la liberté d'expression et celle de protéger les droits et la réputation du plaignant, a jugé qu'il y avait eu violation de l'article 10 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

La Commission de réexamen a déclaré recevable sa demande, fait droit à la demande de réexamen de l'arrêt de la cour d'appel de Paris du 15 janvier 2009 et renvoyé l'affaire devant la cour d'appel de Saint-Denis.

– ***Cour de cassation – Commission de réexamen, 25 avril 2013, David Fraumens***

L'intéressé a déposé des demandes le 1er mars 2013 tendant, d'une part, au réexamen de la décision définitive en date du 3 octobre 2008 par laquelle la cour d'assises du département de la Réunion l'a déclaré coupable de tentative d'assassinat et l'a condamné à trente ans de réclusion criminelle et dix ans de privation des droits civiques, civils et de famille, d'autre part, à la suspension de l'exécution de cette condamnation

Pour rappel, par arrêt du 10 janvier 2013, la Cour européenne des droits de l'homme, 5ème section, a jugé qu'il y avait eu violation de l'article 6, § 1, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales au motif que M. Fraumens n'avait pas disposé de garanties suffisantes lui permettant de comprendre la décision de condamnation et n'avait pas bénéficié d'un procès équitable.

La Commission de réexamen a déclaré recevable sa demande, fait droit à la demande de réexamen de la décision de la cour d'assises du département de la Réunion du 3 octobre 2008, renvoyé l'affaire devant la cour d'assises du département de La Réunion, autrement composée, ordonné la suspension de l'exécution de la condamnation et soumis M. Fraumens à des mesures de contrôle suivies par le juge de l'application des peines du tribunal de grande instance de Meaux.

« *Le 25 avril 2013 (Com. réex. 25 avril 2013, n° 13RDH002,* Bull. crim. *2013, CRDH, n° 3), elle a fait droit à la requête de M. David Y..., condamné le 3 octobre 2008 par la cour d'assises de La Réunion à trente ans de réclusion criminelle pour assassinat. Cette affaire posait un problème identique à celui de l'affaire X.... La Cour européenne des droits de l'homme a également jugé que M. Y... n'avait pas disposé des garanties suffisantes lui permettant de comprendre la décision de condamnation et, pour ce motif, n'avait pas bénéficié d'un procès équitable. La commission a renvoyé l'affaire devant la cour d'assises de La Réunion autrement composée et a ordonné la suspension de l'exécution de la condamnation, en astreignant le condamné à des mesures de contrôle et à des obligations.* »

– ***Cour de cassation – Commission de réexamen, 31 janvier 2013, Maurice Agnelet***

L'intéressé a déposé une demande le 14 janvier 2013 tendant, d'une part, au réexamen de la décision définitive en date du 11 octobre 2007 par laquelle la cour

d'assises des Bouches-du-Rhône l'a déclaré coupable d'assassinat et l'a condamné à vingt ans de réclusion criminelle, d'autre part, à la suspension de l'exécution de cette condamnation.

Pour rappel, par arrêt du 10 janvier 2013, la Cour européenne des droits de l'homme, 5ème section, avait jugé qu'il y avait eu violation de l'article 6, § 1, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

La Commission de réexamen a déclaré recevable sa demande, fait droit à la demande de réexamen de la décision de la cour d'assises des Bouches-du-Rhône du 11 octobre 2007 en renvoyant l'affaire devant la cour d'assises d'Ille-et-Vilaine, ordonné la suspension de l'exécution de la condamnation et dit que M. Agnelet serait soumis à plusieurs mesures de contrôle suivies par le juge de l'application des peines du tribunal de grande instance de Chambéry.

« *Le 31 janvier 2013 (Com. réex. 31 janvier 2013, n° 13RDH001,* Bull. crim. *2013, CRDH, n° 1), elle a fait droit à la requête de M. Maurice X..., condamné le 11 octobre 2007 par la cour d'assises des Bouches-du-Rhône à vingt ans de réclusion criminelle pour assassinat. Cette affaire posait le problème de l'absence de motivation des arrêts rendus par les cours d'assises comportant un jury populaire avant que n'entre en vigueur la loi n° 2011-939 du 10 août 2011 sur la participation des citoyens au fonctionnement de la justice pénale et la justice des mineurs. La Cour européenne des droits de l'homme a jugé que M. X... n'avait pas disposé des garanties suffisantes lui permettant de comprendre la décision de condamnation et, pour ce motif, n'avait pas bénéficié d'un procès équitable. La commission a renvoyé l'affaire devant la cour d'assises d'Ille-et-Vilaine et a ordonné la suspension de l'exécution de la condamnation. Elle a fait application des dispositions de l'artic1e 626-5 du code de procédure pénale qui permet de soumettre le condamné à des mesures de contrôle et à des obligations.* »

– ***Cour de cassation – Commission de réexamen, 14 mars 2012, Claude Brusco***

L'intéressé a déposé une demande le 14 octobre 2011 tendant au réexamen de l'arrêt rendu par la chambre correctionnelle de la cour d'appel de Paris le 26 octobre 2004 qui avait confirmé le jugement du tribunal correctionnel de Paris du 31 octobre 2002 le déclarant coupable de complicité de violences aggravées et le condamnant à cinq ans d'emprisonnement, dont un an avec sursis et mise à l'épreuve.

Pour rappel, par arrêt du 14 octobre 2010, la Cour européenne des droits de l'homme avait jugé qu'il avait été porté atteinte au droit du requérant de ne pas contribuer à sa propre incrimination et de garder le silence tel que garanti par l'article 6 §§ 1 et 3 b de la Convention.

La Commission de réexamen a déclaré recevable sa demande et fait droit à la demande de réexamen de la décision de la chambre correctionnelle de la cour d'appel de Paris, du 26 octobre 2004 en renvoyant l'affaire devant la chambre correctionnelle de la cour d'appel de Paris autrement composée.

– ***Cour de cassation – Commission de réexamen, 20 décembre 2012, Agnès Klouvi***

L'intéressée a déposé une demande le 2 juillet 2012 tendant au réexamen de la décision définitive en date du 5 décembre 2001 par laquelle la cour d'appel de Paris l'a déclarée coupable de dénonciation calomnieuse, l'a condamnée à trois mois d'emprisonnement avec sursis, a ordonné la non-inscription de cette condamnation au casier judiciaire de l'intéressée.

Pour rappel, par arrêt du 30 juin 2011 devenu définitif, la Cour européenne des droits de l'homme a jugé que M^me^ Klouvi n'avait bénéficié ni d'un procès équitable, ni de la présomption d'innocence, en violation des prescriptions des paragraphes 1 et 2 de l'article 6 de la Convention, dans la mesure où, en application de l'article 226-10 du code pénal, dans sa rédaction en vigueur à l'époque, elle avait été privée de la possibilité de contester la fausseté des faits dénoncés, celle-ci résultant nécessairement de l'ordonnance du juge d'instruction déclarant que la réalité des faits n'était pas établie.

La Commission de réexamen a accueilli la demande de M^me^ Agnès Klouvi, ordonné le réexamen de l'arrêt de la cour d'appel de Paris en date du 5 décembre 2001 et renvoyé l'affaire devant la chambre correctionnelle de la cour d'appel de Paris autrement composée.

– ***Cour de cassation – Commission de réexamen, 5 juillet 2012, Gisèle Mor***

L'intéressée a déposé une demande le 28 mars 2012 tendant au réexamen de la décision définitive en date du 10 janvier 2008 par laquelle la cour d'appel de Paris l'a déclarée coupable de violation du secret professionnel et l'a dispensée de peine.

Pour rappel, par arrêt du 15 décembre 2011, la Cour européenne des droits de l'homme a jugé que la déclaration de culpabilité de M^me^ Mor, même suivie d'une dispense de peine, portait atteinte à l'article 10 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

La Commission de réexamen a fait droit à sa demande de réexamen de la décision définitive en date du 10 janvier 2008 et renvoyé l'affaire devant la chambre correctionnelle de la cour d'appel de Paris autrement composée.

– ***Cour de cassation – Commission de réexamen, 3 mars 2011, Vladlen Katritsch***

L'intéressé a déposé une demande le 15 décembre 2010 tendant au réexamen de l'arrêt rendu par la chambre correctionnelle de la cour d'appel d'Amiens le 27 novembre 2006 l'ayant condamné à un an d'emprisonnement et cinq ans d'interdiction du territoire français.

Pour rappel, par arrêt du 4 novembre 2010, la Cour européenne des droits de l'homme a dit qu'il avait été porté atteinte aux droits du requérant de disposer du temps et des facilités nécessaires pour préparer sa défense et à l'assistance d'un avocat, garantis par l'article 6 § 3 b et c de la Convention .

La Commission de réexamen a déclaré recevable sa demande et a renvoyé l'affaire devant la chambre correctionnelle de la cour d'appel de Paris.

– ***Cour de cassation – Commission de réexamen, 27 novembre 2008, Gacon Jean-Claude***

L'intéressé a déposé une demande le 17 juin 2008 tendant au réexamen à titre principal de l'arrêt de la Chambre criminelle du 25 juin 2003 et à titre subsidiaire de l'arrêt rendu par la cour d'appel de Lyon du 13 mars 2002 aux termes duquel il a été condamné à deux ans d'emprisonnement avec sursis et 120 000 euros d'amende ainsi qu'à des dommages intérêts à verser aux parties civiles.

Pour rappel, la Cour européenne des droits de l'homme a jugé que le délai d'appel de deux mois du procureur général n'était pas compatible avec les dispositions de l'article 6 § 1 de la convention pour ne pas respecter l'égalité des armes lors d'un procès pénal.

La Commission de réexamen a déclaré recevable sa demande, fait droit à la demande de réexamen de l'arrêt de la cour d'appel de Lyon du 13 mars 2002 et renvoyé l'affaire devant la cour d'appel de Lyon autrement composée.

– ***Cour de cassation – Commission de réexamen, 28 février 2008, Noël Mamère***

Par arrêt du 3 octobre 2001, la cour d'appel de Paris a confirmé un jugement ayant déclaré M. Mamère, en qualité de complice, coupable du délit de diffamation publique envers un fonctionnaire public, et l'a condamné notamment à une peine d'amende de 10 000 francs.

Pour rappel, par arrêt du 7 novembre 2006, la Cour européenne des droits de l'homme a dit qu'il y avait eu violation de l'article 10 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

La Commission de réexamen a déclaré recevable sa demande, fait droit à la demande de réexamen de l'arrêt de la cour d'appel de Paris du 3 octobre 2001 et renvoyé l'affaire devant la cour d'appel de Paris, autrement composée.

– ***Cour de cassation – Commission de réexamen, 22 novembre 2007, Fahri Rédouane***

L'intéressé a déposé une demande le 6 février 2007 tendant au réexamen de l'arrêt de la cour d'assises des Hauts-de-Seine, en date du 2 juin 2004, qui, pour viol aggravé et délits connexes, l'a condamné à quinze ans de réclusion criminelle, assortie de huit ans de suivi socio-judiciaire, ainsi qu'à la suspension de l'exécution de cette condamnation

Pour rappel, la Cour européenne des droits de l'homme avait jugé qu'il avait été porté atteinte au droit du requérant à un tribunal impartial au sens de l'article 6§1 de la Convention.

La Commission de réexamen a déclaré recevable sa demande, fait droit à la demande de réexamen de la décision de la cour d'assises des Hauts-de-Seine du 2 juin 2004 en renvoyant l'affaire devant la cour d'assises de Paris mais rejeté la demande de suspension de l'exécution de la condamnation.

– ***Cour de cassation – Commission de réexamen, 26 février 2004, Maurice Papon***

L'intéressé a déposé une demande le 16 juillet 2003 tendant au réexamen de la condamnation prononcée le 2 avril 1998 par la Cour d'assises de la Gironde et subsidiairement à celui de l'arrêt rendu le 21 octobre 1999 par la Chambre criminelle de la Cour de cassation, la première l'ayant déclaré coupable de complicité de crimes contre l'humanité et condamné à la peine de dix années de réclusion criminelle.

Pour rappel, par arrêt du 25 juillet 2002 la Cour européenne des droits de l'homme a dit qu'il y avait eu violation de l'article 6§1 de la Convention européenne des droits de l'homme au motif que le condamné avait subi une entrave excessive à son droit d'accès à un tribunal et, donc, à son droit à un procès équitable.

La Commission de réexamen a fait droit à la demande de réexamen du pourvoi formé par Maurice Papon à l'encontre de l'arrêt de la cour d'assises de la Gironde du 2 avril 1998, renvoyé l'affaire devant l'Assemblée plénière de la Cour de cassation et rejeté la demande de suspension de l'exécution de la condamnation.

2) Quelles difficultés pratiques et procédurales ont été rencontrées en pratique ? Comment ont-elles été surmontées ?

Ce point nécessite une étude complémentaire qui est actuellement en cours et fera l'objet d'une contribution complémentaire de la part du Gouvernement.

3) Avez-vous rencontré des difficultés particulières en matière de réouverture de certaines affaires à la suite de règlements amiables ou de déclarations unilatérales ?

Ce point nécessite également une étude complémentaire, qui est actuellement en cours et fera l'objet d'une contribution complémentaire de la part du Gouvernement.

2. Procédures civiles

1) Comment la réouverture de procédures civiles a-t-elle été abordée et existe-t-il des exemples réussis de réouverture dans de tels cas ?

Aucun texte législatif n'est intervenu à ce jour pour permettre la réouverture d'une procédure civile après un constat de violation par la Cour européenne des droits de l'homme. Des réflexions sont toutefois en cours sur ce sujet.

Au plan jurisprudentiel, il convient de citer un arrêt du 30 septembre 2005, par lequel la chambre sociale de la Cour de cassation a jugé que « la décision du Comité des ministres du Conseil de l'Europe ou l'arrêt de la Cour européenne des droits de l'homme dont il résulte qu'un jugement rendu en matière civile et devenu définitif a été prononcé en violation des dispositions de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales n'ouvre aucun droit à réexamen de la cause »[10].

[10] Soc., 30 septembre 2005, n° 04-47.130, Bull. 2005, V, n° 279 (rejet). A signaler, cependant, deux arrêts de la chambre criminelle : dans la première affaire, il était soutenu qu'un arrêt de la Cour EDH condamnant

La Cour de cassation a ainsi confirmé la position de la cour d'appel, qui avait relevé que l'action dont elle était saisie se heurtait à l'autorité de la chose jugée en sorte qu'elle était irrecevable.

La deuxième chambre civile de la Cour de cassation a réaffirmé ce principe dans un arrêt du 17 octobre 2013 aux termes duquel les juges ont estimé qu'« *un arrêt de la Cour européenne des droits de l'homme dont il résulte qu'un jugement rendu en matière civile et devenu définitif a été prononcé en violation des dispositions de la Convention européenne de sauvegarde de droits de l'homme et des libertés fondamentales n'ouvre aucun droit à réexamen de la cause* »[11].

Pour la Cour de cassation, l'obstacle le plus sérieux au réexamen des décisions internes consécutif à une décision de violation prononcée par la Cour européenne est celui de l'autorité de la chose jugée. Ainsi, la Cour a jugé, dans son arrêt de rejet, que « ***la cour d'appel*** *qui (...) a relevé que l'action dont elle était saisie avait un objet et une cause identique entre les mêmes parties à celle qui avait été tranchée par un précédent arrêt,* ***a exactement décidé qu'elle se heurtait à l'autorité de la chose jugée*** *en sorte qu'elle était irrecevable* ».

Il n'est donc à ce jour pas possible de voir sa cause réexaminer en matière civile après un constat de violation de la Cour européenne des droits de l'homme.

2) Si la réouverture a été introduite sur la base de la jurisprudence des tribunaux nationaux, il serait utile de partager les exemples pertinents.

Au vu des développements qui précèdent, ce point est sans objet.

3. Procédures administratives

La question d'une réouverture des procédures internes après une condamnation par la Cour a donné lieu à plusieurs décisions récentes en matière administrative relatives, d'une part, aux violations trouvant leur source dans une procédure juridictionnelle et, d'autre part, aux violations imputables à un agissement administratif.

Dans une affaire *M. Baumet* (CE, Section, 4 octobre 2012, n° 328.502), le Conseil d'Etat a jugé qu'en l'absence de procédure organisée par un texte, l'exécution de l'arrêt

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la France faisait obstacle à ce que la personne poursuivie puisse faire l'objet de sanctions pénales. La Cour a répondu qu' « un arrêt de la Cour européenne des droits de l'homme constatant le non-respect du délai raisonnable au sens de l'article 6.1 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales est sans incidence sur la validité des procédures relevant du droit interne » (Crim., 3 février 1993, n° 92-83.443, Bull. crim. 1993, n° 57). La chambre criminelle a confirmé cette position un an plus tard dans des termes similaires : « les décisions rendues par la Cour européenne des droits de l'homme instituée par l'article 19 de la Convention européenne des droits de l'homme et des libertés fondamentales n'ont aucune incidence directe en droit interne sur les décisions de juridictions nationales. » (Crim., 4 mai 1994, n° 93-84.547, Bull. crim. 1994, n° 166, rejet)

[11] 2e Civ., 17 octobre 2013, pourvoi n° 12-22.957

de la Cour EDH ne pouvait avoir pour effet de priver les décisions juridictionnelles nationales de leur caractère exécutoire.

En effet, le Conseil d'Etat a estimé qu'en raison de l'autorité de chose jugée, seule une loi pouvait prévoir la réouverture d'une procédure juridictionnelle définitivement close.

En revanche, dans une décision d'assemblée du contentieux du 30 juillet 2014, (M. Vernes, n° 358.564), le Conseil d'Etat a jugé que lorsque la violation constatée par la Cour EDH concerne une sanction administrative, pour laquelle ne joue pas l'autorité de chose jugée, le constat par la Cour EDH d'une méconnaissance des droits garantis par la Convention constitue un élément nouveau qui doit être pris en considération par l'autorité investie du pouvoir de sanction

Il en a déduit qu'il incombe en conséquence a cette autorité, lorsqu'elle est saisie d'une demande en ce sens et que la sanction prononcée continue de produire des effets, d'apprécier si la poursuite de l'exécution de cette sanction méconnait les exigences de la Convention.

Dans ce cas, l'auteur de la sanction administrative peut y mettre fin, en tout ou en partie, eu égard aux intérêts dont elle a la charge, au regard de la sanction et de la gravité de ses effets ainsi que de la nature et de la gravite des manquements constatés par la Cour.

Par cette décision, l'assemblée du contentieux du Conseil d'Etat a dégagé une obligation originale, applicable même sans texte, de prise en considération de l'arrêt de condamnation prononce par la Cour EDH par 1'administration compétente, susceptible de déboucher sur le relèvement de la sanction.

En affirmant ainsi, pour la première fois, qu'un arrêt de la Cour EDH peut avoir pour effet d'obliger à reprendre une procédure administrative, le Conseil d'Etat a retenu une solution d'une très grande portée.

GERMANY / ALLEMAGNE

Code of Criminal Procedure:

Section 359
[Reopening for the Convicted Person's Benefit]

Reopening of the proceedings concluded by a final judgment shall be admissible for the benefit of the convicted person

1. if a document produced as genuine, to his detriment, at the main hearing was false or forged;

2. if a witness or expert, when giving testimony or an opinion to the convicted person's detriment, was guilty of wilful or negligent breach of the duty imposed by the oath, or of wilfully making a false, unsworn statement;

3. if a judge or lay judge who participated in drafting the judgment was guilty of a criminal violation of his official duties in relation to the case, unless the violation was caused by the convicted person himself;

4. if a civil court judgment on which the criminal judgment is based is quashed by another final judgment;

5. if new facts or evidence were produced, which, independently or in connection with the evidence previously taken, tend to support the defendant's acquittal or, upon application of a less severe penal norm, a lesser sentence or a fundamentally different decision on a measure of reform and prevention;

6. if the European Court of Human Rights has held that there has been a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and the judgment was based on that violation.

Code of Civil Procedure:

Section 580
Action for retrial of the case

An action for retrial of the case may be brought:

1. Where the opponent, by swearing an oath regarding his testimony, on which latter the judgment had been based, has intentionally or negligently committed perjury;

2. Where a record or document on which the judgment was based had been prepared based on misrepresentations of fact or had been falsified;

3. Where, in a testimony or report on which the judgment was based, the witness or experts violated their obligation to tell the truth, such violation being liable to prosecution;

4. Where the judgment was obtained by the representative of the party or its opponent or the opponent's representative by a criminal offence committed in connection with the legal dispute;

5. Where a judge contributed to the judgment who, in connection with the legal dispute, violated his official duties vis-à-vis the party, such violation being liable to prosecution;

6. Where judgment by a court of general jurisdiction, by a former special court, or by an administrative court, on which the judgment had been based, is reversed by another judgment that has entered into force;

7. Where the party

a) Finds, or is put in the position to avail itself of, a judgment that was handed down in the same matter and that has become final and binding earlier, or where it

b) Finds, or is put in the position to avail itself of, another record or document that would have resulted in a decision more favourable to that party's interests;

8. Where the European Court of Human Rights has established that the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols have been violated, and where the judgment is based on this violation.

Section 586
Period for filing an action

(1) The actions are to be filed prior to expiry of the statutory period of one (1) month.
(2) The period shall commence running on that day on which the party has become aware of the cause for rescission, but not prior to the judgment having become final and binding. Once five (5) years have lapsed, counting from the date on which the judgment has become res judicata, actions shall no longer be an available remedy.
(3) The stipulations of the above subsection are not to be applied to an action for annulment due to lack of representation; the period for bringing an action shall commence on the day on which the judgment has been served on the party and, where the party lacks the capacity to sue and be sued, on which it has been served on its legal representative.
(4) The rule set out in subsection (2), second sentence, is not to be applied to any actions for retrial of a case as provided for by section 580 number 8.

Act Introducing Assistance with Costs for Third Parties in Proceedings before the European Court of Human Rights (EGMR-Kostenhilfegesetz – EGMRKHG)

EGMRKHG

Date of issue: 20.4.2013

Full citation: "ECHR Assistance with Costs Act of 20 April 2013 (Federal Gazette (BGBl. I) p. 829)"

Footnote

(+++ Authoritative as of: 25.4.2013 +++)

This act was approved by the Bundestag as Article 1 of the Act of 20.4.2013 I 829. In accordance with Article 3 (1), it enters into force on 25.4.2013.

Section 1 – Prerequisites; Procedure

(1) In proceedings before the European Court of Human Rights, a third party whose human rights are affected shall be granted assistance with costs upon request if:

1. The Court has referred the application to the Federal Republic of Germany for observations,

2. Either:

   a) The President of the Court has invited such a third party to submit written comments or take part in hearings in accordance with Article 36, paragraph 2, of the European Convention on Human Rights, or

   b) An application by the third party to submit written comments or take part in hearings in accordance with Article 36, paragraph 2, of the European Convention on Human Rights
      aa) was successful or
      bb) has prospects of success and is not frivolous and

3. On account of his or her personal and economic circumstances, the third party affected is unable to meet the costs of litigation or is able to meet them only in part or only in instalments.

(2) With regard to prerequisites and procedures for the granting of assistance with costs, sections 115; 116; 117 (1), sentence 1, first half sentence, sentence 2, (2), sentence 1; section 118 (2); section 120 (1, 3 and 4); and section 124 of the Code of Civil Procedure shall apply mutatis mutandis in their respective current versions. The Federal Office of Justice shall replace the trial court. When making the application, the third party shall use

the forms introduced under section 117 (3) of the Code of Civil Procedure for the declaration of personal and economic circumstances.

Section 2 – Approval

(1) Where assistance with costs is approved, this has the effect of the third party receiving financial assistance from the Federal Cash Office (*Bundeskasse*) with expenses and fees for legal representation. Such representation may be performed by a lawyer or any other person approved as counsel by the Chamber President in the proceedings before the European Court of Human Rights.

(2) If instalments or amounts to be paid from assets are determined upon approval of assistance with costs, such instalments and amounts shall be paid to the Federal Cash Office.

(3) The approval of assistance with costs for a third party shall continue to apply in Grand Chamber proceedings.

Section 3 – Assessment; Power to issue statutory instruments

(1) Assistance with costs covers travel and subsistence expenses and other necessary expenditure incurred by the third party and his or her counsel.

(2) The Federal Ministry of Justice is authorised to determine by statutory instrument without the approval of the Federal Council (*Bundesrat*) the level of reimbursement for fees and expenses in line with the rates which apply under the Rules of Procedure of the European Court of Human Rights. In the case of proceedings which are straightforward in actual and legal terms and whose scope is relatively limited, provision may be made for a reduction in the level of reimbursement. If the counsel's activity is confined to making the application for third-party intervention, provision shall be made for payment of a quarter of the lump-sum.

(3) The Federal Office of Justice shall determine the level of assistance with costs once the third party has demonstrated that the fees or expenses are due. Should the third party unexpectedly not be required to pay fees or expenses, the assistance with costs shall be repaid immediately.

Section 4 – Appeals

(1) A complaint against the decision on assistance with costs shall take the form of a complaint subject to a time limit in accordance with the provisions of the Code of Civil Procedure, on which a judge of the court hearing the complaint sitting alone shall rule. The time limit in accordance with section 569 (1), sentence 1, of the Code of Civil Procedure shall be one month. The complaint may also be declared by recording it with the registry for the files of the court hearing the complaint. Section 572 (1) of the Code of Civil Procedure shall apply with the proviso that the Federal Office of Justice shall decide on redress.

(2) The complaint shall be heard by the regional court (*Landgericht*) in whose district the seat of the Federal Office of Justice is located.

GREECE / GRÈCE

1. Criminal proceedings.

According to the Article *525 par.1.5* of the Code of Criminal procedure (Presidential Decree 258/1986), which was added with the Article *11 of the Law 2865/2000*, in criminal cases the procedure can reopen after a petition is filed by the applicant-convicted person where the Court has found a violation of a right concerning the fair character of the proceedings or the substantive provision applied. In accordance with the case - law of the Court of Cassation, the reopening of the proceedings presupposes that the violation found affected in a negative manner the national court's judgment and the restitution of the damage sustained can be achieved by the reopening of the proceedings *(Court of Cassation 415/2009, 1940/2010, 1138/2011, 831/2014*). Within the meaning of *"the substantive provision applied"* fall all the rights and guarantees of the Part I of the ECHR (*Court of Cassation 831/2014*).

However the Court of Cassation does not accept the reopening of the proceedings in cases where the violation found concerns the reasonable length of the proceedings.

In accordance with the Articles 525A and 533 of the Code of Criminal procedure partial reopening of the proceedings is provided in cases where it was held by the national court that the State has no obligation for compensation or the compensation adjudicated was insufficient regarding those who were provisionally detained and subsequently acquitted by an irrevocable judgment, those who were detained after being sentenced and subsequently the relevant judgment was quashed and those who were convicted and detained and subsequently were acquitted by a judgment issued after the reopening of the proceedings. The case can reopen after a petition is filed by the person sustained the damage under the condition that the Court has found a violation of the Convention by the State with regards to the national court's judgment.

Up today many cases have been brought before the national courts according the provisions of Articles 525 par.1.5, 525A and 533 of the Code of Criminal procedure**.**

2. Administrative proceedings

According to the Code of Administrative Procedure (*Law 2717/1999*) in cases before administrative courts the procedure can reopen after a petition is filed by the applicant or his successors where the Court has found a violation of a right concerning the fair character of the proceedings or the substantive provision applied. The petition must be filed within a time limit of ninety (90) days starting from the date when the Court's judgment becomes final, pursuant to the provisions of article 44 of the Convention **(***Article 105A* of the Code which was added by the *Article 23 of the Law 3900/2010*).

3. Civil proceedings.

With regards to civil cases, Greek legislation does not provide for the reopening of the proceedings. The main obstacles for the introduction of the reopening are the *res judicata* and the legal security, considering the way third parties acted in good faith may be affected. However the issue is being considered.

IRELAND / IRLANDE

The general rule in Irish Courts, civil and criminal, is that there is a presumption of *res judicata*. The principle of the finality of litigation is an important one in Irish law.

No special procedure exists that allows for the reopening of domestic proceedings following a judgment of the European Court of Human Rights.

ITALY / ITALIE

1. La possibilité d'une réouverture d'une procédure judiciaire interne, suite à un arrêt de la Cour EDH prononçant la non équité de la procédure, au sens de l'article 6 de la Convention fait partie du système italien, pour ce qui concerne les procédures pénales, suite à l'arrêt **n° 113 du 4 avril 2011** de la Cour constitutionnelle italienne. Cette dernière a établi, par le biais de ce que l'on appelle en droit italien une *sentenza additiva*, que l'article 630 du code de procédure pénale était illégitime, dans la mesure où il n'incluait pas, parmi les cas de révision du jugement ou du décret de condamnation pénale, aux fins de la réouverture de la procédure, le cas ultérieur qui découle de la nécessité de se conformer à un arrêt définitif de la Cour européenne des droits de l'homme, comme l'exige l'article 46 de la Convention.

La Cour Constitutionnelle, une première fois en 2008 (arrêt n. 129), avait pris acte des projets de loi visant à introduire ce nouveau cas de révision et elle n'avait pas accueilli la question de constitutionnalité posée sur l'article 630 du code de procédure pénale. Avec son arrêt de 2011, le juge de la légitimité des lois est directement intervenu pour combler la lacune due au retard du législateur.

Il faut rappeler qu'en droit italien, l'effet concret d'une *sentenza additiva* est d'ajouter au texte de loi la partie manquante que la Cour constitutionnelle juge nécessaire afin de rendre la disposition en cause compatible avec la Constitution. Les décisions de la Cour constitutionnelle italienne ont un effet *erga omnes*, quand elles accueillent la question de constitutionalité qui lui est posée.

Par conséquent, à la suite de l'arrêt n° 113/2011, l'article 630 du code de procédure pénale doit être lu et appliqué par les juridictions pénales italiennes comme prévoyant un cas de révision ultérieur, ajouté à ceux déjà prévus, c'est-à-dire le cas dans lequel le renouvellement de la procédure constitue un moyen pour se conformer aux obligations découlant de l'article 46 §1 de la Convention. La révision accorde ainsi au sujet qui a subi la violation la possibilité de se trouver à nouveau dans les conditions dans lesquelles il se serait trouvé au cours de la procédure en cause s'il n'y avait pas eu la violation constatée par la Cour européenne.

2. Suite à un recours en révocation présenté au Conseil d'état par les requérants des affaires Staibano n° 29907/07 et Mottola n° 29932/07 contre Italie, qui ont donné lieu à deux arrêts de la cour EDH en date 4 février 2014, qui prononçaient la violation de l'article 6 de la Convention, le Conseil d'Etat, estimant ne pas avoir la possibilité de faire droit aux recours, par ordonnance n. 2 de 2015, a soulevé devant la Cour Constitutionnelle la question incidente de légitimité constitutionnelle de l'article 106 du code du procès administratif et 395 et 396 du code de procédure civile, à l'égard des articles 117 §1, 111 et 24 de la Constitution italienne, sous l'angle de l'absence de prévision d'une ultérieure hypothèse de révocation d'arrêt, en plus de celles déjà prévues, quand cela s'avère nécessaire pour se conformer à un arrêt définitif de la Cour EDH.

Ce référé à la Cour Constitutionnelle, qui devrait se prononcer très prochainement, ouvre une perspective de possible extension d'un remède visant à la réouverture d'une procédure également devant la juridiction civile ou administrative.

LATVIA / LETTONIE

Reopening of cases at domestic level following judgments of the European Court of Human Rights

From the outset it should be noted that the Latvian legal system does not clearly distinguish reopening and re-examination of proceedings. Relevant procedural laws are open enough allowing to consider to what extent a newly disclosed fact or circumstance serves as a basis for reopening of proceedings, and also to determine to what extent the individual concerned may be reinstated in her/his rights. Therefore, for the purpose of the present overview, only the term "reopening" will be used. It should be further noted that the domestic law of Latvia provides for a possibility to reopen criminal, civil and administrative court proceedings. Moreover, under the Latvian law, the "reopening" is not limited to the Court's judgments.

Criminal Proceedings

Legal framework

Article 655 § 1 of the *Criminal Procedure Law* of 21 April 2005 provides for a possibility to reopen criminal proceedings on the basis of "newly disclosed facts and circumstances" in cases where a court's judgment or decision has already entered into force. Pursuant to Article 655 § 2 (5) "newly disclosed facts and circumstances" shall also include a conclusion by an international tribunal that a ruling delivered by the Latvian court and that had entered into force, is incompatible with international legal instruments binding upon Latvia.

Article 656 of the *Criminal Procedure Law* sets time limit for reopening of criminal proceedings under the above given circumstances. However, if the newly established facts and circumstances are at the convicted person's favour, there is no time bar for reopening of the criminal proceedings (Article 656 § 3).

The reopening proceedings on the basis of newly disclosed circumstances consist of two sequential stages. As a general rule, the reopening of proceedings should be initiated by the parties to the respective criminal proceedings or their representatives (Article 657). In the first stage of the reopening the request for reopening is addressed to the competent prosecutor who adopts a conclusion either to proceed with the request or to dismiss it. If the prosecutor refuses to reopen the criminal proceedings, he or she adopts a reasoned decision and notifies the applicant thereof; the prosecutor's decision is subject to an appeal (Article 658 §§ 3 and 4). If the prosecutor decides that there are sufficient grounds for reopening of the criminal proceedings on the basis of newly disclosed circumstances, the prosecutor's conclusion together with the criminal case file is forwarded to the competent court (Article 658 §§ 1 and 2).
In the second stage of the reopening proceedings the competent court may: (1) to revoke the domestic court's ruling in full or in part, and transfer the criminal proceedings to the Prosecutor Office; (2) to revoke the domestic court's ruling in full or in part, and transfer the criminal proceedings to the competent court; (3) to dismiss the prosecutor's conclusion; (4) to terminate the proceedings (Article 660 § 5).

To sum up, if the Court finds that a ruling of the national court is incompatible with the Convention standards, the Court's judgment may serve as a "newly disclosed circumstance" for reviewing the criminal case *de novo*.

Domestic practice

On 28 November 2002 the Court adopted the judgment in the case of *Lavents v. Latvia* (application no.58442/00), *inter alia*, finding a violation of Article 6 § 1 of the Convention concerning the applicant's conviction by the Riga Regional Court on 19 December 2001. Also, the Court found a violation of Article 8 concerning the interference with the applicant's right to respect for his correspondence.

Following the Court's judgment of 28 November 2002, on 13 February 2003, that is prior to the entry into force of the respective provisions of the *Criminal Procedure Law* of 21 April 2005, the Supreme Court of Latvia quashed the Riga Regional Court's judgment of 19 December 2001 and sent the applicant's criminal case for fresh examination before the Riga Regional Court by a new panel of judges. As concerned the violation of Article 8 of the Convention, on 27 March 2003 the Riga Regional Court quashed the Riga Regional Court's decision of 22 October 1997 imposing the attachment on the applicant's correspondence.

On 15 September 2009 the Court delivered its judgment in the case of *Pacula v. Latvia* (application no.65014/01), finding a violation of Article 6 § 3 (d) of the Convention for the applicant's failure to question the main witness (victim) in the criminal proceedings against him. Following the aforesaid Court's judgment, on 26 April 2010 the Prosecutor General Office adopted the decision to reopen the criminal proceedings in the part concerning the applicant's conviction pursuant to Article 657 of the *Criminal Procedure Law* on the basis of newly disclosed circumstances, namely, the Court's judgment of 15 September 2009. On 28 April 2011 the Supreme Court dismissed the prosecutor's decision concerning the reopening of the criminal proceedings on the account that it was no longer possible to question the witness at issue since she had already passed away.

On 8 January 2013 the Court found a violation of Article 6 § 1 of the Convention in the case of *Baltiņš v. Latvia* (application no.25282/07) on the account that the domestic courts had not properly addressed the applicant's incitement complaint. Having examined the request for reopening lodged by the applicant and his defence counsel on 20 June 2013, the Prosecutor Office decided to reopen the criminal proceedings pursuant to Articles 655 § 2 (5) and 657 of the *Criminal Procedure Law* on the basis of newly disclosed circumstances. The prosecutor's conclusion was based on the Court's findings in its judgment of 8 January 2013.

By the decision of 1 October 2013 the Supreme Court upheld the prosecutor's conclusion, quashed the domestic court's rulings, and transferred the criminal case to the appellate instance court for adjudication *de novo*.

On 11 February 2014 the Court found a violation of Article 6 § 1 of the Convention in the case of *Cēsnieks v. Latvia* (application no.9278/06) on the account of the applicant's conviction which based on evidence obtained in breach of Article 3 of the Convention.
On the basis of the application lodged by the applicant and his defence counsel, on 30 July 2014 the Riga Regional Prosecutor Office decided to reopen the applicant's criminal proceedings pursuant to Article 657 of the *Criminal Procedure Law* on the basis of newly disclosed circumstances. The criminal case-file was transferred to the Supreme Court, and on 16 December 2014 the Supreme Court upheld the prosecutor's conclusion as well-founded, quashed the domestic courts' rulings and transferred the criminal case to the appellate instance court for adjudication *de novo*.

Unilateral declarations

The grounds for reopening of criminal proceedings in connection with "newly disclosed circumstances" provided for in the *Criminal Procedure Law* are sufficiently broad, thus also forming a legal basis for reopening of criminal proceedings following the Government's unilateral declaration.

The existing domestic practice supports the aforesaid. As already noted above, following the Court's judgment of 11 February 2014 finding a violation of Article 6 of the Convention in the case of *Cēsnieks v. Latvia* (application no.9278/06) the competent prosecutor decided to reopen the respective criminal proceedings. In the framework of the reopening proceedings both the prosecutor and afterwards the Supreme Court took into account the unilateral declaration submitted by the Government under Article 3 of the Convention concerning the applicant's ill-treatment.

To the contrary, in the case of *Jeronovičs v. Latvia* (application No.547/02) the competent prosecutor refused the applicant's request, which was based on the Government's unilateral declaration as a newly disclosed circumstance, to reopen the criminal proceedings against the third persons. The competent prosecutor considered that there were no conditions, that is, no newly disclosed circumstances within the meaning of Article 655 § 2 of *the Criminal Procedure Law* that would serve as a basis for reopening of the said criminal proceedings.
The prosecutor's refusal to reopen the criminal proceedings against the third persons has generated a fresh application before the Court (application No.44898/10) and is currently subject to the Grand Chamber proceedings.

Civil Proceedings

Legal framework

Under the *Civil Procedure Law* provisions the reopening of civil proceedings at domestic level is, *inter alia*, possible on the basis of "newly disclosed facts and circumstances" (Article 478). "Newly disclosed facts and circumstances" are listed in Article 479 of the *Civil Procedure Law*. Following the 22 May 2008 amendments to Article 479 of the *Civil Procedure Law* that entered into force on 25 June 2008, a ruling by the European Court of Human Rights shall be considered to constitute "newly disclosed facts and circumstances" serving as a basis for reopening of civil proceedings (Article 479 § 6).

As a general rule, the reopening proceedings shall be initiated upon the application from the party to the civil proceedings (Article 478). The respective application has to be submitted to the court of a higher instance (e.g., to the regional court if the contested ruling has been adopted by the first instance court).

The law sets time limit for lodging a reopening request – the application must be submitted within three months following the moment when the newly disclosed facts and circumstances have been established (Article 478 § 2), as well as sets a prescription period of ten years from the entry into force of the contested ruling (Article 478 § 3).

The reopening request is examined by way of written procedure (Article 481). If the court establishes newly disclosed facts and circumstances, it quashes the contested judgment in full or in part, and forwards the case for review to the first instance court (Article 481 § 2). If the court dismisses the application, the applicant may submit an ancillary complaint against this decision (Article 481 §§ 3 and 4).

Domestic practice

On 24 June 2014 the Court find a violation of procedural aspect of Article 8 of the Convention in the case of *A.K. v. Latvia* (application no. 33011/08). Following the Court's judgment, the applicant requested the Supreme Court to reopen the civil proceedings at the domestic level on the basis of Article 479 § 6 of the *Civil Procedure Law*. On 27 March 2015 the Supreme Court dismissed the applicant's request on the account that the applicant in her application had not properly reasoned as to why the Court's judgment in the particular case should be considered as a newly disclosed circumstance justifying the reopening of proceedings. The Supreme Court also noted that neither the domestic law provisions nor the Court's case-law set an obligation to reopen civil proceedings on each occasion whenever the Court finds a Convention violation. The Supreme Court considered that the applicant's grievances were properly addressed by the Court's judgment of 24 June 2014.

Administrative Proceedings

Legal framework

According to the *Administrative Procedure Law* there are two possibilities for reopening of administrative proceedings following the Court's judgment: (1) within the institution which issued the administrative act and (2) before the court.

In accordance with Article 88 § 2 of the *Administrative Procedure Law* the institution upon its own initiative has an obligation to reopen the administrative proceedings if it is necessary for the implementation of a judgment of the European Court of Human Rights or any other international or supranational court. When re-assessing the case, the institution has to base its decision on the legal assessment of the facts of the case as provided by the Court.

The administrative court proceedings, following the entry into force of a judgment or decision rendered by an administrative court, may be reopened on the basis of "newly disclosed circumstances", which are listed in Article 353 of the *Administrative Procedure Law*. According to Article 353 § 6, a ruling by the European Court of Human Rights is a "newly disclosed circumstance" that serves as a basis for reopening of administrative court proceedings.

The reopening of proceedings may be initiated upon the application by a party to the administrative proceedings (Article 354 § 1). However, it is possible to reopen the administrative proceedings only concerning the rulings adopted by the first instance court and the appellate instance court. Thus, a ruling delivered by the Supreme Court is not subject to reopening proceedings.

According to Article 354 § 2 the application shall be submitted by a party to the administrative proceedings within three months following the day when the newly disclosed circumstances have been established. The right to institute administrative proceedings on the basis of the Court's ruling is not time-barred (Article 354 § 3).
If the court establishes newly disclosed circumstances, it quashes the contested judgment in full or in part, and forwards the case for review to the first instance court or appellate instance court (Article 357 § 2). If the court fails to establish newly disclosed circumstances and dismisses the application, the applicant may submit an ancillary complaint against this decision (Article 357 § 3).

Domestic practice

Following the Court's judgment of 9 October 2003 in the case *Slivenko v. Latvia* (application no.48321/99), finding a violation of Article 8 of the Convention on the account of the applicants' expulsion from Latvia, the Department of Administrative Cases of the Supreme Court on 10 August 2004, upon the application submitted by the Office of Citizenship and Migration Affairs pursuant to Article 354 § 2 of the *Administrative Procedure Law*, decided to reopen the administrative proceedings in the applicant's administrative case. The Court's judgment of 9 October 2003 served as a newly disclosed circumstance.

LIECHTENSTEIN

In Liechtenstein, there are no provisions which would foresee the possibility to reopen criminal or civil proceedings.

The practical experience is therefore very limited: After the judgement *Steck-Risch and others v. Liechtenstein* (63151/00), the applicants asked for reopening of the national proceedings. Domestic courts refused to grant that, which led to *Steck-Risch v. Liechtenstein (No. 2)*. This application was declared inadmissible.

LITHUANIA / LITUANIE

➢ Criminal proceedings

1) How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

Under Article 456 of the Lithuanian Code of Criminal Procedure of 2003 the criminal cases examined by the Lithuanian courts may be reopened when the ECtHR finds that the convicting judgment was adopted in violation of the Convention and its Protocols, if the violations taken into consideration their nature and gravity raise reasonable doubts as to the conviction as such and if they might be remedied only upon reopening of the case of the convicted person. Under Article 458 the request for the reopening may be submitted before the Supreme Court of Lithuania within 6 months from the date on which the judgment of the ECtHR becomes final. Under Article 459 duly submitted request shall be transmitted by the President of the Supreme Court to the Chamber of 3 judges of the Supreme Court, which within 1 month from the date of its submission shall resolve the question of its admissibility. If the Chamber finds such a request admissible and decides to reopen the criminal case, the reopened criminal case shall be heard by the Chamber of 3 judges (if the criminal case had not been examined in the proceedings of cassation) or by the Plenary of the Division of Criminal Cases of the Supreme Court (if the case had been examined in the proceedings of cassation).

Before the entry into force of the Code of Criminal Procedure of 2003 the reopening of the criminal cases was regulated by the Code of Criminal Procedure of 1961, as amended in this regard in 2001. Overall 6 criminal cases on the ground of the judgments of the ECtHR have been reopened – in one of them criminal proceedings were discontinued (on the ground of the judgment of GC in the case of *Ramanauskas v. Lithuania*), in 3 of them – persons previously convicted by the domestic courts were acquitted (on the ground of the judgments in cases *Birutis and Others v. Lithuania*, *Malininas v. Lithuania* and *Lalas v. Lithuania*), in 2 of them – the judgments of the domestic courts were left unchanged (on the ground of the judgment in case of *Daktaras v. Lithuania* and *Butkevičius v. Lithuania*).

2) What practical or procedural difficulties have been encountered in practice? How have they been overcome?

Practical difficulties might arise due to the length of proceedings before the ECtHR – e.g. in criminal case by the applicants Malininas and Lalas (2 co-accused in the context of one criminal proceedings) had been terminated before the domestic courts by their conviction by the final judgment of the Supreme Court yet in 2003, and relevant judgments of the ECtHR were adopted in 2008 - in respect of Malinimas and in 2011 - in respect of Lalas. Both applicants were acquitted after the reopening of their criminal case by final judgment of the court of appellate instance, to which the case was transferred by the Lithuanian Supreme Court, adopted in 2013. As the violations of the Convention found were related with illegitimate use of undercover techniques in criminal investigations, namely, the use of evidence obtained as a result of police incitement – some practical difficulties occurred during resumed procedure of assessment of evidentiary after all these years.

3) Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?

No criminal cases were reopened following friendly settlements or unilateral declarations. As a specific difficulty in this regard (though, only in theory, as in practice no such unilateral declarations or friendly settlements following which the reopening of the case would be necessary were adopted/reached in cases against Lithuania) the lack of specific legal regulation might be indicated. Currently, the provision of the Code of Criminal Procedure explicitly refers to the convicting judgment of the ECtHR. However, one could expect some expansive interpretation of existing legal regulation by the Lithuanian Supreme Court in this regard, if the need be.

➢ Civil proceedings

1) How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?

Under Article 366 § 1 Item 1 of the Lithuanian Code of Civil Procedure of 2003 the civil proceedings may be reopened if the ECtHR finds that the judgments, decisions or orders of the Lithuanian courts violate the Convention or its Protocols. Under Article 367 the request for the reopening shall be submitted before the Supreme Court of Lithuania within 3 months from the date when the person concerned became aware of the circumstance constituting the ground for the reopening of the proceedings but no later than within 5 years from the date when the judgment or decision (adopted by the domestic court) came into effect (Article 368 § 2).

Before the entry into force of the Code of Civil Procedure of 2003 the reopening of the civil cases was regulated by the Code of Civil Procedure of 1964, as amended in this regard in 2002. Since 2002 civil proceedings had been reopened on the ground of the judgments of the ECtHR in 4 cases – in one of them additional pecuniary damage to the amount of just satisfaction awarded by the ECtHR was adjudged (on the ground of the judgment in the case of *Jucys v. Lithuania*), in another civil case the dismissal from work of the claimant (ex-KGB officer, in respect of whom the legislative restriction to be employed in private sector was found to be in violation of the Convention) was recognized as unlawful and constituting just satisfaction in itself (on the ground of the judgment in the case of *Rainys and Gasparavičius v. Lithuania*), and in the third one – the civil proceedings, previously dismissed by the Lithuanian courts claiming that they have no jurisdiction on the ground of State immunity, which was found to be incompatible with Article 6 § 1 by the Grand Chamber judgment in *Cudak* case, were reopened on the ground of *Cudak* judgment and examined on the merits, finding the claimant's dismissal from work unlawful and awarding pecuniary compensation in this regard. Moreover, the Supreme Court of Lithuania recently reopened a civil case on the ground of the judgment of the ECtHR in the case of *Digrytė Klibavičienė v. Lithuania*. Additional pecuniary damages will need to be addressed in the domestic court due to the violation of the Convention found.

– What were the obstacles / How have they been overcome?

One practical obstacle is related with the period of limitation of 5 years for the reopening of the civil proceedings under Article 368 § 2 mentioned above due to the length of the proceeding before the ECtHR. For example, in the case of *Digrytė Klibavičienė* the request for the reopening was submitted in 2015 (the judgment of the ECtHR became final in 2015), while the final decision in the civil proceedings the request for reopening of which is submitted was adopted yet in 2006. The Supreme Court by the judgment of 22 April 2015 reopened the case and identified prolonged proceedings before the ECtHR due to which the limitation period of 5 years was missed as an exceptional legal situation which needs to be seen as a ground for exception from the limitation clause. In addition, a legislative initiative currently being under consideration should be mentioned, whereby the Code of Civil Proceedings shall be amended providing for no period of limitation of 5 years for the reopening of civil proceeding on the ground of the judgments of the ECtHR.

Other practical obstacles stem from the quality of the judgments of the ECtHR – for example, the judgments, where the ECtHR making assessment on equitable basis awards some aggregated sum as just satisfaction for all forms of damages, leave room for further claims for damages from the State possibly to be made by the applicants before the domestic courts, while requesting for the reopening of domestic civil proceedings. In this regard, on one hand, more self-restraint of the ECtHR would be desirable, namely, in abstaining from awarding some aggregated sums on equitable basis, while, on the other, general abstention from awarding just satisfaction transferring the question of just satisfaction back to national courts and giving more precise recommendations in this regard of possible reopening of the domestic proceedings, especially in judgments where material violation of the Convention is found though one could make an assumption that the reopening of judicial proceedings at the national level would possibly serve as the most suitable and/or desirable measure in achieving *restitution in integrum*.

– What are the positive outcomes and remaining gaps?

As a remaining gap the lack of specific legal regulation in regard of the reopening of civil proceedings following friendly settlements or unilateral declarations might be indicated.

2) If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

➢ Administrative proceedings

1) How has the reopening of administrative proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

Under Article 153 § 2 Item 1 of the Law on Administrative Proceedings the administrative proceedings may be reopened if the ECtHR finds that the judgment of the Lithuanian court violates the Convention or its Protocols. Under Article 156 § 1 the request for the reopening shall be submitted before the Supreme Administrative Court of Lithuania within 3 months from the moment the person concerned became aware or should have become aware of the circumstance constituting the ground for the reopening

of the proceedings (Article 156 § 1). Noteworthy, that there is no period of limitation for the reopening of cases on the ground of the judgment of the ECtHR.

Moreover, the administrative proceedings might also be reopened even if the ECtHR did not find that the judgment of the Lithuanian court violates the Convention or its Protocols. For instance, the proceedings might be reopened if a person submits obvious evidence demonstrating that the fundamental misapplication of substantive legal rule has been exercised which might have determined an illegal judgment (Article 153 § 10). Another ground might be a need to ensure the uniform case-law of administrative courts (Article 153 § 12). Therefore, the developing jurisprudence of the ECtHR might be seen as a factor of reinterpretation of substantive law in future administrative proceedings.

The Supreme Administrative Court has reopened 2 administrative proceedings on the ground of the judgments of the ECtHR. Both of them concern a failure of domestic courts to ensure compliance with Article 6 § 1 of the Convention. In one of them the court re-examined the case where the violation of the Convention was found due to the inability of the applicant to question the experts in the course of the domestic proceedings (on the ground of the judgment *Balsytė-Lideikienė v. Lithuania*). The administrative case was referred back to the first instance court, which has discontinued the case. In other case the court re-examined the case where the violation of the Convention was found due to the failure of domestic courts to assist the applicant in obtaining evidence and to give it consideration, or at least to provide reasons why this was not necessary (on the ground of the judgment *Jokšas v. Lithuania*). The Supreme Administrative Court upon re-examination of the re-opened administrative case has left its previous decision unchanged, as it was established that the violation of the Convention found has no influence upon the lawfulness and validity thereof.

– What were the obstacles / How have they been overcome?

As in criminal cases practical difficulties might arise due to the length of proceedings before the ECtHR. For instance, there might be difficulties to obtain and adjudicate evidences if a case is reopened after a long period.

– What are the positive outcomes and remaining gaps?

As a remaining gap the lack of specific legal regulation in regard of the reopening of administrative proceedings following friendly settlements or unilateral declarations might be indicated.

2) If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

THE REPUBLIC OF MOLDOVA / RÉPUBLIQUE DE MOLDOVA

Criminal proceedings

1) How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

The criminal proceedings could be reopened in two occurrences:

(1) either during pending proceedings before the Court but only if the case has been communicated to the Government or;

(2) after the judgment of the Court finding a violation (in some occurrences the criminal proceedings can be reopened after the Decision based on friendly settlement and unilateral declaration.

The successful reopening of the criminal proceedings depends on what stage they had been finished before the application where brought with the Court. There could be that during the examination of the case the domestic proceedings were being reopened already or there have been developments, which would not require reopening but the Court were not aware of them or the developments do not suffice in erasing victim status or finding a non-violation. In any instance, the issue of reopening of criminal proceedings could be decided only on case-by-case basis and upon the nature of a violation.

According to the law, a high-ranking prosecutor has a large discretion on reopening of the criminal proceedings if they were finished during the pre-trial stage (unsuccessful investigation or closing of the prosecution on other grounds). After the trial stage and final judgments of the courts, the reopening could be decided by the Supreme Court, either at the request of the applicant (only in case when there has been a judgment of the Court finding a violation) or at the requests for extraordinary revision by the prosecution (usually the General Prosecutor or his deputies).

As to successfulness of reopening, there have been many. Usually the prosecution and the Supreme judges review the criminal investigations in ill-treatment cases or criminal convictions based on serous procedural flaws that undermine the fairness of the merits of indictments. The relevant examples of reopening could be provided latter.

2) What practical or procedural difficulties have been encountered in practice? How have they been overcome?

Procedural difficulties: requests for reopening from the applicants usually exceed the bounds of violation found by the Court (after the judgment) or the alleged violations raised and questions put before the Government (in communicated cases). This could overburden the Supreme Court and the prosecution with speculations on part of the applicants.

Overcome: The Agent’s office proposed to be implied in all such cases at the national level, as a third party intervener, in order to cast light what heads of the reopening requests merit consideration.

Procedural difficulties: to overcome the procedural bars in reopening, such as **res judiciata** of the domestic judgments.

Overcome: Introduction into the law and case-law of principle of direct application of the Convention and the direct effects of the Court's judgments in the national legal order. The Court's judgments are to be considered as "writ for execution" and as "an exceptional circumstance" requiring extraordinary revisions of judgments.

Procedural difficulty: Further, the most difficulty is to reopen investigations and cases where there have been found serious procedural shortcomings on account of failure to gather evidences and non-expeditious proceedings. In these instances, the reopening would not eventually contribute to erasing of consequences but can reinforce them.

Overcome: The Agent proposed to introduce the following provisions into procedural law – Examination on case-by-case basis whether there is a need to reopen the case and, if not, the well justified and motivated official refusal subjected to judicial control.

3) Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?

Yes, when the terms of friendly settlements and unilateral declarations include a clause for reopening, the criminal investigation authorities and the courts may disagree with it, because the applicant benefits from monetary compensation, which in their opinion may suffice. In such cases, in advance of concluding an agreement with the applicant or proposing a unilateral declaration, the Agent seeks assurances from the prosecution that they would agree with reopening. However, such assurances cannot be sought from the judiciary, which would undermine its independence and judicial unpredictability.

In any case, in criminal cases, which would require reopening the authorities' attitude towards a friendly settlement is quite reserved. They would rather prefer to have the case examined by the Court in contentious proceedings than to admit speculations of the applicants during friendly settlement negotiations in criminal cases. In all cases, the burden is usually upon the Agent to find a consensus between the criminal authorities and the grieved applicants.

Civil proceedings

1) How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?
– What were the obstacles / How have they been overcome?
– What are the positive outcomes and remaining gaps?

The mechanism of reopening of civil proceedings is quite similar to the above described, save some particularities.

There are two possibilities to reopen civil proceedings:
(1) during the pending application, when it is clear that the case before the Court is repetitive or there is already well-established case-law on the matter;

(2) after the judgment of the Court finding a violation.
In both instances, the Agent him selves could seek such a reopening. The applicant could request reopening only after the Court's judgment. The case could be reopened by an extraordinary revision by the Supreme Court only.

There are no serious obstacles, apart from the fact that the reopened civil proceedings usually implies serious opposition from the third private parties, which did not participate in the Court's proceedings. If the civil case implies a dispute between the State authorities and the applicant, the reopening of the civil case does not raise such issues. If there are private parties involved, then the reopening becomes difficult to handle.

To overcome such difficulties, the issue of reopening is thoroughly discussed in advance with the applicant and the Agent and could include a negotiation with other private parties involved. If the applicant, however, seeks reopening the Agent can be asked for his opinion during the judicial proceedings before the Supreme court and to explain whether the case require reopening and whether there is another possibility to handle the violation without revision of the case. It depends on the case.

2) If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

The reopening has been introduced by the procedural laws (not by case-law). The translation of legal texts will be provided latter if it will be so desired.

THE NETHERLANDS / PAYS-BAS

Criminal proceedings

The Code of Criminal Procedure was amended in September 2002 (which amendment entered into force in January 2003) so as to allow applications for the review of final judgments following judgments of the Strasbourg court. Pursuant to Article 457 § 1 (b) of the Code of Criminal Procedure, an application for review can be lodged before the Supreme Court on the grounds that the Court has ruled that the Convention was violated in proceedings that led to the applicant's conviction or to a conviction for the same offence, and based on the same evidence, if such review is necessary in order to provide just satisfaction within the meaning of Article 41 of the Convention. Pursuant to Article 465 § 2, in cases as referred to in Article 457 § 1 (b) such an application must in principle be lodged within three months after something has taken place from which it can be inferred that the convicted person is aware of the Court judgment. Pending the decision on the application for review, the Supreme Court may at any time suspend the execution of the judgment (Article 473 § 4). Pursuant to article 472 § 1, if the Supreme Court considers that an application concerning a case as referred to in article 457 § 1 (b) is well founded, it can either decide the case itself or it can order the suspension or interruption of the execution of the final judgment and the referral of the case under Article 471, in order either to uphold the said judgment or to overturn it and render judgment, having regard to the judgment of the Supreme Court.

So far, four applications for review of a final judgment have been brought on the basis of Article 457 § 1 (b). The first application resulted in a successful reopening of the case. Due to the established violation by the Court in the case *M.M. v. the Netherlands*[12], the Supreme Court decided to reduce the fine and accompanying term of default detention in this case.[13] The second application was withdrawn by the applicant, because it had not been submitted within the prescribed time limit.[14] The third application resulted in a reduction of the sentence as well, after the Supreme Court set aside the judgment.[15] As a result of the most recent application based on the case *Vidgen v. the Netherlands*[16], the Supreme Court set aside the judgment and ordered the suspension of the execution of the final judgment and referred the case back to the Court of Appeal.[17] From the Conclusion of the Attorney General in the second case, it can be deduced that difficulties might arise in determining when something has taken place from which it can be inferred that the convicted person is aware of the Court judgment. It follows however from the Explanatory Memorandum, that such an open wording was considered necessary to ensure a real possibility for the convicted person to file an application for reviewing the case when a violation has been established by the Court.

Civil proceedings

The Dutch Code of Civil Procedure contains a chapter on what is known as "herroeping" (formerly known as 'requeste civiel'), Articles 382-389. A court decision in a civil case

[12] ECHR 8 April 2003, appl. no. 39339/98.
[13] HR 27 September 2005, NJ 2007/453.
[14] HR 20 February 2007, NJ 2007/373.
[15] HR 10 February 2009, NJ 2009/167.
[16] ECHR 10 July 2012, appl. no. 29353/06.
[17] HR 4 June 2013, NJ 2013/333.

may – despite the fact it has the force of res judicata – be revoked at the request of a party if:
a. it is based on deception committed by the other party to the proceedings,
b. it is based on documents whose falsehood after the judgment is recognized or established by a final judgment, or
c. the party is in possession of a piece of evidence of a decisive nature, which was withheld by the other party previously.

The last time that the issue of reopening civil-law proceedings following an adverse Court judgment was discussed in Parliament dates back to 2005 (when '*requeste civiel*' still existed). By letter of 12 August 2005 the Minister of Justice notified the House of Representatives of the States General that this option would not be added to the Dutch Code of Civil Procedure. If provision were made for overturning judgments in cases in which judgments of the Court have found a breach of the Convention, the effect would be to produce a lack of legal certainty for the parties to proceedings and any third parties until the moment at which the Court decides whether or not to overturn the judgment. As a consequence, the position taken by the Government was that reopening should only be possible in highly exceptional circumstances.

It should be observed that the Netherlands has rarely been confronted with Court judgments which represent this situation. Furthermore, there are other ways of providing for a judicial remedy in civil cases. For instance, the State can be sued for tort (unlawful dispensation of justice). It is clear from the Supreme Court's case law that stringent criteria are applied when deciding whether a party to proceedings is eligible for compensation on grounds of unlawful dispensation of justice. The State is held liable only if no legal remedies remain open and the fundamental principles of law were so badly neglected when preparing the decision that the parties can no longer be said to have had their case heard in a fair and impartial manner. In one case this resulted in compensation for the applicant on this ground.[18]

[18] Court of Appeal The Hague 17 July 1997, NJK 1997/75.

NORWAY / NORVÈGE

Both the Dispute Act and the Criminal Procedure Act allows, subject to further conditions, for the reopening of a case if there in a complaint against Norway before the European Court of Human Rights has been determined that Norway has violated the European Convention of Human Rights. We have not been able to find examples where a case has been reopened following a judgment of the Court, neither in civil or criminal cases. In this regard, it must be taken into account that Norway has received relatively few judgments from the Court finding a violation of the Convention, and that these cases are often solved in other manners.

Criminal proceedings
Pursuant to Section 391 para. 2 of the Criminal Procedure Act, reopening in favor of the person charged may be required when an international court or UN human rights committee has in a case against Norway found that
a) The decision conflicts with a rule of international law that is binding on Norway, and it must be assumed that a new hearing should lead to a different decision, or
b) The procedure on which the decision is based conflicts with a rule of international law that is binding on Norway if there is reason to assume that the procedural error may have influenced the substance of the decision, and that a reopening of the case is necessary in order to remedy the harm that the error has caused.

The petition for reopening in criminal proceedings is submitted to the Norwegian Criminal Case Review Commission.

Civil proceedings
Pursuant to Section 31-3 para. 1 litra d of the Dispute Act, a petition to reopen a case may be made if in a complaint against Norway in respect of the same subject matter, it is determined that the procedure has violated the Convention. This provision may in particular be applicable in cases where the right to a fair and public hearing pursuant to article 6 of the Convention has been violated.

Pursuant to Section 31-4 litra b of The Dispute Act, a petition to reopen a case may be made if a binding ruling made by the European Court of Human Rights (or another international court or an opinion issued by the Human Rights Committee of the United Nations) in respect of the same subject matter, suggests that the ruling was based on an incorrect application of international law.

The aim of the right to have a case reopened pursuant to these provisions is to redress the effects of the incorrect application of international law. Both provisions apply in cases between private parties as well as in cases between a private party and the government. In other terms, the right to have a case reopened if the Court has found a violation of the convention in a complaint against Norway in respect of the same subject matter, is not limited to cases where the government is a party to the case before the national court. This issue was explicitly considered by the Norwegian Supreme Court in a decision from 7 April 2010, concerning a petition for reopening under Section 31-4 litra b of The Dispute Act. In this decision, the Supreme Court interpreted the right to have a case reopened to be subject to the following condition: In order to ensure that the right to have a cases reopened is not applied to the detriment of the rules on the legal force of a final

and enforceable judgment in the case before the national court, a petition for reopening can only be made if such reopening is necessary in order to redress the violation of the convention. The right to reopening does not apply if the violation of the convention can be redressed in another way, for example by means of just satisfaction. The right to have a case reopened is also subject to further conditions as stated in Section 31-5 and 31-6 of the Dispute Act. It follows *inter alia* that a case shall not be reopened if it is reasonably probable that a new hearing of the case would not lead to an amendment of significance to the party.

The procedure for submitting a petition for reopening in civil cases differs from the procedure in criminal cases: Rulings of the conciliation board may be reopened by petition to the district court. Rulings of the district court and the court of appeal may be reopened by petition to a court of the same level in a judicial district that borders on to the court that made the original ruling, whereas rulings of the Supreme Court may be reopened by petition to the Supreme Court.

POLAND / POLOGNE

1. Criminal proceedings

1) How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

The reopening of criminal proceedings following a ruling of the European Court of Human Rights (the ECtHR) has a clear legal basis under Polish law and is applied successfully in practice. According to the jurisprudence of the Supreme Court, the possibility of reopening applies not only to the applicant and to the criminal proceedings examined by the ECtHR, but also to other persons in a similar situation (*de facto erga omnes* effect).

Legal regulations in force

The Polish Code of Criminal Procedure (PCCP) contains the following provision:

Article 540 § 3. Criminal proceedings shall be reopened to the benefit of the accused if such a need results from a ruling of an international body acting on the basis of an international treaty ratified by Poland.

As interpreted by the Supreme Court, the possibility of reopening proceedings applies not only to the rulings of the ECtHR but also of the UN Human Rights Committee, the Court of Justice of the European Union or the International Court of Justice, among others.

Criminal proceedings may be reopened upon request and only to the applicant's benefit. The procedure is not restricted by any time-limits. A next of kin can file a request for reopening proceedings to the benefit of the deceased accused person.

A decision on reopening is not automatic but is based on a case-by-case assessment of whether a need for reopening arises. As clarified by the Supreme Court, such a need arises if in light of ECtHR findings a ruling adopted in criminal proceedings has violated the Convention. In the interpretative resolution of 26 June 2014 (ref. no. I KZP 14/14), the Supreme Court has pointed out two types of violations which justify the reopening in light of the ECtHR rulings:

- procedural shortcomings which have occurred in the course of criminal proceedings, which – in view of their structural and complex character – could have had an impact on the content of the final ruling adopted in the domestic proceedings;
- substantive shortcomings, *i.e.* when the findings of the violation of the Convention stem from the very content of the final ruling adopted in the domestic proceedings.

In contrast, incidental shortcomings in criminal proceedings which did not have a direct impact on the final ruling on the merits, those which did not concern the main course of the proceedings and were outside their main object (*i.e.* the question of guilt and criminal liability), would in principle not justify a reopening. This applies, for instance, to the excessive length of criminal proceedings or shortcomings of the application of preventive measures (*e.g.* pre-trial detention).

Examples of successful reopening of criminal proceedings

By 1 March 2015 the Supreme Court has examined approximately 20 requests for the reopening of criminal proceedings on the basis of the ECtHR judgments. In the vast majority of cases it allowed such requests. Only two requests were not approved: in one case the ECtHR findings concerned excessive length of criminal proceedings and of pre-trial detention; in the other case the applicant's request did not comply with the formal requirements despite the fact that the applicant was ordered by the court to comply with them.

In several cases, the reopening of proceedings led to the discontinuation of criminal proceedings in respect of the applicants (*e.g.* because the trial courts ultimately considered that the act of which the applicants were accused did not constitute a crime or due to the lapse of statutory time-limits for prosecution). In other cases, the shortcomings identified by the ECtHR in the initial proceedings were rectified in the course of the reopened proceedings (*e.g.* documents in vetting proceedings were declassified).

In addition, in many other cases the ECtHR case-law was referred to when examining the requests for the reopening of criminal proceedings based on other grounds.

Erga omnes effect in the case-law of the Supreme Court

In its interpretative resolution of 26 June 2014 (ref. no. I KZP 14/14), the Supreme Court has recognized that "the need to reopen criminal proceedings resulting from a ruling of an international body" could arise not only with respect to an applicant who has received a favourable ECtHR ruling but could also involve co-accused and even other persons accused in other criminal proceedings – provided that the same violation of the Convention (in terms of a combination of factual and legal circumstances) has occurred.

As the Supreme Court noted, the "need" for reopening in the meaning of Article 540 para. 3 of the PCCP may also arise in order to prevent a finding of another violation of the Convention in another judgment against Poland. The finding by the ECtHR of a human rights violation should produce effects also in other cases where the same violation of the Convention has taken place. This will ensure a full realisation of the principle of subsidiarity of the Convention system, according to which domestic authorities are primarily responsible for ensuring appropriate protection of rights guaranteed under the Convention to everyone within their jurisdiction. This obligation should be met not only with respect to future criminal proceedings, but also with respect to criminal proceedings which have already been closed. The protection of human rights would otherwise be incomplete and that would result in unjustified differences in the situation of the accused depending on whether their cases were examined before or after the ECtHR ruling.

The above approach applies only to ECtHR rulings adopted in respect of Poland and not those adopted in respect of other States Parties (since the Supreme Court assumes that the ECtHR judgments bind *inter partes*).

According to the Supreme Court, the question whether a case concerns the same violation of the Convention should be assessed narrowly bearing in mind the extraordinary nature of the institution of reopening. In essence, the possibility of reopening other criminal proceedings applies to situations when the violation of the Convention is so similar (in terms of the combination of legal and factual circumstances)

as to assume a favourable ECtHR ruling finding a violation of the Convention on the same grounds should an accused decide to file an application with the Strasbourg Court.

2) What practical or procedural difficulties have been encountered in practice? How have they been overcome?

No difficulties have been encountered so far.

One could, however, note that the possibility of reopening may be useful not only in criminal proceedings but also in the event of a violation of the right to compensation for victims of arrest or detention in contravention of Article 5 (Article 5 para. 5 of the Convention). Under Polish law, compensation for unjustified detention is granted under a special procedure for compensation. Nevertheless, even if Article 540 § 3 of the PCCP refers only to the reopening of criminal proceedings to the benefit of the accused, in its judgment of 12 June 2012 (relating to the case of Adam Włoch v. Poland, no. 33475/08, ECtHR judgment of 10 May 2011) the Supreme Court went beyond the literal interpretation of that provision and applied it to proceedings for compensation for unjustified detention and to the formerly accused, invoking the need to interpret the law mindful of its purpose and Article 46 of the Convention.

3) Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?

Under Polish law it is possible to reopen criminal proceedings also on the basis of ECtHR decisions that approve unilateral declarations. The wording of Article 540 § 3 of the PCCP is general and refers to any "ruling" of an international body, not only judgments.

Example: On 23 July 2012 the Warsaw Court of Appeals reopened criminal proceedings in respect of the applicant recognising that such need arises under the ECtHR decision approving a unilateral declaration in the applicant's case (Jarosław Sroka v. Poland, no. 42801/07, (dec.) 6 March 2012). The Warsaw Court of Appeals found a basis in the ECtHR decision for reopening and also took into account the unequivocal acknowledgment by the Polish Government that the applicant's freedom of expression had been violated. In consequence, it quashed earlier judgments and discontinued criminal proceedings in respect of the applicant having found that the act he had been accused of did not constitute a criminal offence anymore since in the meantime the relevant statutory provision had been repealed.

In turn, opinions of the legal doctrine differ with respect to the possibility of reopening of criminal proceedings in the case of friendly settlements (no such cases have been examined by courts so far).

2. Civil proceedings

1) How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?

The issue of reopening civil proceedings on the basis of an ECtHR judgment has not been addressed by Polish law. Although there was one case of successfully reopened civil proceedings relying on an ECtHR judgment, the Supreme Court ultimately adopted an interpretative resolution whereby it considered that Polish law does not provide for

such a possibility. It did not rule out, however, that other means of restitutio in integrum could apply to such cases.

What were the obstacles?

On 30 November 2010 a resolution of seven Supreme Court judges was adopted whereby the Supreme Court excluded the possibility of reopening civil proceedings directly on the basis of an ECtHR judgment. It noted that the Convention did not impose an absolute obligation to introduce such a possibility in civil cases leaving a margin of appreciation to domestic law-makers. The Supreme Court questioned the adequacy of such a solution in civil proceedings invoking the need to respect the stability of final judgments and the rights acquired bona fidae by third parties.

Following this resolution, discussion on this issue has continued in Poland. No progress has been achieved as yet and the following arguments have been put forward against amending the law:

– there is no obligation to introduce such a possibility under the Convention, also as interpreted by the ECtHR[19],
– principles of *res iudicata, ne bis in idem* and the stability of final judgments constitute important values and form part of the fundamental principle of the rule of law;
– civil proceedings are of particular nature as compared to criminal or administrative court proceedings; a departure from the principle of *res iudicata* in such proceedings could affect relations between the parties and the burden of such departure would be shifted to third parties;
– third parties do not participate in proceedings before the ECtHR and are deprived of a possibility to defend their interests in these proceedings;
– in view of the dynamic nature of private-law relations, a rectification of old rulings' shortcomings may be unrealistic and impossible;
– in civil proceedings it would be more appropriate to establish adequate compensatory procedures instead (*nb.* some possibilities to seek compensation in case of unlawful final judgments are already secured under the Polish law).

How have the obstacles been overcome?

There are some alternative possibilities open to the applicants.

Firstly, as the Supreme Court observed in the above mentioned interpretative resolution, other legal remedies could be available to the applicants in some situations, for instance, an action against enforcement of a final domestic judgment, a complaint to

[19] In light of the ECtHR case-law, the Court requires re-examination of proceedings in which a violation of Article 6 of the Convention has occurred only in respect of criminal cases. Although in some cases the Court noted that the reopening of civil proceedings in the applicant's case would be the most suitable individual measure, this concerned situations where the possibility of such reopening has already been provided in the domestic law of the respondent State. The Court has never referred to this issue *e.g.* in Polish cases. It could also be argued that Article 41 of the Convention explicitly recognises that there could be no possibility of *restitutio in integrum* under domestic law as it provides that the ECtHR may grant just satisfaction in such situations.

declare a final court ruling incompatible with the law[20] and an action for compensation against the State Treasury on the basis of the so-called court delict.

Secondly, depending on the circumstances of the case, a violation of the right to a fair trial can constitute a basis for reopening under general provisions governing invalidity of civil proceedings. Some of these provisions concern aspects of the right to a fair trial in the meaning of Article 6 of the Convention (*e.g.* violation of the right to an impartial court or deprivation of the party of a possibility to act)[21].

Example: in the decision of 17 October 2007, ref. no. I PZ 5/07, the Supreme Court held that the ECtHR judgment finding a violation of the party's right to a fair trial could constitute a circumstance justifying the reopening of proceedings in view of their invalidity. Assessing the case in light of the ECtHR findings (*Tabor v. Poland,* no. 12825/02, judgment of 27 June 2006 concerning the refusal of legal aid in cassation proceedings) the Supreme Court considered that the applicant had been deprived of the possibility to act in civil proceedings in the meaning of Article 401 point 2 of the Code of Civil Procedure.

Thirdly, family and guardianship law contains some special provisions that provide for wide possibilities of changing even final court rulings. In particular, in many cases examined under the guardianship law domestic courts can change their decisions, even final, if the interests of the person concerned so require. Furthermore, courts can change rulings on parental authority and the way in which it is exercised and on contacts with a child if the interests of the child so require. The relevant provisions do not require any change of circumstances. It seems that on this basis there is a wide scope for changing final court rulings, if they are considered to be contrary to the Convention, violating the interests of the child or of other persons concerned, etc.

2) If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

The above interpretative resolution of the Supreme Court does not envisage such a possibility under the current legal framework.

3. Administrative proceedings

At the outset it would be useful to clarify that in Poland administrative courts exercise judicial oversight of administrative decisions issued by administrative authorities. There are separate procedural regulations governing administrative proceedings (before administrative authorities) and administrative court proceedings.

[20] Incompatibility of a final judgment with the law extends also to situations of incompatibility with provisions of international law binding upon Poland.

[21] It is worth noting that in Poland all kinds of proceedings – criminal, civil, administrative – may be reopened in case the Constitutional Court finds a given normative act that served as a basis for final decisions, to be incompatible with the Constitution or an international treaty.

1) How has the reopening of administrative proceedings been addressed and have there been examples of successful reopening in such cases?

In the field of administrative law there are the following two possibilities to reopen the proceedings on the basis of ECtHR rulings:

1. The 2002 Act on Proceedings before Administrative Courts provides for the possibility to reopen **administrative court proceedings** following an ECtHR ruling:

> *Article 272 § 3. The reopening of proceedings can be demanded also if such a need results from a ruling of an international body acting on the basis of an international treaty ratified by Poland. The provision of [Article 272] § 2 applies accordingly, however the time-limit for lodging a complaint for reopening shall run from the date such ruling of an international body is served on the party or his/her representative.*

This provision refers to a "ruling of an international body", which means that ECtHR decisions, not only judgments, may also serve as a basis for reopening.

Example: In the judgment of 9 October 2014 (ref. no. I OSK 1463/14), the Supreme Administrative Court examined the possibility of reopening following a friendly settlement concluded in the proceedings before the ECtHR. The request for reopening was rejected due to the lapse of the maximum statutory time-limit of 5 years from the date on which the impugned ruling of a domestic court becomes final. However, the applicability of Article 272 § 3 to friendly settlements reached before the ECtHR was not questioned by the Supreme Administrative Court.

The time-limit for lodging a request for reopening is three months from the date an ECtHR ruling is served on the applicant or his representative. There is also a maximum time-limit for lodging a request for reopening, which is five years from the date on which the impugned ruling of a domestic court becomes final, the only exception being cases in which a party was deprived of the possibility to act or was not properly represented. This maximum time-limit applies generally, not only to reopenings based on ECtHR rulings.

2. Reopening of **administrative proceedings** can be requested if a court has adopted a ruling finding a violation of the principle of equal treatment, in accordance with the 2010 Act on Implementing Certain Legislative Provisions of the European Union in Respect of Equal Treatment. Proceedings may be reopened if a violation of the principle of equal treatment principle has affected the outcome of administrative proceedings ending in a final decision (Article 145b of the Code of Administrative Procedure).

It is understood that the term "court ruling finding violation of the principle of equal treatment" covers not only domestic courts but also the ECtHR or CJEU. A request for reopening can be submitted within one month from the date on which the court ruling becomes final.

* * *

The above possibilities have been introduced to Polish law relatively recently and only one request for reopening has been examined so far, but it did not lead to reopening of the administrative court proceedings concerned for the reasons explained below.

What were the obstacles / How have they been overcome?

1. The main obstacle encountered so far was linked with the maximum five-year time-limit for reopening of administrative court proceedings. This time-limit is calculated from the date a domestic court ruling becomes final (the only exception being cases in which a party was deprived of the possibility to act or was not properly represented). Bearing in mind the length of proceedings before the ECtHR, this could be an obstacle, as was demonstrated in the case examined by the Supreme Administrative Court in its judgment of 9 October 2014.

On that occasion the Supreme Administrative Court expressed the opinion that the introduction of such a maximum time-limit did not raise any doubts as to its constitutionality in view of the need to protect the stability of legal relations in a democratic society.

2. As regards the reopening of administrative proceedings on the basis of an ECtHR judgment, the law explicitly allows it only in cases dealing with a violation of the equal treatment principle. However, general regulations governing the reopening of administrative proceedings may cover many shortcomings to which the ECtHR rulings under Article 6 of the Convention may refer.

For instance, it is possible to reopen administrative proceedings in the event that an administrative decision was adopted by an official or public administration authority which should have been excluded from proceedings, or a party did not participate in proceedings not of his/her fault, or a decision was based on another court ruling or on a decision that was subsequently changed or revoked (see also footnote no. 3 above).

Also, flawed administrative decisions that violate the Convention can be quashed following the reopening of proceedings before administrative courts.

What are the remaining gaps?

The possibility of reopening administrative court proceedings applies in principle only if violations of the Convention found by the ECtHR occurred in proceedings before administrative courts, and not in earlier proceedings conducted before administrative authorities.

Except for violations of the principle of equal treatment, there is no provision in the Code of Administrative Procedure that would explicitly provide for the possibility of reopening of administrative proceedings directly on the basis of ECtHR judgments.

PORTUGAL

En ce qui concerne les questions posées sur la réouverture des procédures pénales et civiles au niveau interne à la suite d'un arrêt de la Cour déclarant une violation de la Convention, on peut dire ce qui suit:

Suite à la Recommandation R (2000)2, du 19 janvier 2000, il a été consacré au droit interne la possibilité de réouverture des procédures judiciaires (civiles et pénales) lorsqu'un arrêt de la Cour ait été rendu s'avérant incompatible avec la décision définitive interne, ou (dans les procédures pénales) avec la condamnation précédente.

Ainsi, un recours (extraordinaire) en révision fut prévu à l'article 449, §1, alinéa g) du code de procédure pénal et à l'article 771, §1, alinéa f) du code de procédure civil. D'après ces dispositions il faut que les jugements internes, prétendument en conflit ou inconciliables avec un arrêt de la CEDH (ou avec d'autres jugements rendus par d'autres instances internationales qui soient contraignantes pour l'Etat portugais), soient définitifs, c'est-à-dire, aient été passé en force de chose jugé.

En tout cas, le droit interne ne prévoit pas un droit absolu, ni automatique, à la « *révision d'un jugement interne».* En effet, la révision est soumise à des conditions établies par loi procédural applicable, qui doivent faire l'objet d'une évaluation par la Cour suprême de justice, qui, par conséquent, a le pouvoir d'autoriser, ou non, l'effective révision de la décision interne définitive.

Cette circonstance peut créer (du reste, a déjà créé) des conflits, notamment, dans les cas où la Cour suprême de justice décide de rejeter les demandes de révision soumises par ceux qui ont réussi à obtenir une décision déclarant une violation de la Convention.
Effectivement, une requête est actuellement pendante devant la Cour, concernant l'éventuel violation des articles 6 § 1 et 46 § 1 de la Convention, car la Cour suprême n'a pas admis un recours extraordinaire en révision d'un jugement précédent où la requérante a été condamnée[22].

Par conséquent, le législateur a décidé de créer ce moyen de recours en révision en donnant aux juridictions nationales – en effet, à la Cour suprême de justice – une large marge d'appréciation. Elle a le pouvoir d'évaluer les circonstances de l'affaire, en interprétant le droit interne applicable (matériel et procédural), pour vérifier si les conditions établies sont effectivement remplis, le cas où, la Cour suprême autorise la révision en déterminant le renvoi de l'affaire au tribunal de première instance (où au tribunal compétent) qui rendra un nouveau jugement.

Pour ce qui est des procédures civiles on n'a pas été notifié de l'existence de problèmes pareils vu que, que l'on sache, un tel recours en révision n'a pas encore été interjeté. En

[22] Dans le cas d'espèce, La Cour suprême a considéré que l'arrêt de la Cour n'était pas inconciliable avec l'arrêt condamnatoire de la cour d'appel de Porto (comme l'exige l'article 449, §1, g) du CPP) et que l'absence d'audition de la requérante par la cour d'appel de Porto constituait une irrégularité procédurale ne pouvant faire l'objet de révision.

tout cas, puisque les pouvoirs octroyés à la juridiction supérieure sont, tout à fait, semblables, des questions comme celles susmentionnées pourront être envisagées.

En outre, on peut envisager de possibles problèmes lorsque la partie requérante demande la révision de la décision interne définitive sans que la partie adverse et d'autres intéressés dans la procédure interne aient eu la possibilité d'intervenir dans la procédure menée par la Cour.
La création dans les systèmes juridiques nationaux des moyens permettant le réexamen des affaires, notamment à travers la réouverture des procédures, répond aux recommandations du Comité de Ministres[23], mais elle peut devenir une source de problèmes si on ne reconnait pas aux Etats, qui ont mis en œuvre des tels moyens, une marge d'appréciation.

[23] Vide la Recommandation R (2000)2, du 19 janvier 2000.

ROMANIA / ROUMANIE

ROMANIA / ROUMANIE

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Procédures pénales

1) Comment la réouverture des procédures pénales a-t-elle été abordée dans votre droit interne et existe-t-il des exemples réussis de réouverture dans de tels cas ?

Droit interne pertinent

La réouverture des procédures pénales à la suite d'arrêts de la Cour est possible en Roumanie à partir de 2004, suite à l'introduction d'un nouveau motif de révision des décisions nationales définitives.

Les conditions de recevabilité pour la demande de révision :

- la Cour européenne a constaté la violation d'un droit prévu dans la Convention en l'espèce;
- la partie intéressée continue de souffrir des conséquences graves à la suite de la décision nationale, conséquences qui ne peuvent être remédiées que par la révision de celle-ci ;
- délai pour l'introduction de la demande - 3 mois à partir du moment de la publication de l`arrêt de la Cour dans le Journal Officiel.

Il est à noter que les premières deux conditions reflètent le langage utilisé par la Recommandation R(2000)2 du Comité des Ministres (CM).

Mesures intermédiaires :

- l'instance nationale peut disposer le sursis de l'exécution de la décision qui fait l'objet de la révision.

La solution d'une telle demande de révision (à condition qu'elle soit recevable et fondée) :

- l'annulation de la décision nationale et le réexamen de l'affaire pour corriger les conséquences de la violation.

Exemples réussis de réouverture des procédures pénales

Constantin et Stoian (23782/06) – l'iniquité de la procédure pénale dirigée contre les requérants, compte tenu du fait que les juridictions internes n'ont pas suffisamment enquêté sur leurs allégations de provocation d'un policier infiltré ; la Haut Cour de cassation et de justice a accueilli la demande de révision de M. Constantin et a disposé la réouverture de la procédure pour les deux requérants ; après le réexamen de l'affaire, M. Constantin et M. Stoian ont été acquittés ; pour M. Constantin, l'exécution de peine a été

sursis pendant la procédure de réexamen ; CM a adopté une résolution finale dans cette affaire.

Bulfinsky (28823/04) - l'iniquité de la procédure pénale dirigée contre le requérant, compte tenu du fait que les juridictions internes n'ont pas suffisamment enquêté sur son allégation de provocation d'un collaborateur de la police; la Haut Cour de cassation et de justice a accueilli la demande de révision de M. Bulfinsky et a disposé la réouverture de la procédure à l'égard du requérant, mais aussi à l'égard de ses co-inculpés, même s'ils n'ont pas été parties dans la procédure devant la Cour ; CM a adopté une résolution finale dans cette affaire avant la finalisation de la procédure interne, compte tenu du fait que, au moment de l'adoption de la résolution finale, l'instance nationale avait procédé à l'audition des témoins et du collaborateur de la police.

Mircea (41250/02) – l'omission des juridictions pénales ayant condamné la requérante en dernier ressort de l'auditionner, alors qu'elle avait été relaxée par les juridictions inférieures; la requérante a sollicité la réouverture de la procédure; cette demande a été accueillie et, à l'issue de la nouvelle procédure, la requérante a été acquittée ; CM a adopté une résolution finale dans cette affaire.

Spînu (32030/02) – la condamnation de la requérante par la juridiction de dernier ressort, après avoir été relaxée par les juridictions inférieures, sans procéder à l'administration directe des preuves (déclarations successives faites par la requérante et l'un de ses coaccusés) ; la demande de révision du procès que la requérante avait formée a été accueillie ; en rejugeant l'affaire, la Cour suprême de justice a fait déposer la requérante et a convoqué son coaccusé à comparaitre comme témoin ; cependant ce dernier a refusé de témoigner ; à l'issue de la nouvelle procédure, la Cour suprême de justice a confirmé la condamnation de la requérante ; compte tenu du droit du coaccusé de refuser de témoigner , CM a estimé qu'aucune autre mesure individuelle n'était nécessaire et a décidé la clôture de l'affaire.

Mihai Moldoveanu (4238/03) (la même procédure pénale que celle qui fait l'objet de l'arrêt *Spînu*)- l'omission de la Cour suprême de justice d'entendre le requérant et d'autres témoins avant d'infirmer l'acquittement du requérant par la juridiction inférieure et les carences dans l'assistance juridique offerte au requérant par un avocat commis d'office ; le requérant a demandé et obtenu la réouverture de la procédure ; l'instance a procédé au réexamen de l'affaire pour remédier aux problèmes constatés par la Cour et, finalement, a maintenu la solution de condamnation du requérant ; les informations transmises par le Gouvernement dans cette affaire sont en cours d'évaluation par le Service d'exécution.

Dragotoniu et Militaru – Pidhorni (77193/01 et 77196/01) – la condamnation pénale des requérants pour des actes qui ne constituaient pas une infraction en vertu du droit national en vigueur au moment des faits ; les requérants ont formé une demande en révision du procès en cause, qui a été accueillie ; ils ont été acquittés à l'issue du nouveau procès ; CM a adopté une résolution finale dans cette affaire.

Reiner et autres (1505/02) – l'iniquité de la procédure pénale en raison de la condamnation des requérants pour le chef d'infraction de meurtre, sur la base des preuves à charge (témoins) que les intéressés n'ont pu interroger ou faire interroger ni au stade de l'instruction, ni pendant les débats ; la même procédure pénale a été analysée par la Cour

dans l'affaire *Agache et autres* (2712/02) (les proches de la victime) et a conclu à la violation procédurale de l'article 2 (absence d'enquête effective) ; à la demande d'un des requérants de l'affaire *Reiner et autres* (M. Paisz), l'instance nationale a disposé la réouverture de la procédure interne; dans le cadre du réexamen de l'affaire, les tribunaux internes ont rencontré des difficultés concernant l'audition des témoins (qui n'ont pas pu être trouvés immédiatement / ont accusés des problèmes de santé / avait décédés) ; les tribunaux ont fait des efforts pour remédier (dans la mesure du possible) aux problèmes constatés par la Cour et finalement, suite à l'audition de la plupart des témoins, ont acquitté M. Paisz ; CM a adopté une résolution finale dans cette affaire.

Note : Il y a beaucoup de situations dans lesquelles, après le prononcé d'un arrêt de la Cour, les parties requérantes n'ont pas formé des demandes de révision des décisions internes, même si les dispositions de la loi concernant cette voie de recours étaient applicables. Dans ces situations, le Gouvernement roumain a informé CM sur la possibilité existante en droit interne d'introduire une demande de révision, estimant qu'aucune mesure individuelle n'est nécessaire. CM a endossé cette approche, en adoptant des résolutions finales. A titre d'exemple, nous mentionnons les affaires suivantes:

Botea (40872/04) - le caractère inéquitable d'une procédure pénale en raison du fait que, lorsqu'elles ont condamné le requérant à une peine d'emprisonnement, les juridictions roumaines se sont fondées de manière décisive sur des enregistrements audio dont l'authenticité était contestée par la défense et n'avait jamais été confirmée au moyen d'une expertise technique

Ciobanu (4509/08) - le refus du tribunal de déduire de la peine infligée au requérant la période afférente à l'assignation à domicile exécutée à l'étranger (en Italie) en vertu d'un mandat d'arrêt international émis par les instances roumaines

Potcovă (27945/07) – la condamnation du requérant sur la base des déclarations données en absence d'assistance juridique, en dépit du fait qu'il était en custodie de la police.

2) Quelles difficultés pratiques et procédurales ont été rencontrées en pratique ? Comment ont-elles été surmontées ?

Les tribunaux n'ont pas signalé des difficultés procédurales dans la solution des demandes de révision. Pour ce qui est d'exemples des difficultés pratiques, on renvoie aux informations concernant les arrêts *Reiner et autres* et *Agache et autres.*

3) Avez-vous rencontré des difficultés particulières en matière de réouverture de certaines affaires à la suite de règlements amiables ou de déclarations unilatérales ?

Le bureau de l'Agent du Gouvernement n'a pas connaissance de l'introduction d'une demande de révision à la suite de règlements amiables ou de déclarations unilatérales.

Procédures civiles

1) Comment la réouverture de procédures civiles a-t-elle été abordée et existe-t-il des exemples réussis de réouverture dans de tels cas ?

Droit interne pertinent

La réouverture des procédures civiles/administratives à la suite d'arrêts de la Cour est possible en Roumanie à partir de 2003, suite à l'introduction d'un nouveau motif de révision des décisions nationales définitives.

Les conditions de recevabilité pour la demande de révision dans la matière civile/administrative sont similaires à celles prévues en matière pénale.

Exemples réussis de réouverture des procédures civiles

Ostace (12547/06) – violation du droit au respect de la vie privée et familiale, en raison de l'impossibilité du requérant d'obtenir la reconnaissance en justice du fait qu'il n'était pas le père d'un enfant né hors mariage, alors qu'une expertise médico-légale réalisée en 2003 avec le consentement de son fils putatif devenu majeur avait clairement exclu sa paternité établie en 1981 par décision de justice ; la demande de révision du requérant a été accueillie et, par la suite, l'action en recherche de paternité formée contre le requérant a été rejetée ; par conséquent, l'instance a disposé la radiation du nom du requérant figurant dans la rubrique « père » dans les actes d'état civil de l'enfant; les informations transmises par le Gouvernement dans cette affaire sont en cours d'évaluation par le Service d'exécution.

Lupsa (10337/04) et *Kaya* (33970/05) - l'atteinte au droit au respect de la vie privée et familiale des requérants (un citoyen serbe et un citoyen turc) en raison de leur expulsion basée sur des considérations de sécurité nationale ; les juridictions nationales ont accueilli les demandes de révision formulées par les requérants et ont annulé les ordonnances du parquet, qui avaient déclaré les requérants indésirables et leur avaient appliqué une mesure d'interdiction du territoire; CM a adopté une résolution finale dans ces affaires.

Ahmed (34621/03) - la violation des garanties procédurales dans le cadre de la procédure d'expulsion (violation de l'art. 1 du Prot. n° 7) ; l'instance nationale a accueilli la demande du requérant de révision de l'arrêt par lequel avait été confirmée l'ordonnance du procureur qui le déclarait indésirable ; dans la nouvelle procédure, l'instance a rejeté à nouveau la contestation du requérant contre ladite ordonnance; les informations transmises par le Gouvernement dans cette affaire sont en cours d'évaluation par le Service d'exécution.

Mateescu (1944/10) – violation de l'article 8 en raison du refus du barreau de Bucarest, confirmé par les tribunaux, d'autoriser le requérant à exercer simultanément en tant qu'avocat et médecin ; la demande de révision du requérant a été accueillie et la décision en litige du barreau de Bucarest a été annulée ; par conséquent, le requérant a obtenu la permission d'exercer simultanément en tant qu'avocat et médecin; les

informations transmises par le Gouvernement dans cette affaire sont en cours d'évaluation par le Service d'exécution.

The Argeş College of Legal Advisers (2162/05) – atteinte à la liberté d'assemblée et d'association de la requérante en raison du refus des tribunaux nationaux de l'enregistrer comme association ; la demande de révision a été accueilli et la requérante a été enregistrée comme association; CM a adopté une résolution finale dans cette affaire.

Stoian (12221/06) - l'annulation, en 2005, d'une décision judiciaire définitive du 16 juillet 2001, à la suite du pourvoi en annulation introduit par le Procureur général ; la Haute Cour de Cassation et de Justice a accueilli l'action en révision formulée par le requérant et a révoqué sa décision rendue dans le cadre du pourvoi en annulation ; cela a permis de rétablir la situation juridique favorable au requérant, découlant de la décision du 16 juillet 2001; CM a adopté une résolution finale dans cette affaire.

Note : Tout comme dans la matière pénale, dans le domaine civil il y a beaucoup de situations dans lesquelles, après le prononcé d'un arrêt de la Cour, les parties requérantes n'ont pas formé des demandes de révision des décisions internes, même si les dispositions de la loi concernant cette voie de recours étaient applicables. Dans ces situations, le Gouvernement roumain a informé CM sur la possibilité existante en droit interne d'introduire une demande de révision, estimant qu'aucune mesure individuelle n'est nécessaire. CM a endossé cette approche, en adoptant des résolutions finales. A titre d'exemple, nous mentionnons les affaires suivantes:

Şega (29022/04) - atteinte au droit d'accès à un tribunal dans une procédure d'indemnisation d'un accident de la route, en raison du refus d'enregistrement d`une demande introductive d'instance, refus qui n'avait pas de support légal

Jeniţa Mocanu (11770/08) - violation du droit de la requérante à ce que sa cause soit entendue par un « tribunal établi par la loi » en raison du fait que la formation de jugement qui a examiné en 2007 son pourvoi en recours dans le cadre d'une procédure civile n'avait pas été composée en conformité avec les règles de droit interne

Teodor (46878/06) - atteinte au droit du requérant à la présomption d`innocence, en raison du fait que des juridictions civiles examinant des procédures relevant du droit de travail se sont fondées de manière déterminante sur un non-lieu rendu dans une procédure pénale contre le requérant, en utilisant également des termes qui outrepassaient le cadre civil, jetant ainsi un doute sur l'innocence de celui-ci

S.C. IMH SUCEAVA S.R.L. (24935/04) – l'interprétation divergente de la validité et de la fiabilité d'une même preuve par les instances nationales, sans motivation suffisante, dans le cadre de deux procédures engagées contre la société requérante en raison des faits constituant à la fois une atteinte aux droits de consommateurs et une contravention fiscale

Dans quelques affaires, le Gouvernement a estimé que la réouverture des procédures n'était pas une mesure nécessaire et CM a adossé l'avis du Gouvernement.

Diacenco (124/04) - atteinte à la présomption d'innocence, en raison du fait que, tout en confirmant la relaxe du requérant par les juridictions inférieures, la juridiction de dernier ressort l'a néanmoins déclaré coupable de l'infraction dont il était accusé, dans les considérants de son arrêt, le requérant étant obligé à verser des dommages – intérêts à la partie civile ; en application de l'article 41 de la Convention, la Cour a obligé l'Etat à payer des dédommagements moraux et au titre des frais et dépens, mais a rejeté la demande de réparation du préjudice matériel, car elle n'a pas discerné de lien de causalité entre le préjudice allégué et la violation constatée ; ce fondant sur cette conclusion de la Cour, le Gouvernement a estimé que le constat de violation de l'art. 6§2 n'a pas remis en cause en soi la solution retenue par la cour d'appel sous le volet civil de l'affaire ; par conséquent, il a considéré que l'exécution des mesures individuelles dans cette affaire ne requérait pas la réouverture de la procédure litigieuse ; en outre, le Gouvernement a jugé que la publication de l'arrêt était suffisante pour contrecarrer les effets de la déclaration de culpabilité sur la réputation du requérant ; CM a adopté une résolution finale dans cette affaire.

2) Si la réouverture a été introduite sur la base de la jurisprudence des tribunaux nationaux, il serait utile de partager les exemples pertinents.

Ce n'est pas le cas pour la Roumanie

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

Reply to question 1.

In accordance with Article 413 (paragraph 4, subparagraph 2) of the Russian Federation Code of Criminal Procedure (*Grounds for Reopening Proceedings in Criminal Case in View of New or Newly Discovered Circumstances*), the new circumstances shall be: violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms in the course of examination of the criminal case by a court of the Russian Federation, ascertained by the European Court of Human Rights, pertaining to:

a) application of a Federal statute inconsistent with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms;

b) other violations of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.

According to Article 414 (paragraph 4, subparagraph 3) of the same Code, the day of the discovery of new or newly discovered circumstances shall be deemed: the day when the decision of the European Court of Human Rights on the presence of the violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms takes legal effect – in the instances referred to in Article 413 (paragraph 4, subparagraph 2) of this Code.

Examples of successful reopening cases.

October 11, 2011, the Court issued a judgment in the case of «Romanov v. Russia", which establishes the violation of para. 1, Art. 6 of the Convention in relation to failure of national courts to comply with the principle of public hearing (in camera hearing in the criminal case of the applicant).

Pursuant to the representation by the Chairman of the Supreme Court of the Russian Federation, by the ruling of the Presidium of the Supreme Court of 22 May 2013, the judgment in the case of the applicant was canceled because of new circumstances with the resumption of the proceedings. The new trial of the criminal case was conducted in a fair and public hearing.

July 18, 2013 the Court issued a judgment in the case of "Nasakin v. Russia", which establishes the violation of Art. 3 of the Convention in connection with the abuse of the applicant on the part of police officers and the failure to conduct effective investigation of the facts; the violation of para 1, Art. 5 of the Convention – in connection with the illegal applicant's detention; the violation of 1, Art. 6 of the Convention – in connection with the unfairness of the trial (at sentencing, the court relied on the testimony of the applicant obtained under duress).

Pursuant to the representation by the Chairman of the Supreme Court of the Russian Federation, by the ruling of the Presidium of the Supreme Court of 18 June 2014, the proceedings in the case were resumed because of new circumstances, as a result of which there were cancelled: the judgment against Nasakin (with the forwarding the criminal

case for a new trial), judicial decisions on the extension of detention, as well as court decisions, by which ruling of the investigative body to refuse to open a criminal investigation into the ill-treatment of the applicant have been recognized as legal.

Similar approaches are ensured in all other cases, where the Court found violations requiring the cancellation of court decisions. In particular, after the reopening of cases in view of new circumstances in view of the violations found by the Court, about 200 judicial decisions in criminal cases, including about 60 judgments, 100 decisions on measure of restraint in the form of detention and the extension of its duration, 25 rulings on extradition of persons for criminal prosecution or execution of sentence were canceled.

Reply to question 2.
No practical or procedural difficulties have been encountered in practice.

Reply to question 3.

There is no judicial practice relating to reopening of cases following friendly settlements or unilateral declarations.

SAN MARINO / SAINT-MARIN

Criminal Proceedings

1. *How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?*

The reopening of criminal proceedings is the only means of extraordinary appeal provided for by the Code of Criminal Procedure. The reopening of criminal proceedings is possible in case of judgments which have become *res judicata* and it may be undertaken by the party demonstrating that any of the following conditions are fulfilled:

- new evidence has emerged or has been discovered that demonstrates, alone or together with that already acquired, that the convict must be acquitted; or
- the judgment was issued as a consequence of a falsehood or of another offence; or
- the facts upon which the decision is based are not compatible with those established in another final criminal decision; or
- the Court of Human Rights has ruled that the judgment was rendered in violation of the provisions of the European Convention of Human Rights and Fundamental Freedoms or of its Protocols and the serious negative effects of such judgment can only be removed by reopening the case.

There is a single case of successful reopening (TIERCE vs. SAN MARINO -2007-).

2. *Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?*

There has been no case in this regard.

Civil Proceedings

1. *How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?*
   - *What were the obstacles / How have they been overcome?*
   - *What are the positive outcomes and remaining gaps?*

San Marino legal system has two extraordinary remedies available against any judgements which have become *res judicata*.

The first remedy is the so-called *restitutio in integrum.* It is available to those wishing to challenge the veracity of the examination of the merits carried out by the judge, upon which the judgment under appeal was based. Indeed, *restitutio in integrum* is granted where the party was not able to defend its own rights or in the presence of relevant facts which were unknown to the judge due to *force majeure* or to the opposing party, thus affecting the adequacy and completeness of the assessment of the findings.

The second remedy, the so-called *querela nullitatis*, relates to the challenge of irremediable, substantive or procedural errors regarding the essential requirements of the decision rendered by the judge.

There is a single case of successful *querela nullitatis* (BATTISTINI GRAZIANA vs. BATTISTINI DOMENICO and THE STATE OF THE REPUBLIC OF SAN MARINO -1989-) and three cases of successful *restitutio in integrum* (CECCAROLI MARINO vs. THE STATE OF THE REPUBLIC OF SAN MARINO -1982-; CORINALDI ISA and LIA vs. THE STATE OF THE REPUBLIC OF SAN MARINO -1985-; BATTISTINI GRAZIANA v. BATTISTINI DOMENICO and THE STATE OF THE REPUBLIC OF SAN MARINO -1989-).

SERBIA / SERBIE

I. LEGAL GROUNDS

General

Within the legal system of the Republic of Serbia, reopening of proceedings is an extraordinary legal remedy possible before the courts of general jurisdiction (civil and criminal courts) as well as before the courts of special jurisdiction (commercial, administrative, minor offences courts).

Civil Proceedings

Reopening of proceedings is prescribed by procedural law governing civil proceedings. Rules of civil proceedings are applied by civil departments of the courts of general jurisdiction and commercial courts, and by administrative courts to a certain extent. The law governing civil proceedings **explicitly prescribes** reopening of proceedings on the basis of the case-law of the European Court of Human Rights, as well as in respect of the decisions of the Constitutional Court concerning constitutional appeals, which are filed because of violations of human rights protected by the Constitution compatible with the rights contained in the Convention.

Namely, the Civil Procedure Code published in the Official Gazette RS, no.72/2011 of 28 September 2011 (Chapter 28 – Extraordinary Legal Remedies - 3. Repeated trial) prescribes as follows:

Article 426
A trial completed by an effective court decision may be repeated upon the request of a party:

11) if the party gets the opportunity to use the decision of the European Court of Human Rights that found violations of human rights, which could have affected the adoption of favourable decision.

12) if, in the proceedings following a constitutional appeal, the constitutional court has established violations or denial of human or minority rights and freedoms guaranteed by the Constitution in a litigious proceedings, and this could have influenced taking of a more favourable decision.

Criminal Proceedings

Reopening of proceedings is also prescribed by procedural law governing criminal proceedings (The Criminal Procedure Code, published in the Official Gazette RS, nos. 72/2011 and 101/2011 - 2. Extraordinary Legal Remedies -Reasons for Reopening of Criminal Proceedings). However, the provisions on reopening of proceedings do not prescribe the case-law of the European Court of Human Rights or the case-law of the Constitutional Court concerning constitutional appeals, as an explicit reason for reopening. Both case-laws could fall under the reasons for reopening of proceedings "… if new facts are presented or new evidence submitted …", pursuant to Article 473 which

prescribes that criminal proceedings concluded with a final judgment may be repeated only to the benefit of the defendant.

Administrative Disputes

Proceedings before the administrative courts are governed by the Law on Administrative Disputes (the Official Gazette of RS, no. 111/09 - applied since 30 December 2009). Within the meaning of Article 56 paragraph 1 item 7 of this Law, reopening of proceedings is an extraordinary legal remedy that may be undertook if the finding of subsequently adopted decision of the European Court of Human Rights concerning the same issue may have any effect on lawfulness of finally ended court proceedings. Indeed, this option is explicitly prescribed.

Proceedings before minor offences courts

Proceedings before minor offences courts are governed by the Law on Minor Offences (the Official Gazette of RS, no. 65/13) applied since 1 March 2014) in Article 280 paragraph 1 items 5 and 6, which prescribes that minor offences proceedings finished by final decision may be reopened if:

5) the accused gains an opportunity to use a decision of the European Court of Human Rights establishing a violation of some human right, which may have impact on adoption of more favourable decision for the accused;

6) the Constitutional Court established, in proceedings on a constitutional appeal that there has been a violation or denial of some human or minority right and freedom guaranteed by the Constitution in misdemeanour proceedings, which might have impact on adoption of more favourable decision for the accused.

Proceedings before the Constitutional Court

Within the legal system of the Republic of Serbia, human rights enjoy constitutional protection. The decisions of the Constitutional Court concerning constitutional appeals because of violations of human rights are final and may not be subject to re-examination. Additionally, pursuant to Article 89 paragraph 2 of the Law on the Constitutional Court (the Official Gazette of RS, nos. 109/07, 99/11, 18/13 – the Constitutional Court, 108/13 – other law, 40/15 – other law**)** if this Court finds a violation of human right, it shall be authorized to quash an individual act causing the violation concerned at the same time, also including court decisions, while, according to Article 87 of the Law on the Constitutional Court, a decision of the Constitutional Court establishing a violation of right of some person also concerns to those who had not filed a constitutional appeal, if their legal situation is the same.

II. RELEVANT CASE-LAW

Civil proceedings

Example:
There are many examples of reopening of proceedings based on the case-law of the Constitutional Court according to Articles 89 in conjunction with Article 87 of the Law on the Constitutional Court (cited above), if the Constitutional Court quashed an

individual act causing a violation of some human right resulting in reopening of proceedings in respect of a person for whom the Constitutional Court had adopted its decision, but also to reopening of proceedings resulting from identical legal situation of third parties that had not filed constitutional appeals (under a request by such persons for reopening of proceedings based on the case-law of the Constitutional Court).

Criminal proceedings

Example:
In the case *Stanimirović versus Serbia* (judgment no. 26088/06 of 18 October 2011, application of 22 May 2006) the Court found that the applicant did not have a fair trial within the meaning of Article 6/1 of the Convention, since the evidence on which his conviction was based were provided violating Article 3 of the Convention (see paragraphs 51-52 of the judgment).

Based on this judgment of the Court, the applicant made a request of 17 May 2012 for reopening of proceedings, which request was dismissed by the first instance court on two occasions, while the second instance court quashed the first instance decisions on two occasions and remitted them for a new trial. On the third occasion, the first instance court allowed reopening of proceedings based on the case-law of the Court. The reopened proceedings are pending.

SLOVAK REPUBLIC / RÉPUBLIQUE SLOVAQUE

➢ Criminal proceedings

1) How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

2) What practical or procedural difficulties have been encountered in practice? How have they been overcome?

Under Section 394 §§ 1 and 4 of the Criminal Procedure Code, reopening of the proceedings, which were terminated by a final judgement or by a final criminal order shall only be granted if there are found the facts or evidence not known to the court previously, which could, by themselves or in conjunction with the facts and evidence previously known, justify a different decision on the guilt, or with respect to which the originally inflicted punishment would be clearly inadequate to the act's gravity or the perpetrator's situation, or if the inflicted punishment would clearly contradict the purpose of the punishment, or with respect to which abandonment of punishment or abandonment of imposition of a subsequent total sentence would be clearly inadequate to the act's gravity or to the perpetrator's situation, or which would clearly contradict the purpose of the punishment. A decision of the European Court of Human Rights according to which fundamental human rights or freedoms of an accused person were violated by a decision of a prosecutor or a court of the Slovak Republic or in the proceedings, which preceded such decision, also constitutes a fact not previously known under §§ 1- 3, provided that negative consequences of such decision cannot be redressed otherwise.

The proceedings were successfully reopened on the basis of the European Court of Human Rights judgment in the case *Klein v. Slovakia* of 31 October 2006 (no. 72208/01). The case concerned a violation of the applicant journalist's right to freedom of expression on account of his criminal conviction for defamation following the publication in March 1997 of an article on Archbishop Ján Sokol (violation of Article 10). The article criticised the Archbishop for advocating that a film, and the posters publishing it, should be withdrawn as they constituted a defamation of the symbol of the Christian religion, and questioned why decent members of the Catholic Church did not leave it. By judgment of 15 June 2000, the applicant was convicted of an offence under Article 198(1)(b) of the Criminal Code on the grounds that he had defamed the Archbishop and thereby offended members of the Roman Catholic Church. He was sentenced to a fine, to be converted into one month's imprisonment in the event of failure to pay. The judgment was upheld on appeal by the Košice Regional Court on 10 January 2009. The European Court of Human Rights found that the applicant's article criticised exclusively the person of the Archbishop, and had neither interfered with the right of believers to express and exercise their religion, nor denigrated their faith. In these circumstances the European Court of Human Rights observed that, irrespective of the nature of the penalty imposed, the applicant's conviction was in itself inappropriate. It held that the interference with his right to freedom of expression neither corresponded to a pressing social need, nor was proportionate to the legitimate aim pursued.

The judgment became final on 31 January 2007. On 30 January 2008 the Kosice I District Court, under Section 394 §§1 and 4 of the Code of Criminal Procedure, allowed the reopening of the criminal proceedings and quashed its judgment of 15 June 2000 and the judgment of the Kosice Regional Court of 10 January 2001. Consequently, the Kosice I District Court began new proceedings on the basis of the original charge, in which the applicant was acquitted on 19 September 2008.

3) Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?

The Slovak law do not provide for possibility of reopening of proceedings following friendly settlements or unilateral declarations.

- **Civil proceedings**

1) How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?

– What were the obstacles / How have they been overcome?
– What are the positive outcomes and remaining gaps?

Under Section 228 § 1 (d) of the Civil Procedure Code, a party to the proceedings may challenge a final judgment by a petition seeking reopening of the proceedings if there exists a decision delivered by European Court of Human Rights, in which it found that a decision taken by national court, or the proceedings preceding such a decision, had violated the fundamental rights or freedoms of the party to the proceedings, whereby substantial consequences arising from such violation have not been duly remedied by awarding a just satisfaction.

Under Section 230 § 1, a petition for reopening of proceedings must be filed in the time limit of three months from the day when the person proposing the reopening learned about the reason of the reopening or from the day when he/she could apply it.

The proceedings were successfully reopened on the basis of the European Court of Human Rights judgment in the case *Paulík v. Slovakia* of 10 October 2006 (no. 10699/05). The case concerned a violation of the right to respect for private life of the applicant due to the impossibility, in 2004, of challenging his paternity which had been established by a court in 1970, notwithstanding the fact that according to DNA tests conducted in 2004 he was not the father of the child (violation of Article 8). It also concerned the difference in treatment between the applicant, who, due to the fact that his paternity had been established by a court, had no procedure by which he could challenge the declaration of his paternity, and others in a similar situation who (if paternity was only presumed by marriage or declaration) were able to access a procedure to challenge paternity (violation of Article 14, taken in conjunction with Article 8).

The judgment became final on 10 January 2007. The applicant, under Section 228 § 1 (d) of the Civil Procedure Code, filed a petition for reopening of the paternity proceedings with the Bratislava IV District Court, on 26 January 2007. On 21 August 2007 the Bratislava I District Court granted reopening of paternity proceedings. On 3 October

2007 the Bratislava I District Court pronounced decision in the reopened paternity proceedings. On 2 April 2008 the Nitra Register Office amended the record in the birth register, removing the reference to the applicant as the father. Subsequently, a new birth certificate of the child has been issued in which the applicant is not registered as the father and in the column "father" the word "unknown" is marked.

The proceedings were also successfully reopened on the basis of the European Court of Human Rights judgment in the case *Ringier Axel Springer Slovakia a. s. v. Slovakia* of 26 July 2011 (no. 41262/05). The case concerned a violation of the right to freedom of expression on account of the judgment of the Žilina District Court of 12 June 2003 and the judgment of the Žilina Regional Court of 3 February 2004 by which the applicant company – editor of the journal was obliged to apologise to the plaintiff and to pay him a non-pecuniary damage for publication of a series of articles (violation of Article 10).

The applicant company, under Section 228 § 1 (d) of the Civil Procedure Code, filed a petition for reopening of the civil proceedings with the Žilina District Court, on 4 November 2011. On 5 December 2012 the Žilina District Court granted reopening of proceedings. On 20 May 2013 the Žilina District Court pronounced decision in the reopened proceedings by which it changed the original judgment of 12 June 2003 and rejected the action.

2) If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

The reopening of proceedings has not been introduced in Slovakia on the basis of the case law of domestic courts.

It is important to note in this respect that the Slovak legal order provides also for the possibility of **constitutional proceedings** being reopened where the European Court of Human Rights concludes in a judgment that a Constitutional Court's decision or proceedings prior to it were in breach of the fundamental human rights or freedoms of the party. (As of 1 January 2002 Slovakia introduced constitutional remedy enabling individuals to complain to the Constitutional Court on the violation of their rights guaranteed under the Convention in proceedings before the domestic authorities. If it finds a violation of a person's rights or freedoms, it may, among other actions, quash the final decision, measure or act of the authority concerned, order to take the necessary action and grant appropriate financial compensation to this person.)

SLOVENIA / SLOVÉNIE

Reopening of criminal proceedings

In the field of criminal proceedings Slovenia has introduced specific legislative provisions to their reopening in order to facilitate execution of the ECHR's judgments.

The Slovenian Code of Criminal Procedure explicitly regulates reopening of criminal proceedings in the context of the execution of the judgments of the ECHR in individual cases (inter partes). Article 416 of the Code of Criminal Procedure is worded as follows:
"*The provisions of this chapter on the reopening of criminal proceedings (Articles 406 through 415) shall apply correspondingly to the request for modification of a final judicial decision pursuant to the decision of the constitutional court by which the latter reversed or abolished the regulation on the basis of which the final judgement of conviction was passed, or pursuant to a decision of the European Court of Human Rights relating to grounds for reopening criminal proceedings.*"

The judgment of the ECHR can be the basis for filing the request for the protection of legality. Paragraph 4 of Article 421 of the Criminal Procedure Act provides:

"(4) If under a decision of the European Court of Human Rights it is established that the final judicial decision prejudicial to the convicted person is in violation of a human right and basic freedom the period of time for filing the request for the protection of legality shall be counted from the day the decision of the European Court was served on the convicted person."

Systemic solution to the reopening of criminal proceedings based on the judgment of the European Court of Human Rights in the Criminal Procedure Act is furthermore confirmed by Article 113 of the Courts Act – which refers to the text of the European Convention on Human Rights or the Slovenian national laws (in this case the Criminal Procedure Act). Article 113 of the Courts Act provides:
"*A decision of the European Court of Human Rights shall be directly enforced by the competent court of the Republic of Slovenia only if so provided by a ratified international treaty or if so provided by the act regulating judicial proceedings.*"

The Slovenian Code of Criminal Procedure so explicitly provides for the possibility for a successful applicant to request review of a criminal case on the basis of a finding of a violation by the European Court of Human Rights; however in practice there have been no examples of reopening in such cases so far.

Reopening of civil proceedings

Regarding the question of reopening of civil proceedings Slovenia follows the principle of *res judicata*.

The reopening of proceedings in civil cases (where applicable Civil Procedure Act) in order to facilitate execution of the ECHR's judgments is currently not explicitly provided

for by the existing legal provisions. This is the traditional view of the Constitutional Court of the Republic of Slovenia[24] and legal theory.

By analogy, the reopening is not possible either **for administrative proceedings** – ie administrative disputes to be decided by the courts because for the administrative disputes shall apply mutatis mutandis Civil Procedure Act.

* * * *

Constitutional Court's decision following the judgment Gaspari v. Slovenia (21 July 2009, no. 21055/03)[25]

ORDER

In proceedings to examine the petition and the application for the reopening of the constitutional complaint proceedings of Alenka Gaspari, Ljubljana, represented by Marjan Sušnik, lawyer practising in Ljubljana, at a session on 14 April 2011 the Constitutional Court

decided as follows:

1. The petition to initiate proceedings for the review of the constitutionality of Articles 394 through 401 of the Civil Procedure Act (Official Gazette RS, No. 73/07 – official consolidated text, and No. 45/08) is rejected.

2. The petition to initiate proceedings for the review of the constitutionality of Articles 50 through 60 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text) is dismissed.

3. The application for the reopening of the proceedings of constitutional complaint No. Up-140/02 is rejected.

[24] Regarding the view of the Constitution Court is important to note the judgment Gaspari v. Slovenia, (21 July 2009, no. 21055/03). In this judgment the European Court of Human Rights considered that the most appropriate form of redress in respect of a violation of Article 6 of the Convention is to ensure that the applicant as far as possible is put in the position he or she would have been had the requirements of Article 6 not been disregarded. The Court further noted that this would in the present case be best achieved, if the domestic legislation provided for a possibility to reopen the proceedings and re-examine the case (see paragraph 80 of the Court's judgment), however the Constitutional Court of the Republic of Slovenia (Ustavno sodišče) (decision no. U-I-223/09, Up-140/02 of 14 April 2001) stated that, the ECHR decision does not mean that the Constitutional Court imposes the obligation of unconditional execution of individual measure in the manner of the reopening of civil proceedings. The Constitutional Court considered that the ECHR does not have the power to give orders for the reopening of civil proceedings (see Lyons and others v. the United Kingdom, no. 15227/03, 8 July 2003). Therefore, the Constitutional Court found that the reasons, on which the ECHR based his particular decision, can be understood as the indication of possible type of measure that might be taken in order to bring to an end consequences of the violation found (see Öcalan v. Turkey, no. 46221/99, 12 May 2005, § 210).

[25] This decision is also available on the following webpage:
http://odlocitve.us-rs.si/en/odlocitev/AN03482?q=U-I-223%2F09 or
http://odlocitve.us-rs.si/documents/fa/39/up-223-09-up-140-02-final2.pdf

Reasoning

A.

1. The petitioner submitted to the Constitutional Court an application for the reopening of the constitutional complaint proceedings which were concluded by Constitutional Court Decision No. Up-140/02, dated 12 December 2002. She substantiates her application by referring to the Judgment of the European Court for Human Rights (hereinafter: ECtHR) in the case Gaspari v. Slovenia, dated 21 July 2009. In it, the ECtHR found that the right of the applicant for the reopening of proceedings [hereinafter the applicant] (at that time the opposing party in litigation) to a fair hearing, as determined by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter ECHR), was violated due to the fact that she had not had the opportunity to participate in the above-mentioned constitutional complaint proceedings. The applicant calls attention to the standpoint of the ECtHR in the above-mentioned Judgment, according to which in the event of such violations, the most appropriate form of redress is the possibility to reopen the national proceedings and thus the possibility to re-examine the case in keeping with the requirements of a fair hearing. She is of the opinion that given the binding force of ECtHR judgments for convicted states, her application should be granted (on the basis of the existing statutory provisions). She additionally substantiates her application by referring to the right to obtain redress for the violation of human rights (the fourth paragraph of Article 15 of the Constitution) and to the right to an effective remedy (Article 13 of the ECHR).

2. At the same time, the applicant submitted a petition to initiate proceedings for the review of the constitutionality of Articles 394 through 401 of the Civil Procedure Act (hereinafter: the CPA), and of Articles 50 through 60 of the Constitutional Court Act (hereinafter: the CCA), in the event the Constitutional Court assessed that the challenged acts could not be interpreted so broadly. In the present case, the challenged acts are allegedly inconsistent with Articles 14 and 15 of the Constitution and with Articles 13 and 14 of the ECHR. According to the assessment of the petitioner, the possibility to appeal to the ECtHR is not by itself an effective remedy, as follows from the fourth paragraph of Article 15 of the Constitution and Article 13 of the ECHR, since by means of such it is not possible to obtain redress for a violation of human rights and since such is not a legal remedy before national authorities. Therefore, the above-mentioned provisions of the Constitution and the ECHR allegedly require the upgrading of the system of national legal remedies. That the alleged existence of an unconstitutional legal gap in the challenged acts that occurred due to the non-existence of the possibility of an "ECtHR judgment in which the ECtHR establishes a violation of the ECHR or its Protocols" is grounds for the reopening of the proceedings is allegedly especially evident when a violation occurs in proceedings before the Constitutional Court. In proceedings before ordinary courts individuals are allegedly ensured protection against human rights violations by means of the institute of the constitutional complaint, while in the event a violation occurs in constitutional complaint proceedings, individuals allegedly do not have available any national legal remedy to redress such. Furthermore, the petitioner substantiates her allegations regarding the violation of the right to equality before the law by comparing her situation to the situation of persons charged in criminal procedures. She emphasises that in the event of the conviction of the Republic of

Slovenia before the ECtHR, such persons are ensured the possibility that proceedings be reopened by the Criminal Procedure Act (Official Gazette RS, Nos. 32/07 – official consolidated text, 68/08, and 77/09), with regard to which convicted persons allegedly have the possibility to submit, on such grounds, a request for the protection of legality, whereas parties to civil proceedings and proceedings before the Constitutional Court are allegedly not (explicitly) ensured such legal remedies. The petitioner is of the opinion that it is possible to compare these situations since the two examples entail judicial proceedings in which the rights and obligations of individuals are decided upon. Therefore, in her opinion there are no sensible grounds for such to be treated unequally. She proposes that the Constitutional Court issue an appropriate declaratory decision and determine the manner of its implementation, such that, until the established nonconformity with the Constitution is remedied, it is possible to reopen civil procedures and constitutional complaint proceedings which the ECtHR has established human rights violations in relation to.

3. The National Assembly of the Republic of Slovenia did not respond to the petition, however, the Ministry of Justice did submit an opinion. In it, it states that a legal basis for the reopening of constitutional complaint proceedings on the basis of the ECtHR judgment does not exist. It refers to the fourth paragraph of Article 41 of the CCA, in accordance with which no appeal is allowed against decisions and orders issued in cases within the jurisdiction of the Constitutional Court. In addition to this, the CCA allegedly does not allow any other legal remedies. The Ministry is of the opinion that according to the hitherto case-law of the Constitutional Court, the reopening of the constitutional complaint proceedings would be possible had any grounds for reopening as determined by the CPA existed; however the present case manifestly does not demonstrate such. The Ministry rejects the allegations that the two challenged acts are unconstitutional merely due to the fact that in the present case the petitioner's application for the reopening of the proceedings cannot be granted. Furthermore, it is of the opinion that the different regulation of legal remedies with regard to different judicial procedures does not entail a violation of Article 14 of the Constitution or the ECHR, since in accordance with the first paragraph of the mentioned constitutional provision, the status of party to proceedings cannot be deemed to be a personal circumstance. With regard to criminal procedure and civil procedure, respectively, the different regulation of the possibility to reopen proceedings on the basis of an ECtHR judgment is allegedly also otherwise reasonably justified. The Ministry emphasises that civil procedure and criminal procedure are essentially different from one another. The decisive difference between the two can allegedly be seen in the very concept of the two types of judicial procedures. Due to the fact that civil procedure is conceptualised as a dispute between two equal parties, broadening legal remedies in such procedure allegedly always entails an infringement on the right of the opposing party to effective judicial protection. Allegedly, differently holds true for criminal procedure, which is conceptualised as a dispute between the person charged and the state. An abrogated judgment issued in criminal proceedings is allegedly not harmful to anyone. Therefore, in the assessment of the Ministry, in criminal procedure legal certainty can give way to justice, which allegedly cannot be the case for civil procedure. The more extensive regulation of legal remedies in the field of criminal procedure is allegedly also justified by the more severe consequences that conviction therein allegedly has for individuals. For the same reasons, the alleged nonconformity of the challenged acts with the fourth paragraph of Article 15 of the Constitution and Article 13 of the

ECHR allegedly does not exist. Furthermore, the Ministry added that the regulation of extraordinary legal remedies in judicial procedures belongs in the domain of the legislature's consideration. With regard to such, the legislature must, in the Ministry's opinion, only be careful to not interfere excessively with the situation of other participants in proceedings. In light of the above-mentioned, the Ministry is of the opinion that the challenged acts are not inconsistent with the Constitution or the ECHR.

4. The opinion of the Ministry was sent to the petitioner, who responded thereto. She disagrees with the standpoint that there was no violation of Article 14 of the Constitution and the ECHR. She does agree with the standpoint that differences exist between civil procedure and criminal procedure, however, she is of the opinion that such are not decisive for the decision regarding her petition. She emphasises that what is especially disputable in her opinion is the regulation of the CCA in reference to the CPA, from which it follows that in the event of a violation of human rights in proceedings before the Constitutional Court, she is not granted an effective national legal remedy by means of which the violation could be redressed. She maintains that the existence of the ECtHR judgment in which the violation of the first paragraph of Article 6 of the ECHR was established requires the established violation to be redressed. With regard to such, it is allegedly not important which body caused the established violation or in what type of proceedings such was committed. In the opinion of the petitioner, it is not permissible to limit her right to obtain redress for the violation of human rights by referring to the rights of the opposing party. She opposes the standpoint of the Ministry that the question whether she should be granted redress for the violation of human rights belongs in the domain of the legislature's discretion. Furthermore, what is also allegedly unconvincing is the argument that reopening the proceedings on the basis of the ECtHR judgment is not possible in order to ensure legal certainty. The petitioner is of the opinion that trust in the unchangeability of judicial decisions cannot be given priority over the right to obtain redress for human rights violations. Allegedly, such trust in the unchangeability of judicial decisions is also not absolutely protected in the Slovene legal order. The already existing system of extraordinary legal remedies as well as the institute of the constitutional complaint allegedly demonstrate such. If it is allegedly possible to file an extraordinary legal remedy for mere statutory law violations or even for an error in the finding of facts, a regulation of a legal remedy by which it would be possible to request redress for human rights violations is allegedly that much more necessary and legitimate. By means of the institute of the constitutional complaint, the constitution framers allegedly already gave clear priority to the protection of human rights over the trust of the opposing party in the unchangeability of judicial decisions with legal finality. The petitioner emphasises that the standpoint of the Ministry regarding the disputed issue is contrary to the standpoint of the ECtHR. She again states that those individuals whose human rights have been violated in proceedings before the Constitutional Court are in a significantly worse position than those whose human rights have been violated in proceedings before ordinary courts. With regard to the above-mentioned, the applicant and petitioner maintains that she should be granted the opportunity to make a statement regarding the constitutional complaint of the opposing parties in the litigation in reopened proceedings. Therefore, she insists on her application and petition in their entirety.

B. – I.

5. In its Judgment in the case Gaspari v. Slovenia, the ECtHR established a violation of the first paragraph of Article 6 of the ECHR in proceedings before the Constitutional Court since, due to the fact that the applicant was not correctly served the constitutional complaint of the opposing parties in the litigation (which was accepted for consideration), she was not granted the opportunity to participate properly in the proceedings.[1] Despite the violation having been established, the ECtHR did not award the applicant compensation in respect of pecuniary damage (due to the fact that the existence of a causal link between the violation found and the alleged damage was not demonstrated). With regard to such, the Court added that the most appropriate form of redress would be to ensure that the applicant is put in the position he or she would have been in had the requirements of Article 6 of the ECHR not been disregarded. In the assessment of the ECtHR, this would in the present case be best achieved if the national legislation provided the party the possibility to reopen the disputed proceedings. For the distress caused to the applicant by the lack of guarantees in accordance with Article 6 of the ECHR, the ECtHR awarded her EUR 4,000.00 in respect of non-pecuniary damage.[2] The Judgment became final on 10 December 2009.

6. The applicant is of the opinion that her application for the reopening of the proceedings should have been granted merely on the already mentioned grounds of the ECtHR Judgment since such is binding for the Republic of Slovenia.

7. In accordance with the first paragraph of Article 46 of the ECHR, contracting states undertake to abide by the final judgments of the ECtHR in any case to which they are parties and the execution of such shall be supervised by the Committee of Ministers (the second paragraph of Article 46 of the ECHR). Thus, the applicant's emphasis that the ECtHR Judgment issued in her case is binding for the Republic of Slovenia is well founded. The binding force of ECtHR final judgments does not entail that only the legislature is obliged to abide by them, but rather that also national courts must strive to interpret national regulations in accordance with the requirements of the ECHR. Such a requirement follows also from Article 1 of the ECHR, which obliges contracting states to ensure the compatibility of national legislation with the requirements of the Convention.[3] In democratic states governed by the rule of law such is possible only if all holders of public authority abide by the requirements of the ECHR. Nevertheless, the applicant is incorrectly of the opinion that the binding force of the ECtHR judgment in itself substantiates the conclusion that her application for the reopening of the constitutional complaint proceedings is well founded.

8. ECtHR judgments are of a declaratory nature.[4] The ECtHR can only establish the (non-)existence of human rights violations, while its further possibilities, in accordance with Article 41 of the ECHR, are limited to only awarding the applicant just satisfaction if it finds that there has been a violation and if it assesses that the national law does not allow full redress for the violation. However, the above- mentioned does not necessarily entail that by the payment of just satisfaction the convicted state has entirely fulfilled its obligations following from the judgment. In accordance with the established standpoint of the ECtHR, its judgments can, within the meaning of Article 46 of the ECHR, order the state responsible not only to pay just satisfaction, but it can also impose on it to adopt general and/or, if necessary, individual measures that the state

must introduce into its national legal order and thereby prevent further violations and ensure all possible types of redress to remedy violations in such a manner that the situation is returned, as best possible, to the state that existed before the violation.[5] However, it is not within the jurisdiction of the ECtHR to order the contracting state to adopt precisely defined measures. A contracting state can select appropriate measures to redress the consequences of an individual act that is disputed, or measures by which it will be able to ensure that its national legislation is consistent with the requirements of the Convention.[6] Only in exceptional cases, when a violation is of such nature that it excludes any option regarding the selection of measures, does the ECtHR direct the contracting state to adopt a precisely defined measure.[7]

9. In its reasoning in the case Gaspari v. Slovenia, the ECtHR did in fact note that the most appropriate form of redress would be to reopen the proceedings and thus ensure that the applicant is put in the position she would have been in had the requirements of Article 6 of the ECHR not been disregarded. And in cases of violations of Article 6 of the ECHR, the ECtHR has already adopted such a standpoint on numerous occasions.[8] However, the reasons on which the ECtHR based its judgment in the present case do not necessarily entail that thereby the Constitutional Court has an obligation to unconditionally implement the specific measure of reopening the constitutional complaint proceedings in the applicant's case. It is not within the jurisdiction of the ECtHR to order the reopening of national judicial proceedings.[9] Therefore, in the present case such a statement in the reasoning of the Judgment of the ECtHR cannot be interpreted differently than as an indication of a possible measure which could be, in the assessment of the ECtHR, appropriate to redress the consequences of the established violation.[10]

10. The CCA does not provide for the possibility of reopening constitutional complaint proceedings. With regard to the first paragraph of Article 6 of the CCA[11], the question arose in the process of review by the Constitutional Court whether such a legal remedy can be permissible on the basis of mutatis mutandis application of the statutory provisions regulating individual court proceedings. In its early case-law the Constitutional Court rejected a relatively large number of applications for the reopening of constitutional complaint proceedings, but it did so since the stated reasons for reopening the proceedings were obviously not of such nature that the proceedings could be reopened on such basis.[12] In subsequent orders it added that with regard to such it did not take into consideration the question whether the reopening of proceedings before the Constitutional Court is even permissible.[13] By Order No. Up-2383/06, dated 27 February 2008, adopted in a panel session, the Constitutional Court allowed, by mutatis mutandis application of the provisions of the CPA, the reopening of constitutional complaint proceedings since, due to the unlawful conduct of the Constitutional Court, the party was not given the opportunity to be heard before the court (the second indent of Article 394 of the CPA). The Constitutional Court again addressed the issue of the permissibility of the reopening of constitutional complaint proceedings in panel Order No. Up-915/07, dated 3 July 2008 (Official Gazette RS, No. 73/08, and OdlUS XVII, 79), in which the Court rejected an application for such. It adopted the standpoint that the reopening of the constitutional complaint proceedings, taking into account the special nature of the proceedings in question, is not permissible due to the fact that the CCA does not contain special provisions on the reopening of proceedings. Thus, in accordance with the subsequent standpoint of the Constitutional

Court, mutatis mutandis application of the statutory provisions regulating court proceedings does not entail that in proceedings before the Constitutional Court legal remedies are permissible that the CCA does not explicitly provide for.[14] In panel Order No. Up-54/1, dated 17 March 2011, the Court did, however, adopt the standpoint that in the event that an obvious administrative error occurs in constitutional complaint proceedings it can re-examine the constitutional complaint in question. Nevertheless, the present case is not such a case since the applicant requests the reopening of the constitutional complaint proceedings on the basis of the existence of the ECtHR Judgment in which the existence of such an error of the Constitutional Court had already been established.

B. – II.

11. At the same time, the petitioner submitted a petition to initiate proceedings for the review of the constitutionality of the CPA and the CCA due to the fact that the two acts do not determine the possibility of reopening (constitutional complaint) proceedings on the basis of the stated reason. However, in her application, which the petitioner substantiates by the ECtHR Judgment establishing a violation of a human right only in proceedings before the Constitutional Court, she applies for only the reopening of the proceedings thereof and on these grounds also a review of the constitutionality of the CCA. Thereby, she does not demonstrate legal interest for a petition for the review of the constitutionality of the CPA (cf. the first and second paragraphs of Article 24 of the CCA). Therefore, the Constitutional Court rejected her petition in this part (Point 1 of the operative provisions) and examined only the grounds for the petitioner's allegations regarding the unconstitutionality of the CCA.

12. The petitioner is of the opinion that the requirement to upgrade the system of national legal remedies for cases of violations of human rights in proceedings before the Constitutional Court follows from Article 13 of the ECHR and from the fourth paragraph of Article 15 of the Constitution. In the assessment of the petitioner, the possibility to file an application before the ECtHR is not by itself an effective legal remedy, as follows from the mentioned provisions of the Convention and the Constitution, since such are not legal remedies before national courts, and since by means of such it is not possible to obtain redress for the established violation. Therefore, she is of the opinion that from the above-mentioned provisions of the ECHR and the Constitution, there follows the requirement to provide for the possibility to reopen constitutional complaint proceedings on the basis of the "ECtHR Judgment in which the ECtHR established a violation of the ECHR or its Protocols".

13. Article 13 of the ECHR ensures everyone whose rights and freedoms as set forth in the Convention are violated an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. Thus, the mentioned provision of the Convention obliges contracting states to protect human rights first and above all within the framework of their own judicial systems. In the assessment of the ECtHR, such a subsidiary nature of applications to the ECtHR is reflected not only in Article 13 of the ECHR but also in Article 35. According to the ECtHR, the content of Article 35 of the ECHR is founded on the assumption expressed in Article 13 of the ECHR that an effective national legal remedy exists for claiming a violation of individual rights provided for by the Convention. In the

assessment of the Constitutional Court, in order to respect Article 13 of the ECHR while also taking into account the above-mentioned, it is sufficient that an individual can, before resorting to international mechanisms for the protection of human rights, thus before initiating proceedings before the ECtHR, raise the issue of a violation of the rights provided for by the Convention in proceedings before national courts.

14. While the petition in question does, inter alia, open the issue of the need to amend the CCA in a manner that would ensure individuals the possibility to claim before the national (constitutional) court that their human rights have been violated in constitutional complaint proceedings prior to the initiation of proceedings before the ECtHR, the petitioner does not demonstrate legal interest for such allegations. Namely, she does not substantiate her application for the reopening of the constitutional complaint proceedings by claiming a violation of procedural guarantees, the nature of which is that of a human right, but by claiming the existence of an ECtHR judgment in which such a violation was established. Therefore, the petition under consideration does not address the issue of the need to provide individuals with an additional national legal remedy before they initiate international mechanisms, but the issue of the need to ensure such a legal remedy after international mechanisms have already been initiated. In the assessment of the Constitutional Court, the requirement to ensure such a subsequent legal remedy does not follow from Article 13 of the ECHR. Therefore, merely on such a basis, the petitioner's allegations regarding the nonconformity of the CCA with Article 13 of the ECHR must be dismissed as manifestly unfounded.

15. The petitioner is of the opinion that the requirement to ensure the possibility to reopen constitutional complaint proceedings on the basis of the ECtHR Judgment also follows from the fourth paragraph of Article 15 of the Constitution. The above-mentioned constitutional provision ensures individuals judicial protection of human rights and fundamental freedoms and the right to obtain redress for violations thereof. The petitioner's opinion that such redress is possible only by re-establishing the prior situation is incorrect. The requirements determined by the mentioned constitutional provision can also be met by ensuring the right to financial compensation or even just by establishing the violation itself.[15] In the present case, the petitioner was already ensured all of the above-mentioned by the ECtHR Judgment. The ECtHR did not merely establish the violation of a human right, but also awarded the petitioner financial compensation on the basis of such. This entails that the consequences of the established procedural error of the Constitutional Court have already been remedied in a constitutionally acceptable manner.[16] With regard to the above- mentioned, the petitioner's allegations regarding the nonconformity of the fourth paragraph of Article 15 of the Constitution are also manifestly unfounded.

16. The petitioner substantiates her petition also by alleging the nonconformity of the CCA with Article 14 of the Constitution (the principle of equality before the law) and Article 14 of the ECHR (the prohibition of discrimination). She bases such on a comparison of the position of parties to civil procedures and the position of parties to criminal procedures. Since the CCA does not allow the reopening of constitutional complaint proceedings on the basis of an ECtHR judgment in any case, the above-mentioned allegations of the petitioner do not substantiate the claimed unconstitutionality of the CCA, but of the CPA. Therefore, in the examination of the petition submitted to initiate proceedings for the review of the constitutionality of the

CCA, the Constitutional Court did not examine these allegations. Furthermore, to the extent the petitioner substantiates her allegations regarding a violation of the second paragraph of Article 14 of the Constitution by comparing the positions of parties to constitutional complaint proceedings to that of parties to civil proceedings, such allegations should be dismissed as manifestly unfounded merely because the legislature did not regulate such positions differently (from the perspective of the possibility to reopen proceedings on the basis of an ECtHR judgment). Furthermore, due to the different nature of the two types of proceedings, the situations of parties to them are also not comparable.

17. With regard to the above-mentioned, the Constitutional Court dismissed the petition as manifestly unfounded (Point 2 of the operative provisions).

B. – III.

18. The applicant substantiates her application for the reopening of constitutional complaint proceedings on the basis of the ECtHR Judgment that established the violation of her human rights by her claims regarding the binding force of the ECtHR Judgment concerning the issue in question that were already dismissed above (cf. Paras. 7 through 10 of the reasoning of this Order), and additionally by the arguments she used to substantiate the petition. Since the petition was not granted, by means of such allegations she also cannot substantiate the application for the reopening of proceedings. Since the CCA does not provide for the possibility to reopen constitutional complaint proceedings (for the reasons claimed) and since the applicant's allegations that the Constitution and the Convention require such statutory regulation are manifestly unfounded, the Constitutional Court rejected the applicant's application for the reopening of the proceedings (Point 3 of the operative provisions).

C.

19. The Constitutional Court reached this Order on the basis of the third paragraph of Article 25, the second paragraph of Article 26, and the first paragraph of Article 54 of the CCA, composed of: President Dr. Ernest Petrič, judges Dr. Mitja Deisinger, Dr. Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jože Tratnik. Judge Jan Zobec was disqualified from deciding on the case. The decision was adopted unanimously.

Mag. Miroslav Mozetič
Vice President on behalf of
Dr. Ernest Petrič
President

Notes:
[1] Cf. Paras. 50 through 57 of the mentioned Judgment.
[2] Cf. Para. 80 of the mentioned Judgment.
[3] In accordance with Article 52 of the ECHR, contracting states are obliged to provide an explanation as to which of its national laws ensures effective implementation of the provisions of the Convention.
[4] Cf. the Judgment of the Grand Chamber of the ECtHR in the case Tierfabriken

Schweiz v. Switzerland (No. 2), dated 30 June 2009, Para. 61.
[5] As stated by the ECtHR, inter alia, in its Judgment in the case Lungoci v. Romania, dated 26 January 2006, Para. 55, and in its Judgment in the case Yanakiev v. Bulgaria, dated 10 August 2006, Para. 89. Cf. also P. van Dijk, F. van Hoof, A. van Rijn, and L. Zwaak (eds.), Theory and Practice of the European Convention on Human Rights, 4th edition, Intersentia, Antwerpen – Oxford 2006, p. 257.
[6] Cf. the ECtHR Judgment in the case Lyons and Others v. the United Kingdom, dated 8 July 2003 and the Judgment of the Grand Chamber in the case Tierfabriken Schweiz v. Switzerland (No. 2), Para. 88.
[7] Cf. the ECtHR Judgment in the case Assanidze v. Georgia, dated 8 April 2004. For more information, see P. van Dijk, F. van Hoof, A. van Rijn, and L. Zwaak (eds.), op. cit., p. 277.
[8] Cf. the ECtHR judgments in the cases Somogyi v. Italy, dated 18 May 2004, Para. 86; Öcalan v. Turkey, dated 12 May 2005, Paras. 208 through 210; Lungoci v. Romania, Para. 56; and Yanakiev v. Bulgaria, Para. 90.
[9] As stated by the ECtHR, inter alia, in the case Lyons and Others v. the United Kingdom. Cf. also the Judgment of the Grand Chamber in the case Verein gegen Tierfabriken Schweiz v. Switzerland (No. 2), Para. 89.
[10] Cf. the ECtHR Judgment in the case Öcalan v. Turkey, Para. 210. Cf. also the Judgment of the Grand Chamber in the case Sejdovic v. Italy, dated 1 March 2006, Paras. 126 and 127, in which the Grand Chamber – differently than the Chamber in its Judgment of 10 November 2004 (Cf. Para. 3 of the operative provisions) – merely established the existence of a violation (for more information, see A. Csaki, Die Wiederaufnahme des Verfahrens nach Urteilen des Europäischen Gerichtshofs für Menschenrechte in der deutschen Rechtsordnung, Verlag Dr. Kovač, Hamburg 2008, pp. 34–35).
[11] The Article determines: "For procedural questions which are not regulated by this Act, the Constitutional Court applies mutatis mutandis the statutory provisions regulating court proceedings with due consideration of the legal nature of the case." [12] Cf. Constitutional Court Orders Nos. Up-95/95, dated 26 February 1998; Up-70/98, dated 17 December 1998; and Up-416/01, dated 15 February 2002.
[13] Cf. Constitutional Court Orders Nos. Up-189/01, dated 21 November 2001; Up-524/01, dated 13 January 2003; Up-408/03, dated 24 November 2005; Up-550/02, dated 7 March 2006; and Up-1069/05, dated 28 September 2006.
[14] As the Constitutional Court stated also in panel Orders Nos. Up-555/07, dated 4 July 2008, and Up-1840/07, dated 19 May 2009.
[15] Cf. Constitutional Court Decision Nos. Up-4/95, dated 19 December 1996, Para. 13 (OdlUS V, 193), and Constitutional Court Order No. Up-2436/08, U-I-42/08, dated 26 March 2009, Para. 5.
[16] The ECtHR did not award the petitioner compensation in respect of pecuniary damage, however, this was due to the fact that the existence of a causal link was not demonstrated (and not since it would have awarded her only financial compensation for the damage that could not have been redressed in any other manner), i.e. the request for just satisfaction was not reserved for later deciding until the national court had decided on the reopening of the proceedings (Cf. the ECtHR Judgment in the case Schuler-Zgraggen v. Switzerland, dated 24 June 1993, Paras. 72 through 74).

SPAIN / ESPAGNE

Criminal proceedings

1) How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

The Constitutional Tribunal of Spain established in its leading judgment 245/1991, of 16th December, that the judgments of the ECHR will have an effect a reopening of the previous criminal proceedings if:

a) The ECHR has declared a violation of the Convention that implies a violation of the fundamental rights provided for in the Constitution which may entitle to raise a "Amparo appeal" before it.
b) The violation stems from a decision by a Criminal Court of Justice.
c) The effects of the violation still remain
d) The freedom of the applicant is at stake.

In that case the Constitutional Tribunal considered that the judgment of the ECHR declares violation of the right to a fair trial in criminal matters (art 6.1 of the Convention) and that entails that there has been a violation of art 24.1 of the Spanish Constitution, with the effect of declaring the nullity of the whole criminal procedure, which has to trace back to the point where the violation took place. In the instant case, it had to go back to the moment when the public hearing begun.

The Constitutional Court developed this jurisprudence in its judgements on cases 96/2001, 240/2005, 313/2005 and 197/2006, as a consequence of several judgments of the ECHR.

National Courts have followed this criteria ever since.

In the Great Chamber´s Judgment of 21st October 2013 on the Del Rio Prada vs. Spain Case, the Court indicated an individual measure consisting in the release of the applicant from jail as soon as possible. The Criminal Chamber of the Audiencia Nacional , one of Spain´s highest Criminal Courts, declared on a judicial decision of 22nd October 2013 that when the ECHR declares that there has been a violation of articles 5 and 7 of the Convention this entails a breach of article 17 of the Constitution and, therefore, the questioned national jurisdictional decisions had to be immediately revised and –in that case– quashed. This led to the reopening of all the national procedures where the Spanish jurisprudence had been the same, and those persons still in prison who had to benefit from the ECHR judgment were immediately released. The Tribunal Supremo adopted a general internal rule declaring that all these decisions could be subject to revision before it.

In order to generalize the procedure to reopen criminal cases deriving from ECHR judgments, the Tribunal Supremo in non jurisdictional agreement of 21st October 2014 has established that the revision appeal regulated in article 954 of the Law on Criminal Procedure can be used as procedural mean to achieve that end.

Following the Organic Law 7/2015, the possibility to request the revision of a final judgment following an ECHR judgment is provided for by the legislation (see Appendices).

2) What practical or procedural difficulties have been encountered in practice? How have they been overcome?

At the beginning the practical difficulty lied in the fact that the procedural law did not expressly contemplated how to act when an execution of a ECHR judgment ha to lead to the reopening of a criminal procedure. This difficulty was overcome through dynamic interpretation of the existing provisions of the Constitution, the Organic Law of the Constitutional Tribunal and of the Law on Criminal Procedure, as detailed above.

3) Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?

To date we have not had to make any friendly settlement or unilateral declarations concerning criminal cases. Criminal prosecution on serious offences entails a public interest and can´t be subject to such agreements. Only a judgment on the merits from the ECHR may have the effect of reopening the procedure.

Civil proceedings

1) How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?

It depends on whether the affected decisions of the civil jurisdiction are final or not. If it refers to decisions that are subject to change when the underlying reality changes (for example, decisions concerning the wellbeing of minors in some cases, decisions on provisional pensions,…) it is possible to reassess the previous judgment, safe when – due to the time passed– it is impossible to do so.

Following the Organic Law 7/2015, it is possible to request the revision of a final judgment following an ECHR judgment.

– What were the obstacles / How have they been overcome?

The main obstacle foreseen following the entry into force of the new legislation is the effect that the reopening of civil procedures may cause on parties to it that have not had the opportunity to post observations before the ECHR.

In this respect we would like to gather information on this issue on other Member States. It could be envisaged that the ECtHR, in cases where this may happen, should call the other parties on the national proceedings using the possibility established in 36.2 of the Convention.

– **What are the positive outcomes and remaining gaps?**

On this issue we would refer to our previous answer

2) If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

We have not registered any example.

APPENDICES

Act no. 41/2015, of 5 October, amending the Code of Criminal Procedure in order to accelerate the criminal justice and to strengthen procedural safeguards.

Sole Article. *Amendment to the Code of Criminal Procedure*.

Fifteen. Article 954 is amended to read as follows:
[…]

"3. A review of a final judgement may be requested when the European Court of Human Rights has declared that such judgement was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and serioussness, has a persistent effect and cannot cease in any other way than by means of this review.
In this event, the review can only be requested by whom, being entitled to lodge this review, had acted as claimant to the European Court of Human Rights. The requirement shall be formulated within a year of the said Tribunal's Judgement has become final".

Sole Transitory provision. Relevant law.
[…]

"2. Article 954 will also apply to judgements becoming final following their entry into force.

The event provided for in section 3 of article 954 will apply to judgements of the European Court of Human Rights becoming final following their entry into force"
[…]

Organic Law 7/2015, of 21 July, amending Organic Law 6/1985, of 1st July, on the Judiciary.

[…]

PREAMBLE

[…]

II

[...]

It is also included a provision regarding the European Court of Human Rights' judgments that declares the violation of some of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, stipulating that they will be reason enough to lodge an appeal on review strictly of the final judgment in the "a quo" process. Here from, the legal certainty is without doubt increased in a sensitive sector such as the protection of fundamental rights, foundation of political order and social peace, as declared in Article 10.1 of our Constitution.
[…]
Sole Article. Amendment to Organic Law 6/1985, of 1st July, on the Judiciary.
The Organic Law 6/1985, of 1st July, on the Judiciary is amended as follows:

[...]

Three. A new article 5 bis is added to read as follows:

"Article 5 bis.

An appeal review may be lodged to the Supreme Court against a final judgment, according to procedural regulations of each jurisdictional order, when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review.

[…]

Second final provision. Amendment to Organic Law 2/1989, of 13 April, on Military Procedure.

Law 2/1989, of 13 April, on Military Procedure is amended as follows:

One. Article 328 is amended to read as follows:

"Article 328:

1. The appeal review against final judgments will be granted when:

[...]

2. Additionally, an appeal review may be lodged against a final judgment when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review.

In these cases, the review proceedings shall be conducted according to the rules therein under the Code of Criminal Procedure and it shall not be applicable the stipulations of Articles 329 to 333, 335 and 336. Standing rules set forth in that Code for these proceedings shall be applied.

Likewise, judgments issued on such proceedings shall have the effects set forth for these cases in the Code of Criminal Procedure".

[...]

Three. Article 504 is amended to read as follows:

"Article 504.

1. Final judgments issued in contentious-disciplinary judicial appeal by the Military Chamber of the Supreme Court, as well as the final orders to which

Article 478 are referred, issued by that Chamber, may be object of an appeal review in the following cases:

[...]

2. Additionally, an appeal review may be lodged against a final judgment when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review.
3. The provisions of the Code of Civil Procedure will govern the legitimacy, deadlines and procedure with regard to this review proceedings.

Exceptions shall be made for the cases provided for in sections a), b) and g) of this article, for which the appeal review shall be lodged within a month of notification of the judgement has become final.

[...]

Third final provision. Amendment to Act 29/1998, of 13 July, regulating the jurisdiction for judicial review.

[...]

Three. Article 102 is amended to read as follows:

"Article 102.

1. The review against final judgments will be granted:

[...]

2. Additionally, an appeal review may be lodged against a final judgment when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review, without this prejudicing the *bona fide* rights acquired by third parties.
3. The provisions of the Code of Civil Procedure will govern the legitimacy, deadlines and procedure with regard to this review proceedings. Nevertheless, there will only be a public hearing when requested by all the parties or the Chamber deems it necessary.
4. Review in the matter of accounting liability shall operate in the cases provided for in the Law on the Functioning of Court of Auditors".

Fourth final provision. Amendment to Act 1/2000, of 7 January, on Civil Procedure.
[...]

Thirteen. Article 510 is amended to read as follows:

"Article 510. *Reasons*.

1. The review against final judgments will be granted:

[...]

2. Additionally, an appeal review may be lodged against a final judgment when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review, without this prejudicing the *bona fide* rights acquired by third parties.".

Fourteen. Article 511 is amended to read as follows:

"Article 511. *Locus standi*.

The party aggrieved by the challenged final judgment may request a review.

In the event provided for in section 2 of the preceding article, the review can only be requested by whom had acted as claimant to the European Court of Human Rights"

Fifteen. Section 1 of article 512 is amended to read as follows:

"1. In no case the review may be requested after five years from the date of publication of the judgment that is being challenged. Any request of review produced after this deadline shall be rejected.

The provisions foreseen in the preceding paragraph shall not apply when the review is reasoned on a Judgment by the European Court of Human Rights. In this case, the requirement shall be formulated within a year of the said Tribunal's Judgment has become final".

[…]

Tenth final provision. *Entry into force*

This act shall enter into force on 1 October 2015, except sections one, two and five of the third final provision, that shall do it within a year of its publication.

Therefore,

I hereby order all Spanish citizens, individuals and authorities, to observe and enforce this organic law.

[…]

SWEDEN / SUÈDE

Under the Swedish Code of Judicial Procedure , the re-opening of proceedings (referred to in the Code as 'relief for substantive defects'), can be granted only under certain circumstances stipulated in Chapter 58, Sections 1 (civil proceedings) and 2 (criminal proceedings). A new ruling from the Supreme Court amending previous case-law has generally not been considered as a circumstance on which the re-opening of proceedings could granted. New case-law from the European Court of Human Rights and the EU Court of Justice is dealt with in the same manner.

However, when it comes to criminal proceedings, the Supreme Court has found that re-opening could be granted in certain situations based on Article 13 of the Convention and Swedish procedural law. This follows from a decision of 13 July 2013 in which the Supreme Court examined the question whether a former defendant could be granted a re-opening of criminal proceedings if he or she had been convicted of an offence under the Tax Offences Act in a manner incompatible with Article 4 of Protocol No. 7 to the Convention. The decision was handed down after the Supreme Court, in a ruling dated 11 June 2013, had amended its case-law concerning the application of the *ne bis in idem* principle in tax matters. Previous case-law had stipulated that there was no reason generally to invalidate the Swedish system with double proceedings by virtue of Article 4 of Protocol No. 7. The change in case-law was partly based on the case-law of the European Court of Human Rights, including its judgment in the case of *Sergey Zolotukhin* ([GC], no. 14939/03, judgment of 10 February 2009, ECHR 200, thus on 10 February 2009.

In its decision of 13 July 2013, the Supreme Court concluded that, on the basis of the Convention, in particular Article 13, a Swedish court may decide, in certain situations; that a case should be re-opened notwithstanding the special conditions specified in Chapter 58, section 2. This should apply if it is necessary to discontinue a deprivation of liberty that constitutes a violation of the individual's rights. This could also be the case in situations where re-opening is considered a substantially more adequate measure of just satisfaction than other available measures, provided that the violation in question is of a serious nature.

When it comes to the issue of practical/procedural issues that have been encountered in practice, the following may be of relevance. In the decision of 13 July 2013, the Supreme Court also considered the issue of from which point in time individuals could be granted a re-opening of criminal proceedings in cases concerning the application of the *ne bis in idem* principle. In this regard, the court took the position that the incompatibility of Swedish legislation regarding sanctions for tax-related offences with Article 4 of Protocol No. 7 had arisen by virtue of the *Sergey Zolotukhin* judgment (cited above). The Supreme Court's decision led to criminal proceedings being re-opened in respect of an individual's conviction for an offence under the Tax Offences Act. As a result, the possibility of being granted a re-opening of criminal proceedings applies retroactively to judgments having been delivered in criminal proceedings as from 10 February 2009.

SWITZERLAND / SUISSE

La possibilité de demander la réouverture de la procédure (indépendamment soit sa nature) après que la Cour a constaté une violation de la Convention a été introduite en Suisse en 1991 déjà.

Les dispositions pertinentes font partie de la loi fédérale du 17 juin 2005 sur le Tribunal fédéral (LTF ; http://www.admin.ch/opc/fr/classified-compilation/20010204/index.html), dont les dispositions pertinentes, dans leur teneur actuelle, se lisent comme suit :

Art. 122 Violation de la Convention européenne des droits de l'homme
La révision d'un arrêt du Tribunal fédéral pour violation de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950 (CEDH) peut être demandée aux conditions suivantes:

a. la Cour européenne des droits de l'homme a constaté, dans un arrêt définitif, une violation de la CEDH ou de ses protocoles;
b. une indemnité n'est pas de nature à remédier aux effets de la violation;
c. la révision est nécessaire pour remédier aux effets de la violation.

Art. 124 Délai
1 La demande de révision doit être déposée devant le Tribunal fédéral:
…
c. pour violation de la CEDH, au plus tard 90 jours après que l'arrêt de la Cour européenne des droits de l'homme est devenu définitif au sens de l'art. 44 CEDH;
…

Art. 127 Echange d'écritures
Pour autant que le Tribunal fédéral ne considère pas la demande de révision comme irrecevable ou infondée, il la communique à l'autorité précédente ainsi qu'aux éventuels autres parties ou participants à la procédure, ou aux autorités qui ont qualité pour recourir; ce faisant, il leur impartit un délai pour se déterminer.

Art. 128 Arrêt
1 Si le Tribunal fédéral admet le motif de révision invoqué, il annule l'arrêt et statue à nouveau.
2 Si le Tribunal fédéral annule un arrêt qui avait renvoyé la cause à l'autorité précédente, il détermine les effets de cette annulation à l'égard d'un nouveau jugement de l'autorité précédente rendu entre-temps.
3 Si le Tribunal fédéral statue à nouveau dans une affaire pénale, l'art. 415 CPP est applicable par analogie.

Quant aux questions plus spécifiquement, les informations suivantes peuvent être fournies

Procédures pénales

1) Comment la réouverture des procédures pénales a-t-elle été abordée dans votre droit interne et existe-t-il des exemples réussis de réouverture dans de tels cas ?

E.L., R.L. et J.O.L. c. la Suisse (arrêt du 29 août 1997)
A.P., M.P. & T.P. c. la Suisse (arrêt du 29 août 1997)
La Cour européenne des Droits de l'Homme a conclu à une violation de l'article 6 § 2 de la Convention du fait, qu'indépendamment de toute faute des requérants, ce derniers avaient été condamnés, en tant qu'héritiers, pour une infraction qu'aurait commise le défunt. A la suite des arrêts de la Cour les requérants ont introduit une demande de révision de leur condamnation en application de l'article 139a de l'ancienne loi fédérale d'organisation judiciaire (aOJ, aujourd'hui : art. 122 LTF).

Résultat: Le Tribunal fédéral, par arrêts du 24 août 1998, a révisé les décisions de justice qui avaient été censurés par la Cour européenne des droits de l'homme et a acquitté les requérants. A l'issue de cette procédure de révision, l'administration fiscale cantonale a été obligée de restituer le montant de l'amende infligée aux requérants, avec des intérêts.

NB : L'abrogation formelle des dispositions concernées du droit interne faisait partie des mesures à caractère général.

Affaire Damman c. Suisse (arrêt du 25 avril 2006)
La Cour a constaté que la condamnation du requérant, qui est journaliste, pour incitation à une violation du secret de fonction constituait une violation de l'article 10 de la Convention. Le requérant a ensuite demandé une réouverture de son procès en application de l'article 139a aOJ.

Résultat: Selon le Tribunal fédéral, l'acquittement du requérant constituait le seul moyen pour effacer toutes les conséquences de la violation constatée par la Cour. Ne pouvant pas, à l'époque des faits, acquitter lui-même le requérant, le Tribunal fédéral a admis la demande de révision, annulé l'arrêt rendu par l'instance inférieure et ordonné à cette dernière d'acquitter le requérant (arrêt du Tribunal fédéral 6S.362/2006 du 3 novembre 2006).

2) Quelles difficultés pratiques et procédurales ont été rencontrées en pratique ? Comment ont-elles été surmontées ?

Non.

3) Avez-vous rencontré des difficultés particulières en matière de réouverture de certaines affaires à la suite de règlements amiables ou de déclarations unilatérales ?

Il n'y a pas de cas d'application puisque la réouverture n'entre en ligne de compte que lorsque la Cour a constaté une violation de la Convention.

Procédures civiles

1) Comment la réouverture de procédures civiles a-t-elle été abordée et existe-t-il des exemples réussis de réouverture dans de tels cas ?

Affaire Hertel (arrêt du 25 août 1998)
La Cour a constaté que l'interdiction faite au requérant par les tribunaux suisses «d'affirmer que les aliments préparés dans les fours à micro-ondes sont dangereux pour la santé et provoquent dans le sang de ceux qui les consomment des altérations traduisant un trouble pathologique et donnant une image qui pourrait indiquer le début d'une évolution cancérigène » constituait une violation de l'article 10 de la Convention. Le requérant a ensuite demandé une réouverture de son procès en application de l'article 139a aOJ. Selon le Tribunal fédéral, il n'était ni nécessaire ni approprié, sous l'angle des exigences découlant de l'art.10 de la Convention, de lever complètement l'interdiction susmentionnée. Il se contentait donc de préciser qu'il était désormais interdit au requérant « d'affirmer, sans mentionner les opinions divergentes, dans des communiqués destinés au public en général qu'il était scientifiquement prouvé que les aliments ... » (arrêt du Tribunal fédéral du 2 mars 1999). La requête introduite contre cet arrêt a été qualifiée de manifestement mal fondée (décision de la Cour du 17 janvier 2002).

Affaire Losonci (arrêt du 9 novembre 2010)
Cette affaire concernait la discrimination d'un couple binational fondée sur le sexe dans leur liberté de choisir leur nom de famille après le mariage. Les requérants, un homme hongrois et une femme suisse-française résidants en Suisse, étaient empêchés de garder leur propres noms de famille après leur mariage, ce qui aurait été possible s'ils avaient été de sexe inverse, selon les dispositions légales portant sur le nom de famille contenues dans le code civil suisse. Bien que le Tribunal fédéral ait reconnu, dans son arrêt de 2005, que celles-ci représentaient une inégalité de traitement entre les sexes, il a refusé d'introduire des modifications à la loi portant sur les noms, ce qui avait auparavant (en 2001) été rejeté par le législateur. Dans son arrêt, la Cour a constaté qu'il y a violation de l'article 14 combiné avec l'article 8 de la Convention.

Résultat : Le 19 avril 2011, les requérants ont déposé une demande de révision en vertu de l'article 122 LTF. Par son arrêt du 8 septembre 2011, le Tribunal fédéral a partiellement cassé son arrêt du 24 mai 2005 et, à la lumière des constats de la Cour européenne, a ordonné à l'autorité de l'état civil d'enregistrer le requérant masculin dans le registre de l'état civil avec le nom de famille « Losonci » (au lieu d'auparavant « Losonci Rose »).

NB : A la suite de l'arrêt de la Cour, une nouvelle tentative de modifier le droit de nom fut entreprise. La modification du droit interne à la lumière des exigences découlant de la CEDH faisait partie des mesures à caractère général.

D'autres exemples réussis concernent, p.ex., les arrêts du Tribunal fédéral rendus à la suite des arrêts *Neulinger c. Suisse* (du 6 juillet 2010, Grande Chambre, art. 8 CEDH, enlèvement d'un enfant, arrêt du Tribunal fédéral 5F_8/2010 du 26 mai 2011), *Emonet et autres c. Suisse* (du 13 mars 2008, art. 8 CEDH, adoption de la fille majeure de la concubine par l'un des requérants, arrêt du Tribunal fédéral 5F_6/2008 du 18 juillet

2008) et *Jaeggi c. Suisse* (du 13 juillet 2006, art. 8 CEDH, reconnaissance de paternité, arrêt du Tribunal fédéral 1F_1/2007 du 30 juillet 2007).

– Quels ont été les obstacles / Comment ont-ils été surmontés ?
– Quels sont les résultats positifs et les lacunes à combler ?

Dans les affaires civiles, il peut s'avérer difficile d'associer correctement l'autre partie concernée à la procédure de réouverture/révision. En adoptant l'article 127 LTF, disposition que l'aOJ ne contenait pas, le législateur a cherché à garantir l'égalité des parties à la procédure.

En outre, il sied de rappeler que la réouverture/révision d'une procédure n'est pas la seule solution mais qu'il existe des alternatives notamment dans le cadre des affaires relevant du droit administratif.

2) Si la réouverture a été introduite sur la base de la jurisprudence des tribunaux nationaux, il serait utile de partager les exemples pertinents.

N/A

TURKEY / TURQUIE

CRIMINAL PROCEEDINGS

1. The notion of "retrial" has been regulated in Articles 311 to 323 of the Code of Criminal Procedure ("CCP") (Law no. 5271). The regulation in question which bases the retrial on the judgment of the European Court of Human Rights ("ECtHR") is enshrined in Article 311. The said Article provides that: *"... where a final judgment of the European Court of Human Rights has established that the criminal judgment has violated the Convention on the Protection of Human Rights and Fundamental Freedoms or its Protocols. In such cases, retrial may be requested within one year after the date of the final judgment of the European Court of Human Rights*". Furthermore, according to Article 172 § 3 of the CCP, if it is established in a final judgment of the ECtHR that the decision not to prosecute was taken without an effective investigation having been carried out and if a request is made to that effect within three months of the judgment becoming final, a new investigation is opened.

In our country, the retrial procedure in respect of criminal proceedings has been applied successfully in the case of *İşeri and Others v. Turkey* (no. 29283/07). The application of *Ümran Durmaz v. Turkey* (no. 3621/07) is an example decision in which Article 172 § 3 of the Code of Criminal Procedure has been applied.

2. Problems such as statutory time-limit in respect of penalties or cases arise in practice. On the other hand, as the provisions in question require relevant persons (applicants) to lodge a request, retrial cannot be conducted ex officio where applicants fail to lodge a request in due time. The relevant judicial organ and parties are kept informed of the judgment finding a violation within the scope of the execution of the judgment, thus enabling the relevant parties to become aware of the ECtHR's judgment.

3. In the domestic law system of Turkey, there is no provision allowing for retrial as applications lodged with the ECtHR are concluded by friendly settlement or unilateral declarations. Our laws allow for retrial only where a judgment finding a violation is rendered.

CIVIL PROCEEDINGS

1. The notion of "retrial" has been regulated in Articles 374 to 381 of the Code of Civil Procedure (Law no. 6100). The regulation in question which bases the retrial on the judgment of the ECtHR is enshrined in Article 375. The said Article provides as follows: "*... where a final judgment of the European Court of Human Rights has established that the judgment has violated the Convention on the Protection of Human Rights and Fundamental Freedoms or its Protocols."*

In our country, the judgments of *Dilipak and Karakaya v. Turkey* (nos. 7942/05 and 24838/05) and *Ruhat Mengi v. Turkey* (nos. 13471/05 and 38787/07) can be cited as examples of judgments in which the retrial procedure in respect of civil proceedings has been applied successfully. In the aforesaid applications, the domestic courts ordered the reimbursement of damages on the basis of the ECtHR's judgment.

– Problems such as the fact that cases become time-barred arise in practice.

– As a result of the retrial conducted in accordance with the ECtHR's judgment, court decisions that are contrary to the Convention are reviewed and revised, and thus the breach of applicant's right is remedied and awareness of persons about the European Convention on Human Rights and the judgments of the ECtHR is raised. It also enables the human rights law to develop harmoniously by paving the way for the European standards applied by the ECtHR in respect of human rights to be uniformly applied by the courts of the High Contracting States.

2. The relevant procedure codes provide for the right to lodge a request for retrial following the judgment of the ECtHR.