Review of the implementation of Recommendation (2000) 2 of the Committee of Ministers to the Member States on re-examination and reopening of certain cases at domestic level following judgments of the European Court of Human Rights

Rapporteur : Mr. Adrian SCHEIDEGGER (Switzerland)
Member of the Secretariat : Mrs Virginie FLORES

I. INTRODUCTION ON THE STATE OF PLAY OF AVAILABLE INFORMATION :

1. In its Recommendation (2000)2 on re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, the Committee of Ministers :

> *"I. Invites […] the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, restitutio in integrum;*
>
> *II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:*
>
> *(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and*
>
> *(ii) the judgment of the Court leads to the conclusion that*
>
> *(a) the impugned domestic decision is on the merits contrary to the Convention, or*
>
> *(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."*

2. All the member states have now provided information on the implementation of this Recommendation and all of the replies have been compiled into a single document for each member state. The contributions of other sectors of the Council of Europe, in particular the Parliamentary Assembly[1] and the Department for the Execution of Judgments of the Court, were also taken into account.

3. As regards this Recommendation in particular, it was decided to put greater emphasis on the specific issues raised during the second phase of the review. This approach differed from that used for the two other recommendations. It was preferred on account of the first phase of the exercise having already permitted a global picture of the possibilities of reopening and since it was now expedient to clarify certain issues without going back on what had already given rise to conclusions.[2]

---

[1] Working Document AS/Jur (2007) 35 rev.
[2] For further information on first phase of the follow-up exercise, the first review can be found in document CDDH(2006)008 Appendix I.

II. EVALUATION OF THE IMPLEMENTATION OF THE RECOMMENDATION

1) Means other than the reopening of proceedings by which judicial systems ensure the existence of adequate possibilities to achieve, insofar as possible, *restitutio in integrum*:

4. Few methods were described other than those already mentioned by member States during the first stage of follow-up. Thus other than re-examination, the following also appear:, tort liability, amnesty, grace, rehabilitation, un-conditional release, restoration of rights, procedural acceleration, abstention from execution of certain decisions or the correction of information in the public records such as removal from the judicial record, public excuse or pardon.

Concerning re-examination in particular

5. It is worth recalling that, in the context of the first review, it had been considered necessary to define the word "re-examination" as meaning a re-assessment, normally by the same decision-making body, of the situation that had given rise to a violation of the Convention, this being capable also of leading to the award of that which had been requested during the original procedure.

6. Re-examination is most often cited as the solution for obtaining, so far as possible, *restitutio in integrum* in above all the specific fields of civil law, for example family rights or those concerning a person's situation. Equally, many states submitted information indicating that re-examination would be possible in the specific fields of administrative law, such as authorisation to engage in an economic activity, law concerning the building and construction sector or the rights of foreigners and refugees.

2) Whether the possibility of reopening differs according to whether the proceedings at issue were unfair or whether it was their outcome that violated the Convention:

7. With the exception of a few (Finland, Moldova, Norway), the majority of member States make no distinction between the two situations.

3) Procedural rules applicable to the reopening of criminal proceedings:

8. In the majority of member States, the reopening of criminal proceedings is possible, either at the request of the applicant or at that of either the public prosecutor or some other public authority (Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, Spain, Switzerland, the "former Yugoslav Republic of Macedonia," Turkey and the United Kingdom), and legislative reforms to this end are underway in certain other states. Nevertheless, it has already been shown, in the context of the first follow-up sheets, that member States have implemented the Recommendation in different ways, for example as regards the competent bodies or the time-limits within which reopening is possible.

9. If the great majority of States have responded to the following questions, few have specified whether it is the normal rules of criminal procedure or rules specific to the reopening of proceedings that apply. One can certainly deduce that in the majority of States, the normal rules apply.

a) Concerning the costs of the procedure:

10. In most States, the legal costs can, under certain conditions, be at the State's expense (Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Sweden, Switzerland, Turkey and the United Kingdom). These conditions can include the admissibility of the request for reopening, the acquittal of the defendant or the fact that the person making the request has succeeded in obtaining the reopening of proceedings.

b) Concerning legal aid for the request to reopen:

11. A large number of States allow for the possibility of granting legal aid (Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany, Georgia, Hungary, Iceland, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Switzerland, Turkey and the United Kingdom).

c) Concerning the existence of a rule forbidding *reformatio in pejus*:

12. *Reformatio in pejus* is prohibited in many member States (Austria, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Luxembourg, Moldova, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Sweden, Turkey and the United Kingdom).

d) The rules governing the detention of the convicted person/ defendant once the application for reopening has been allowed:

13. Whilst States enjoy a margin of appreciation as regards the consequences of the decision to reopen a procedure, they still have to guarantee application of the principle of the presumption of innocence and the principles concerning provisional detention, in conformity with Committee of Ministers' Resolution DH(2004)31 in the case of Sadak, Zana, Dogan and Dicle v. Turkey, as seems to be the case upon reading the replies received. This reasoning is all the more clear when the main criterion for reopening is that a serious doubt subsists concerning the outcome of the first procedure or that the first conviction is fundamentally contrary to the Convention. Continuing to hold in detention would undoubtedly raise various questions with regard to articles 5 and 6 § 2 of the Convention.

e) Concerning the possible suspension of other proceedings:

14. Finally, as regards the extent to which the reopening of criminal proceedings implies the suspension of other proceedings, there do not seem to be pre-established rules, with the jurisdictions that handle the other proceedings taking their decision on a case-by-case basis.

4) The issue of possible re-examination in the context of a procedure for compensation made against the State on the basis of a finding of a violation of the Convention:

15. As certain States have indicated, this possibility is above all useful when there is no other possibility for obtaining re-examination or reopening, whether because there is no legal provision or because it would affect the principle of legal certainty, or simply because the objective pursued during the first procedure can no longer exist (for example, the right to exercise a professional activity for a particular period in the past). A sort of re-examination can thus take place, in the sense that the initial decision can be considered ill-founded so that compensation can be awarded (Germany, the Netherlands, Sweden). The decision will not, however, be modified without the procedure being reopened (Sweden).

III. CONCLUSIONS ON THE IMPACT OF THE MEASURES TAKEN ON THE LONG TERM EFFECTIVENESS OF THE CONVENTION

16. It has already been noted, during the first stage of follow-up, that important action in the area of reopening had been taken in response to the Recommendation. More than twelve member States have adopted legislation allowing the reopening of criminal proceedings, legislative reforms are underway (Italy) and a certain number of courts have developed their jurisprudence so as to allow reopening.

17. Thus, it is today possible to reopen criminal proceedings in the majority of member States. Around twenty member States allow for the possibility of reopening of civil proceedings following an individual application or the application of a public authority. For a minority of these, legislation does not contain a clear and specific example of the reopening of proceedings after the finding of a violation by the Court but existing general legislation or case-law might seem sufficiently "open" to allow this possibility. Around twenty member States allow for the possibility of reopening administrative proceedings, whether following an individual application or on the application of a public authority. It was underlined, in the first phase of the review, that when States have not given effect to the recommendation to allow for reopening of proceedings in the fields of civil and administrative law; major concerns expressed in this connection relate to the need for legal certainty and the need to protect the interests of good faith third parties.

18. When reopening is possible, it is necessary to ensure that specific limitations do not render the possibility impracticable in certain situations, for example the fact of too-short deadlines. In the same way, the absence of legal aid or the obligation to bear the costs of the procedure may, for the applicant, be just as much an obstacle to reopening a procedure. One can nevertheless welcome the fact that this is not the case in the great majority of member States.

19. Once reopening has been allowed, it is essential that the individual is treated as a defendant and that the presumption of innocence and the rules of provisional detention apply.

20. On the other hand, when reopening is not possible, it depends on States' practice whether re-examination can be an effective means of affording adequate relief, especially in certain types of civil or administrative case. It is apparent from the replies to the questionnaire that there also exists a great number of other ways chosen by member States to achieve, insofar as possible, *restitutio in integrum*.

21. If the impact on the long-term effectiveness of the Convention appears less obvious than for the other two priority recommendations, as it concerns more the interests of the applicant, the implementation of this Recommendation has nonetheless contributed to the effectiveness of the Convention. On the one hand, insofar as it has given rise to important reforms permitting reopening;

on the other hand, the fact that the national authorities reconsider the applicants' situation would allow one to think that lessons would be learned and that certain measures would not be repeated.

22. That said, if the progress achieved by member States is notable, the conclusions drawn by the Ministers' Deputies in May 2006[3] remain fully applicable:

"In order to achieve, as far as possible, restitutio in integrum, particularly through the re-opening of cases in the circumstances highlighted in the recommendation, the member states which have not yet done so should be urged to provide for the possibility of re-opening of criminal proceedings and be encouraged to consider introducing such possibilities in respect of civil and administrative proceedings. In this context, member states should also be invited to consider whether adequate possibilities exist for re-examination of a case at national level, which can be an important way to offer adequate redress without re-opening the domestic proceedings themselves, where such re-opening is not strictly called for."

[3] CM(2006)39 final / 12 May 2006 – Report by the Ministers' Deputies.