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The legal framework for the re-examination and re-opening of criminal proceedings following the finding of a violation by the European Court of Human Rights: an assessment of the legal framework of Albania

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Table of content

Executive summary

The re-examination or reopening of proceedings represents a manifestation of the classical principle of *restitution in integrum*, which aims at re-establishing the situation as it was before the violation and belongs to the category of individual and general measures. The way how the reopening of proceedings is regulated falls within the margin of appreciation of the State.

Although the European Convention on Human Rights contains no provision imposing an obligation on Contracting Parties to provide in their national law for the re-examination or reopening of proceedings, the existence of such possibilities have, in special circumstances, proven to be important, and indeed in some cases the only, means to achieve *restitutio in integrum.* An increasing number of States of Council of Europe have thus adopted special legislation providing for the possibility of re-examination or reopening. In other States the courts and national authorities have developed this possibility under existing law. The issue of reopening of proceedings as a form of *restitution in integrum* was the object of Recommendation R (2000) 2 of the CM to member states on the re-examination or reopening of certain cases at domestic level. In 2015 the Committee of Experts on the Reform of the Court (DH-CDR) reviewed conducted an exchange of information amongst the Member States in order to identify good practices or procedural obstacles to the reopening of proceedings. The findings of such analysis have been used as benchmark to review the situation of re-opening in Albania and formulate the related recommendations.

The European Court of Human Rights has reiterated its settled case-law to the effect that the Convention did not guarantee the right to the reopening of proceedings, and referred to the lack of a uniform approach among the member States as to the operational procedures of any existing reopening mechanisms. This freedom in the choice of means is not unlimited, first of all since it is exercised under the supervision of the Committee of Ministers (hereinafter CM), to which Article 46 § 2 of the Convention gives the power to supervise the execution of judgments of the Court and to assess the measures taken by the defendants. Secondly, the Court is not entirely absent from the supervision of the execution of its judgments. For example, in recent years, the Court has insisted that the means used should be compatible with the conclusions contained in its judgments and takes a more and more frequent position on the most effective means to achieve implementation.

Since 2014, Albania has been working on the justice system reform. On 30 March 2017 the Albanian Parliament has approved the law no. 35/2017 “On some additions and amendments to the law no. 7905, of 21.03.1995 “Criminal Procedural Code of Albania”. This law aims, among others, to harmonize its provisions with the best international standards and jurisprudence of ECtHR. Some of these amendments address at some extent two of three general measures that were indicate by the Committee of Ministers when exercising its supervisory role on the group of cases “Caka”, “Berhani”, “Cani”, “Laska and Lika”, “Shkalla”, “Izet Haxhia” and “Kaçiu and Kotorri” against Albania as non-implemented, respectively for the failure to secure the appearance of witnesses and the lack of guarantees surrounding criminal proceedings in absentia. The third general measure, for ensuring the right to defend oneself in court, it is noted that the article 437 of the CPrC that foresee the procedure of trial before the Supreme Court, has not changed in the framework of judiciary reform, so the general measure is not implemented (Cani versus Albania). Given to the specificity of the new jurisdiction of the High Court, the presence of the accused in its proceeding and the right to defend itself might be a controversial issue. Domestic jurisprudence following the approval of CPrC will be the most effective tool to measure the effectiveness of the new provisions and consequently to assess the implementation of these pending general measures.

Prior to the approval of the recent amendments to the new Albanian CPrC, the criminal procedural legislation did not provide for the re-examination of criminal proceedings following a decision of ECtHR but for other grounds. The re-examination of the proceedings in criminal cases where ECtHR's judgments have found a violation of Article 6 of the Convention, was conducted under the ruling of the Constitutional Court through judgment no. 20, dates 01.06.2011 that recognized the jurisdiction of the Supreme Court to provide reconsideration of final criminal decisions, which are based on ECtHR findings. With the law no.35/2017 "On some amendments to the Criminal Procedural Code of Albania, as amended", the article 450 of CPrC has undergone some changes. by reflecting the necessity that derives from the judicial practice as well as regards the procedure, due to the change of jurisdiction of the Supreme Court.

The findings of this Report indicate that, generally speaking, the amendments introduced have the potential to bring the situation in line with European standards and practice. However, considering that they only recently came into force and that they have not been subject to the judicial practice, it is premature and difficult to reach final conclusions. One of the findings indicate that althought the practice of Albania has been to provide for re-opening of proceedings following a judgment of the European Court, neither the previous nor the new provisions of the CPrC explicitly refers to "re-opening" of criminal trials. Within the title "Review", the Code contains reference to "re-adjudication of the case" which is something that, for instance, does not require a full re-opening but can take the form of a mere reassessment, by the same judicial body, of the situation that gave rise to the violation of the ECHR.

The *prohibition of reformatio in pejus*, of *beneficium coahesionis* and *trial in absentia* appear in line with European practices, and so is the procedure whereby the request for review is decided. The lack of detail of the amendments, however, are an issue of concern: for instance, it is not clear whethre review is only available in cases where the Court established a violation of the right to a fair trial or also when their outcome violated the Convention. Alternatives to re-opening (better, review), such as 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 are not envisaged. A better internal coordination, for instance in relation with the norms regulating legal costs and expenses and legal aid would have been advisable and ensure that, at least in a number of clearly meritorious circumstances, as identified in the European practice, the applicant benefits from such measures when requesting reopening. legal expenses are not borne by the applicant. The full application of the principle of presumption of innocence and of the presumption in case of liberty remain outstanding issues, that might be clarified by the judicial practice. Lastly, the presence of transitory provisions would have been welcomed, considering that some of the the requests for review were lodged in the High Court before the entry into force of the amendments.

The present report has been based on an unofficial translation of the Albanian CPrC prepared by EURALIUS. Errors due to interpretation are thus possible.

Main Report

1. Re-examination or reopening of proceedings under the European Convention on Human Rights: an overview

According to Article 46 para. 1 of the European Convention on Human Rights (herein after ECHR) "the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties ". This provision has been interpreted meaning that any judgment by the ECtHR condemning a State entails for that State three types of obligations:

a) to pay the just satisfaction awarded by the European Court of Human Rights (hereinafter the Court or ECtHR) under Article 41 ECHR;
b) to ensure that the violation has ceased and that the consequences have been erased to the extent possible; and
c) to avoid future violations similar to those established in the judgment.

In short, the obligations arising from the Court's judgments fall under three main categories: just satisfaction, individual measures and general measures. The ECHR does not contain any details as to how to comply with a judgment delivered by the Court. Indeed, the latter recalls in its jurisprudence that the findings of violations are in principle declaratory; it also recognizes the freedom of States to choose the means to be used in their domestic legal order to fulfil their obligations under Article 46. In other words, States are subject only to an obligation of result and not of conduct.

The re-examination or reopening of proceedings represents a manifestation of the classical principle of *restitution in integrum*, which aims at re-establishing the situation as it was before the violation and belongs to the category of individual and general measures. How the reopening of proceedings is to be regulated, however, falls within the margin of appreciation of the State.

This was confirmed by the Grand Chamber of the Strasbourg Court in the recent case of Ferreira v. Portugal (no. 2) (application no. 19867/12). The case concerned the rejection by the Supreme Court of a request lodged by the applicant for revision of a criminal judgment following a judgment delivered by the European Court of Human Rights on 5 July 2011. The Court reiterated its settled case-law to the effect that the Convention did not guarantee the right to the reopening of proceedings, and referred to the lack of a uniform approach among the member States as to the operational procedures of any existing reopening mechanisms. The Court emphasised that in its judgment of 5 July 2011 the Chamber had held that a retrial or reopening of the proceedings represented “in principle an appropriate way of redressing the violation”. A retrial or the reopening of the proceedings had thus been described as an appropriate solution, but not a necessary or exclusive one. The Court had thus refrained from giving binding indications on how to execute its judgment. The Court could not conclude that the Supreme Court’s reading of the Court’s 2011 judgment, viewed as a whole, had been the result of a manifest factual or legal error leading to a denial of justice. Having regard to the principle of subsidiarity and to the wording of the Court’s judgment of 5 July 2011, the Court considered that the Supreme Court’s refusal to reopen the proceedings as requested by the applicant had not distorted the findings of that judgment and that the grounds on which it was based fell within the domestic authorities’ room for manoeuvre (“margin of appreciation”).

Obviously this freedom in the choice of means is not unlimited, first of all since it is exercised under the supervision of the Committee of Ministers (hereinafter CM), to which Article 46 § 2 of the Convention gives the power to supervise the execution of judgments of the Court and to assess the measures taken by the defendants. Secondly, the Court is not entirely absent from the supervision of the execution of its judgments. For example, in recent years, the Court has insisted that the means used should be compatible with the conclusions contained in its judgments and takes a more and more frequent position on the most effective means to achieve implementation. It thus indicates the general and individual measures of execution that States could adopt. Amongst others, the reopening of the internal proceedings occupies a prominent place.

In most cases decided by the Court, the reopening clause for violations of article 6 ECHR is inserted in the part relating to article 41 ECHR on just satisfaction. This provision indicates "*If the Court find that there has been a violation of the Convention or the Protocols thereto, and it the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*" In concrete terms, Article 41 states that the payment of just satisfaction arises only in cases where the *restitution in integrum* is not possible. It therefore seems logical that, when possible, the Court favours the reopening of proceedings as a measure that replaces or supplements the just satisfaction. In this logic, the Court uses the reopening clause by granting at the same time just a sum for moral damage or uses the reopening clause but refuses to grant just satisfaction on the ground that the finding of a violation of article 6 § 1 constitutes in itself (Sejdovic v. Italy[1]). The Court may also propose an alternative to the State: either uphold the applicant's request to be retried or to pay compensation for non-pecuniary damage (Claes and Others v. Belgium[2]). The Court may also reserve the application of article 41 in order to verify, within the scope of its competence under that article, whether or not the measures adopted by the respondent State to enforce the conviction

Since the Salduz[3] judgment of 2008, the usual practice of the Grand Chamber and of the various sections is that of including the reopening clause only in the statement of reasons for the judgment (Cudak v. Lithuania [GC][4], Taxquet v. Belgium [GC][5], Laska and Lika v. Albania[6] etc.). However, separate opinions continue to be expressed on this point, arguing for the insertion of the reopening clause in the operative part of the judgments. Some of the Judges continue to believe that is the operative part of the judgment that is binding on the parties for the purposes of article 46 § 1 and it is therefore not immaterial from a legal point of view that certain considerations of Court also appear in the operative part. In any event, the Court reserves the right to adapt its practice when justified by the circumstances of each case and the nature of the violation established.

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[1] Sejdovic v. Italy, application no. 56581/00 [GC], 1 March 2006, available at http://hudoc.echr.coe.int/eng?i=003-1598935-1674030

[2] Claes and Others v. Belgium, applications nos. 46825/99, 49716/99, 49104/99, 47132/99, 47502/99, 49010/99 and49195/99, 02 June 2005, available at http://hudoc.echr.coe.int/eng?i=001-69230 (French only).

[3] Sejdovic v. Italy, application no. 56581/00 [GC], 1 March 2006, available at http://hudoc.echr.coe.int/eng?i=003-1598935-1674030

[4] Cudak v. Lithuania, application no. 15869/02, [GC], 23/03/2010, available at http://hudoc.echr.coe.int/eng?i=002-1027

[5] Taxquet v. Belgium, application no. 926/05, [GC], 16/11/2010, available at http://hudoc.echr.coe.int/eng?i=001-115758 (Albanian version)

[6] Laska and Lika v. Albania, applications no. 12315/04 and 17605/04, 20/04/2010, available at http://hudoc.echr.coe.int/eng?i=002-980

The reopening clause has been thus used systematically by the Court in cases related to property and to fairness of proceedings, both civil and criminal. In connection to the latter, there are several types of violation of article 6 ECHR for which the clause may be applied. A few examples would be:

a) Infringement of the right of access to a Court;
b) the right to participate in the trial or to be heard by the court;
c) violation of the principles of adversarial and equality of arms;
d) infringement of the right to examine witnesses for the prosecution or for the defence;
e) infringement of the right of the accused to be informed of the nature of the charge against him, and the right to dispose of the time and facilities necessary for the preparation of his defence;
f) the right to have the assistance of a lawyer;
g) interference with the right not to have information collected as a result of entrapment used in criminal proceedings;
h) interference with the right that statements obtained under torture be used.

If proceedings are not reopened, a range of individual measures may be sufficient to offer redress in criminal cases. These may include an agreement not to enforce the domestic measure at issue, including a judgment such as in the case of Muyldermans v. Belgium , Resolution DH (96) 18 of 9.02.1996, where the enforcement of the Audit Court judgment at issue was waived under a subsequent law. In some states, rectification of criminal records does not require a retrial: for instance, Resolution ResDH (2006) 79 of 20 December 2006, on 32 judgments against Turkey in 1999, 2000, 2002, 2004 and 2005 concerning freedom of expression following convictions under former Article 8 of the Law against Terrorism No. 3713, refers to the following individual measures: ex officio removal of the convictions from the judicial records and statistics of the Ministry of Justice and automatic lifting of restrictions on applicants' civil and political rights. In some countries the legislation also has special provisions, such as the possibility of suspending enforcement of a sentence. Mention should also be made of acts of clemency and reduction of sentences, with procedures varying considerably from one State to another. In the past, pardons have in fact constituted an adequate measure of relief for a number of applicants and in cases where reopening of proceedings is not possible, as in the Belgian cases concerning infringements of the applicants' right to defend themselves through legal assistance of their own choosing at different stages of criminal proceedings. Another possibility is the unconditional release of the applicant or, failing that, release on parole. "Positive" action, which is more noteworthy than that described above since it entails the adoption of new provisions rather than the annulment or repeal of the contested measure, is also less widespread in practice. With difference of these alternative measures, re-examination or re-opening is a more effective remedy for *restitutio in integrum*, because it might give rise to a decision on the innocence/acquittal of the person (there is a probability), by fully re-establishing the situation of the person before the violation.

Re-opening is possible in a number of Member States[7] following unilateral declarations or friendly settlements. However, as the Governments' commitments in unilateral declarations and friendly settlements cannot be imposed on the judiciary or legislative power, recognition of their force to justify a re-opening might require additional legislation.

[7] Czech Republic, Georgia, Latvia, the Republic of Moldova, Poland, Slovenia.

The issue of reopening of proceedings as a form of *restitution in integrum* was the object of Recommendation R (2000) 2 of the CM to member states on the re-examination or reopening of certain cases at domestic level (Annex I). In 2008 the CM's Steering Committee for Human Rights (CDDH) reviewed the implementation of the Recommendation and in 2015 the Committee of Experts on the Reform of the Court (DH-CDR) reviewed conducted an exchange of information amongst the Member States in order to identify good practices or procedural obstacles to the reopening of proceedings. The findings of such analysis have been used as benchmark to review the situation of re-opening in Albania and formulate the related recommendations.

2. Obstacles related to re-opening of a criminal case following the finding of a violation of article 6 of ECHR: a comparative perspective

As already indicated, in 2008 the CDDH reviewed the implementation of the Recommendation and in 2015 the Committee of Experts on the Reform of the Court (DH-CDR) conducted an exchange of information amongst the Member States in order to have an overview of how Member States are dealing with the issues arising in connection with the re-opening of proceedings. What follows is an overview of the findings of the review.

In general, the right to have unfair or otherwise unjust proceedings' reopened is recognised at national level. The reopening of proceedings or the re-examination of the situation of the applicant is not, however, the only mean as there is, indeed, a plethora of examples in the CM's practice within the framework of its supervisory role of execution of the Court's judgments, whereby other solutions were found and enabled the placement of the applicant back, insofar as possible, in the situation the victim would have been in had the violation not happened. It is noteworthy to mention *ad hoc* solutions through the re-examination of administrative proceedings or through compensation for the loss of an opportunity – which the Court itself has often applied in its case-law by affording the applicant pecuniary compensation for the loss of an opportunity to avoid dealing with sensitive matters such as legal security or third parties' interests. Reopening is thus a significant means, but one among many others. However, it is true that the possibility to obtain a re-examination or a reopening at domestic level often facilitates the execution process and speeds up its conclusion. Currently, thirty-three States allow the reopening of criminal proceedings.[8] In thirty countries laws provide for the reopening of criminal proceedings.[9] In two States, before being introduced into criminal legislation, reopening was first introduced by a judgment of the Constitutional Tribunal through a dynamic interpretation of the existing provisions.[10]

Successful cases of reopening have been recorded in a number of member States,[11] where the finding of an article 6 ECHR violations led to the annulment of the initial impugned domestic judgments and the re-examination of the case resulting in the rectification of the

[8] Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and Turkey.

[9] Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Estonia, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Switzerland, Turkey.

[10] Spain, judgment 245/1991 of 16 December 1991 and Italy, judgment No. 113 of 4 April 2011.

[11] See, for example, Estonia, France, Poland, Russian Federation, and Slovak Republic.

shortcomings identified by the Court with the same or a different outcome (e.g. acquittal, reduction or suspension of a sentence).[12]

2.1 Res judicata and legal certainty

The two main obstacles to the re-opening of proceedings have been identified in the notions of *res judicata* and the principle of legal certainty (finality of litigation, statute of limitation). The following solutions, however, were noted to overcome obstacles. First, the impossibility of reopening can be overcome by a dynamic interpretation of an existing provision of the Constitution, the Organic Law regarding the Constitutional Tribunal and the Law on Criminal Procedure. Secondly, the principle of direct application of the Convention and the direct effects of the Court's judgments in the national legal order can be invoked to overcome the principle of res judicata and legal certainty. This because the Court's judgments are to be considered "writ for execution" and "an exceptional circumstance" requiring extraordinary revision of judgments. In Greece, for example, reopening is ordered only in cases where the violation found has negative repercussions for the judgment of the criminal court and the damage caused can only be repaired through re-examination of the case. It is for this reason, moreover, that the Court of Cassation has refused reopening in cases of excessive length of proceedings, holding that this violation does not affect the judgment of the domestic court. Amendments to legislations have also been presented (e.g. France).

Restrictive criteria for reopening can also be overcome by a non-formalistic interpretation by domestic courts. For instance, in Poland, the Supreme Court applied a non-formalistic interpretation of a relevant provision to allow the reopening of compensatory proceedings for unjustified detention (violation of Article 5 para. 5 of the Convention). Furthermore, during the exchange of views and the round table organised by the Department for the Execution of the Court's judgments, it was noted that, time-limits for seeking reopening shall be reasonable, take into account the length of proceedings before the Court, and be more clearly defined.

Procedural difficulties linked to the passage of time can be dealt with by allowing other persons to reopen, such as the prosecutor or family members in case of death or absence of the person concerned. One State amended its law to this purpose and provided for an extensive list of representatives. In case the passage of time affects the possibility to hear witnesses, efforts shown by the jurisdictions to locate them are considered sufficient for the CM to close the case.

3. Execution by Albania of the judgments of the ECtHR in case of violation of article 6 ECHR (fairness): overview of general measures and their implementation

In its supervisory role, the CM has been examining the group of cases, respectively "Caka", "Berhani", "Cani", "Laska and Lika", "Shkalla", "Izet Haxhia" and "Kaçiu and Kotorri" against Albania, regularly since 2009, most recently during its 1193rd meeting (March 2014) (DH) on the basis of the action plan of 26/02/2014 (DH-DD(2014)364). The CM on that occasion urged the authorities to provide information on individual measures, as well as on the adoption of general measures concerning fair trial, measures taken or envisaged in relation to the use of evidence obtained as a result of torture, ill-treatment by the police and lack of

[12] Estonia, France, the Netherlands, Poland.

access to a lawyer in custody. In reply, the authorities submitted revised action plans on 27/04/2015 (DH-DD(2015)491) and 6/07/2016 (DH-DD(2016)828), providing information on the progress achieved in the adoption of individual and general measures. In the 1265th meeting (20-21 September 2016), the CM noted that substantial progress has been achieved in the adoption of both individual and general measures in the abovementioned group of cases.

The reopening of the proceedings has been the general measure foreseen in all the above-mentioned cases. This measure was implemented by the Albanian State 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 review of final criminal decisions, which are based on ECtHR findings. 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 High Court of Albania, following the requests lodged by most of the applicants, affected by ECtHR judgments (as above mentioned).

As to the other general measures, the 2016 action plan of Albanian Government explains in detail the general measures adopted to address all particular shortcomings discerned by the European Court in this group of cases. The shortcomings that have been addressed through general measures are as follows:

a) Use of incriminating statements obtained as a result of torture

The authorities noted in the action plan that this problem existed between 2001 and 2005 and that since then numerous amendments to the CPrC have been implemented, including on the rights of the accused during the interrogation phase and access to a lawyer from the first moment of arrest or detention. The provisions of the CPrC set principles as regards, inter alia, prohibition on using the defendant's statement as testimony, self-incriminating statements and rules on interrogation. In order to ensure proper judicial practice in this respect, the Supreme Court and the School of Magistrates were informed of the relevant findings of the ECtHR. The authorities confirm these measures have been effective in preventing repetition of similar violations and that this problem is of a historic nature.

b) Lack of a procedure for identification of persons and items

The CPrC, as amended in 2013, sets out clear rules on the process for identification of persons or items, including on identity parades. The action plan provides examples of a change in the domestic courts' practice following the judgments in the present cases. By a letter of 14/02/2013 the General Prosecution Office informed that its instructions were rigorously implemented. The action plan confirms that no cases indicating shortcomings similar to those found by the European Court have been reported since then.

c) Lack of access to a lawyer in police custody

The right to a lawyer from the initial moment of the detention is included in the CPrC, as amended in 2013. In order to address shortcomings which could stem from improper judicial practice, such as lack of convincing evidence in the domestic courts' judgments justifying conviction, failure to have due regard to some testimonies or improper calculation of the time-limit to lodge an appeal, numerous awareness-raising measures were taken in 2012-2014 (round tables, seminars, training for judges, police and prosecutors).

3.1 Pending issues

The shortcomings with respect to which general measures have not yet been implemented are the following:

a) Failure to secure the appearance of witnesses:
b) Lack of guarantees surrounding criminal proceedings *in absentia*;
c) Ensuring the right to defend oneself in court, including an amendment to the CPrC on summoning the defendant or witnesses in his favour;

In the light of the information summarised above, the CM closed its supervision of the cases in which individual and general measures have been taken, namely: Berhani (where the issue of general measures concerning the appearance of witnesses will be followed under the Caka case); Shkalla (the general measures concerning criminal proceedings *in absentia* will be followed in the Izet Haxhia case); Laska and Lika; Kaçiu and Kotorri. The Committee continued the examination of the outstanding general measures in the context of the cases Caka, Izet Haxhia and Cani. The committee adopted Final Resolution CM/ResDH(2016)272, and, for the cases remaining under the Committee's supervision, invited the authorities to provide information on progress with the adoption of general measures in relation to the outstanding issues.

The new legislation addresses the above mentioned pending issues in the following way. In relation to the failure to secure the appearance of witnesses, in the article 164 of the Criminal Procedural Code is foreseen the right of the court to impose a fine for the witnesses that are not present in the trial without a reasonable ground (cause). In the framework of judiciary reform, the article 402 of the new CPrC was amended and foresees the possibility of verbal notification of the witnesses from the officer of judicial policy. In relation the right to defend oneself in court (Cani against Albania), it is noted that the article 437 of the CPrC that foresee the procedure of trial before the Supreme Court, has not changed in the framework of judiciary reform, so the general measure is not implemented. Article 437 of Criminal Procedural Code provides that a defence lawyer must represent the accused and private parties. As to the procedure, paragraph 5 of the said section states that the judge rapporteur introduces the case, followed by the prosecutor's oral submissions and the defence lawyer's pleadings. No counter-pleas are allowed. Meanwhile, in the framework of the judiciary reform the jurisdiction of the High Court is limited, by aiming to reduce its overload and to damage the primary function of this court, that of verification of implementation of the law form the lower courts and unification of the judiciary practice. Now, based on the article 14/a of the CPrC the High Court examines the recurs (appeal before High Court) in advisory chamber composed by three members, examines the unification or development of judicial practice in advisory chamber composed by 5 members and examines the changes of judiciary practice in Unified College (with all its members). Given to the specificity of its jurisdiction, the presence of the accused in its proceeding and the right to defend itself might be a controversial issue. In conclusion, the domestic jurisprudence following the approval of CPrC will be the most effective tool to measure the effectiveness of the new provisions (amendments) and consequently to assess the implementation of these pending general measures.

3.2 The judicial reform in Albania

The CM, monitoring the executions of general measures provided in the group of cases mentioned above, urged the Albanian authorities rapidly to finalise the reform of the judicial system aimed in general to ensure trials in compliance with Article 6 of the Convention and to, among other things, address the outstanding issues in this group of cases.

Since 2014, Albania has been working on the justice system reform. The first phase of this reform consisted in changing constitutional and legal provisions related directly with justice system and its institutions such as Constitutional Court, courts of all levels, prosecution, criminal, administrative and civil procedures, etc. Among 27 draft laws, known as the "package of laws of judiciary reform", on 30 March 2017 the Albanian Parliament has approved the law no. 35/2017 "On some additions and amendments to the law no. 7905, of 21.03.1995 "Criminal Procedural Code of Albania". This law aims, among others, to harmonize its provisions with the best international standards and jurisprudence of ECtHR.

4. Assessment of the current legislation and practice of Albania in the light of European standards and practice and relevant recommendations

4.1. Request to review criminal proceedings: the national framework

Prior to the approval of the recent amendments to the new Albanian CPrC, the criminal procedural legislation did not provide for the reopening of criminal proceedings following a decision of ECtHR. However, in practice, the judgments of the ECtHR had direct effect in the domestic legal system, based on article 1221 and article 17/2 of the Constitution, also pursuant to Article 46 ECHR. ECtHR's judgments finding a violation of Article 6 ECHR on grounds of lack of guarantees to the right for a fair trial of the applications, 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, dates 01.06.2011 that recognized the jurisdiction of the Supreme Court to provide reconsideration of final criminal decisions, which are based on ECtHR findings. Such jurisdiction has been accorded on the interpretation of articles 450 and Article 102 of the Criminal Procedural Code.

The new grounds that are foreseen for the review of final criminal judgments are some of the procedural novelties that was introduced by the new CPrC of Albania, by reflecting the necessity that derives from the judicial practice. The novelty is to be commended as it introduces certainty in a situation which otherwise, should have been dealt by way of judicial interpretation. More concretely, with the law no.35/2017 "On some amendments to the Criminal Procedural Code of Albania, as amended", the article 450 of CPrC, letter "b" was modified and three new letters were added after the letter "ç", respectively the letters "d", "dh" and "e". For the purpose of this Report, the focus will be on the following:

d) if the ground for the revision of the final decision results from a European Court of Human Rights judgment making the re-adjudication of the case indispensable.The request shall be filed within 6 months from the notification of that decision;

dh) if the extradition of a person tried in absentia is granted on the explicit condition that the case be re-tried. The request for re-trial may be submitted within 30 days from the date of extradition of the person. The request submitted within that time limit may not be refused..

e) if the person is tried *in absentia* pursuant to Article 352 of this Code and requests the case to be re-tried. The request shall be filed within thirty days from the date he is informed. The request submitted within that time limit may not be refused.[13]

In the framework of justice system reform, the constitutional amendments brought some amendments in the CPrC, inter alias, as regards the procedure of the "Review". In the previous Constitution, the Supreme Court has initial and review jurisdiction (article 141). Meanwhile in the new Constitution, as amended by the law No. 76/2016 "On some additions and amendments in the law no. 8417, date 21.10.1998, "Constitution of the Republic of Albania", article 141 does not foresee the review jurisdiction of the Supreme Court. According to such article the Supreme Court examines the cases related to the understanding and implementation of the law, in order to ensure unification or development of judicial practice, according to the law.

However, it should be pointed out that the provisions of both previous and amended' CPrC do not explicitly refers to "re-opening" of criminal trials but, within the title "Review", contains reference to "re-adjudication of the case" which is something that, for instance, does not require a full re-opening but can take the form of a mere reassessment, by the same judicial body, of the situation that gave rise to the violation of the ECHR.

Also, it is not clear whether the court examining the request of review will determine if there is a need for a full re-opening or a mere re-assessment of the case, or whether the retring court will have discretion to decide on this. The margin of appreciation of the judicial instance that will examine the request of review is not clear and the CPrC does not provide guidance in this respect. The lack of detailed provisions in CPrC, might create a hamstring in judicial practice and create basis for wide subjective assessment from the courts.

After the constitutional amendments and the amendments in the CPrC, the Supreme Court is not anymore, the court that examines or decides on the requests of review. According to the article 453 of the new CPrC, the request of review is examined by the advisory chamber of the court of first instance that has issued the judgment, without the presence of the parties. When the request has been made for none of the letters foreseen in the article 450, or has been made from those that do not have such right, or when it is clearly ill founded, the court rejects it. When the request is accepted, the competent court of first instance decides to send the case for retrial from another chamber of the same court or in the appeal court, when the request is made against its decision. The right of appeal against such decision is not permitted.[14]

Article 454 of the new CPrC provides that the court that examines the request of review has the right to suspend the execution of the conviction or of the civil consequences of the judgment. Such decision might be appealed in the Court of Appeal, meanwhile the decision of the last court (appeal court) might not be appealed.

[13] EURALIUS translated text of CPrC constitutes an unofficial document.

[14] This situation does not pose any problem as far as fair trial is concerned. Indeed, article 6 is not applicable to proceedings concerning an application for the reopening of civil proceedings which have been terminated by a final decision (see Sablon v. Belgium□, § 86). This reasoning also applies to an application to reopen proceedings after the Court has found a violation of the Convention (see Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC], § 24).

By comparing the ground of review related to ECtHR' jurisprudence as it is foreseen in the new Criminal Procedural Code with the analogue ground of review in the Civil Procedural Code, it is a noted a difference in the way of formulation. More concretely, according to the article 494 of the Civil Procedural Code, the request for review might be lodged *inter alia*, when the ECtHR finds a violation of the ECHR and its protocols, ratified from Republic of Albania. In this article is not foreseen the condition that is provided in the ground of review in criminal proceeding that is rephrased with the wordings "when the ground for reviewing the final judgments results from the judgment of the ECtHR that makes necessary the retrial of the case". By this wording "that makes necessary the retrial of the case" the CPrC has provided with some discretion the national judge, who will reason the necessity of the retrial of the case, meanwhile in the civil procedures the review seems automatic if the ECtHR finds a violation of the European convention and its protocols.

4.1.1 European practice

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), under the normal rules of criminal procedure.

Recommendations

1. Whilst the introduction in article 450 CPrC of letter d) is welcomed, as it introduces certainty in a context so far regulated by way of judicial interpretation, the provision lacks detail. Thus, it is recommended that it is either reformulated so as to clearly indicate in which situations the case should be re-opened or, in line with the European practice, list the various forms that review can take. Such alternatives must be available in cases where the Court established a violation of the right to a fair trial. The following options might be considered in the light of the European practice: 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.

2. In light of the international practice, it is recommended that the letter of the law better specifies that the request for review can be lodged either when the proceedings were unfair or their outcome violated the Convention.

3. Although so far the judicial practice on re-opening seemed to recognize the right to request re-trial only to the victim of the violation established by the Strasbourg Court, something which is in line with Recommendation No. R (2000) 2 (and the margin of appreciation it recognizes to States in determining who is empowered to request the re-examination), it is a fact that article 451 CCP also lists the Prosecutor as one of the persons entitled to request the revision. This interpretation is line with the European practice, as in the majority of member States the tendency is to link re-opening of criminal proceedings either at the request of the

applicant or at that of either the Public Prosecutor or some other public authority. This approach seems to better serve the interest of justice and protection of human rights.

4. The law no.35/2017 "On some amendments to the Criminal Procedural Code of Albania, as amended" do not foresee any transitory provisions what occurs with the requests for review that are lodged in the High Court before this law entered into force. Such issue might create a confusion for the judicial practice of this court for these kinds of requests. An analogue problem was discussed in the past with the law no.49/2012 on administrative courts and trial of administrative disputes. Law no. 49/2012 did not foresee any transitory provision on the applicable law for administrative disputes that were in the process in civil courts or that were not examined until the date of the establishment of administrative courts. In this case, the legal vacuum created as a result of lack of transitory provisions was addressed with the Unifying Decision of the High Court no.3 date 06.12.2013.[15]

4.2 Legal costs and expenses and legal aid: the national framework

With the law no. 35/2017 "On some amendments to the Criminal Procedural Code of Albania, as amended", the articles on legal representation of defendants (articles 48 and following of CPrC) have undergone some changes. With difference to the previous Code, these articles foresee the provision of free legal aid from the licensed attorneys, not only for defendants who do not possess the sufficient financial incomes but also for other categories of defendants in which the free legal aid is obligatory, such as for persons under 18 years old, for persons that could not speak and write, for disabled persons that are not capable to realize themselves the right of defence, for persons accused for a criminal offence that is convicted in the maximum, not less than 15 years with prison, for persons accused for a criminal offence according to the article 75/a, letter "a" and "b" of the Code (corruption and organized crime), for persons that are interrogated/questioned in the quality of arrested or detained, for persons who have been declared by a court as escaped or in absentia and for other cased foreseen in the law. The Criminal Procedural Code does not foresee explicitly the grant of legal aid to the person who wishes to review the final decision, but as it refers to the legislation into force for other cases of such legal aid that the CPrC could not foresee. The judiciary reform continues to be in process as the whole package of laws that will reform justice system is not yet finalized. One of the draft-laws pending is the new draft law on legal aid that will establish the forms and content of state guaranteed legal aid, the conditions and procedural rules for benefitting of state guaranteed legal aid and the rules for the organisation and administration of state guaranteed legal aid. This draft has changed continuously during the parliamentary procedures and according right now a new version will be consulted again with stakeholders and civil society.

4.2.1 European practice

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

[15] http://www.gjykataelarte.gov.al/web/Vendime_Unifikuese_39_1.php

acquittal of the defendant or the fact that the person making the request has succeeded in obtaining the reopening of proceedings.

A large number of States allow for the possibility of granting legal aid to the person who wishes to re-open proceedings (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).

Recommendations

5. The newly introduced legislation on re-opening should be coordinated with the norms regulating legal costs and expenses and ensure that, at least in a number of clearly meritorious circumstances, as identified in the European practice, legal expenses are not borne by the applicant;

6. The newly introduced legislation on re-opening should also be backed up by the provisions on free legal aid, explicitly entitling applicant to apply for it.

4.3 Reopening and reformatio in peius: the national framework

Reformatio in peius (from Latin *reformatio*, 'change' or 'reformation', and *peius*, 'worse') is an expression used in law meaning that a decision from a court of appeal is amended to a worse one. This means that following an appeal, the appellate court cannot put a sole appellant in a worse position than if he had not appealed the first instance decision.

Article 449, paragraph 2 of the new CPrC foresees one the most debatable provisions of this Code during the drafting process, in the framework of judiciary reform. Prohibition of *reformatio in peius* is clearly spelled out in the new provisions of CPrC for the review. Discussions in the media and public put into question the lack of effectiveness of this article for judgments that have acquittal from the accusation defendants accused for corruption. According to article 449/2, the review of the final judgment of acquittal or conviction **is not allowed when it aims at aggravating the position of the convicted person**.

4.3.1 European practice

Reformatio in pejus following re-opening 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).

4.4 Reopening and beneficium cohaesionis: the national framework

Beneficium cohaesionis is a Latin phrase that indicate that the beneficial effects of an appeal or revision judgments are also applied to those defendants who have not lodged it and as far as they are concerned, for instance in relation to material errors or establishment of facts.

In the case of re-opening, article 455 and following articles of CPrC do not provide explicitly *benefecium cohaesionis.* Even though, from the interpretation of other procedural rules foreseen in other articles of CPrC beneficial effects of an appeal or revision judgment might be applicable to other defendants who have not lodged it. Article 416 paragraph 1 CPrC foresees that "The appeal lodged by the defendant that is not based solely on personal grounds, extends its effects to other defendants". According to the article 425, paragraph 1 CPrC the Appeal Court examines the case within the grounds raised in the appeal. For issues pertaining to the law that should be examined *ex officio* as well as for grounds raised in the appeal that are not related to the personal motives, the Court of Appeal examines also the part of appeal that is related to the co-defendants who have not filed an appeal. In the article 447, paragraph 4 of CPrC is foreseen the procedure of re-examination of the case after the High Court has decided to abolish the decisions of lower courts. In this case, the abolishment of the decision has the same effect for the defendants that has not filed a *rekurs* (appeal before the high court), with the exception of cases when the ground of abolishment is personal.

Even in the judiciary practice, *beneficium cohaesionis* was applied as for example in case Vladimir Laska & Artur Lika v. Albania. After the judgment of the European Court on Human Rights, following the request of review of Mr. Valdimir Laska and Mr. Artur Lika, the High Court has accepted their request. Mr. Behar Lika, co-defendant with the applicants did not lodge the request for review. Nevertheless, the High court has decided to abolish the decision no. 793, date 22.12.2002 of the High Court and the decision no. 145, date 09.09.2002 of the Appeal Court in Shkodra and to send the case for re-trial to the Appeal Court of Shkodra, with another chamber of judges. The abolishment of this decisions has affected also Mr. Behar Lika who was re-examined with both applicants from Appeal Court of Shkodra.

As mentioned before, the provisions on review of final decisions and retrial after a request for a review is accepted, are very general and are not elaborated in detail. With regard to the *beneficium cohaesionis*, the future judicial practices might reveal cases in which the defendant who have not lodged a request for review might not want to be part of the procedure of retrial if the review of other co-defendants is accepted. This is something that might also affect those who have lodged such requests and for example it relates with the feasibility of their criminal status that might be addressed in the parallel with a pardon, amnesty or conditional release. Basically, they might be not more interested to be part of the processes of review or retrial. What will happen in these cases will be elaborated by the judiciary practice and the courts might have a wide margin of appreciation for such issues.

4.4.1 European practice

The application of the principle of *beneficium cohaesionis* applies in Bulgaria and Czech Republic where, as a result, the decision allowing the reopening of the case is to be beneficial also to the applicant's co-accused. The possibility of reopening in respect of other accused persons in other criminal proceedings where the same violation was found (in terms of the combination of factual or legal circumstances) is also the rule Finland and Poland. It was noted that other accused persons in other criminal proceedings should lodge their requests for having their proceedings reopened, i.e. it does not take place automatically by virtue of one decision allowing the reopening.

Recommendations

7. Although article 455 and following articles of CPrC do not provide explicitly for *beneficium cohaesionis,* it seems possible to infer it from the combined reading with the other provision of CPrC related to the beneficial effects of an appeal or revision judgment also on the defendants who have not lodged it. Whilst this approach would be in line with the European practice, it recommended that it is clearly spelled out.

8. The principle of *beneficium cohaesionis* must exert its effects also in relation to application of the presumption in favour of liberty under article 5 ECHR. The co-accused, thus, must be released pending the new trial unless pre-trial detention is justified. CPrC should provide clear provisions for such cases of liberty and extraordinary exception for pre-trial of these defendants.

9. CPrC should spell out what occurs in cases when the defendant who has lodged a request for review or the co-defendant that is affected by this process want to withdraw from the process based on different grounds, inter alia on grounds of their feasibility of criminal status (because they have benefited from the alternatives of re-opening.

4.5 Reopening and trial *in absentia*: the national framework

In relation to *trial in absentia*, a number of amendments have been introduced in the CPrC. As highlighted by the Report of the Draft law of the Code issued by the Parliamentary Committee on Legal Issues, Public Administration and Human Rights, the articles of the previous CPrC for the *trial in absentia* did not guarantee enough the procedural rights of the defendant and do not reflect enough the minimum rules set in the Resolution (75)11 of the CM of the Council of Europe "On the criteria governing proceedings held in absence of the accused". Previous CPrC did not provide to the accused any legal remedy that together with the request for leave to appeal out of time to request also the suspension of the execution of the sentence. The main changes to the institution of criminal proceedings or *trial in absentia*, are as follows:

- New provisions foresee the necessary legal mechanism that enables the participation of the accused and/or its defence lawyer (attorney) in the trial, in order to avoid *trial in absentia* (such as fine or substitution *ex officio* of the defence lawyer from the court). More concretely the new article 350, paragraph 4 CPrC provides "When the defence lawyer who has been regularly notified do not present himself regularly to the hearing and do not have obstacles that excludes him from the responsibility to be present or if the defence lawyer leaves from the hearing without permission, the court might decide to charge him with a fine deriving from 5000 until 100 0000 Lek and might order to pay the expenses of the hearing". According to the new article 344 CPrC "the absence of the accused who leaves the courtroom and who does not accept to have an attorney, do not obstruct the development of the trial. In this case the court might appoint a defensive lawyer who continue the trial. The accused or the defence lawyer appointed by him might be accepted in courtroom in every time".
- Two paragraphs were added to Article 247 CPrC, providing a definition of fugitive in relation to the trial. More concretely, according to the new paragraph 3/1 "A fugitive is a person who, although aware, is voluntarily evaded to the implementation of remand measures (security measures) foreseen in the articles 233, 235, 237 and 238 of this Code, or to the Imprisonment sentence". According to the paragraph 3/2 "The procedural consequences of the status of fugitive is valid only within the proceedings for which it is stated (declared). The status is maintained until the security measure is

executed, revoked, lost the effect, or when the offense or punishment for which the measure is imposed is extinguished."

- Article 351 and 352 CPrC have been amended at a large scale, by taking into consideration the respect of the constitutional right of access to justice and the practice held by ECtHR in this regard. According to article 351, "1. When an accused who is free does not appear in the hearing, although it has been notified and there were no legitimate reasons for not being present, the court postpones the hearing session and order compulsory escort, unless he/she declares that will not to be present in the trial, before the notary or responsible state authority. In this case the trial continues without his/her participation. 2. When the accused that is present at the hearing waives explicitly from his right to participate in the trial, the trial continues without his/her participation. 3. In the cases foreseen in paragraphs 1 and 2 of this Article, the defendant shall be deemed to be present, with the condition that the trial takes place in the presence of the accused.4. The same rules applies when the accused escape in every moment during the judicial examination or its intervals". According the article 352 CPRC, "1. When the accuses is free, despite the searches according to the Articles 140-142 of this Code, he/she does not appear in the session and it results that he/she did not personally know about the trial, the court decides its suspension and orders the judicial police to continue searching for the accused. After one year from the date of the suspension of the trial for this reason, as well as in any time there is information about the placement of the defendant, the court resumes the trial, ordering the repetition of the notice. Even when the accused was newly searched but he/she is not found, the court declares the absence. In this case the trial takes place in the presence of the defensive lawyer. 2. When it is proved that the accused is hiding in justice, the court declares the absence. In this case, the trial is held in the presence of the defence lawyer. 3. The court declares the absence even when it is proved that the accused is abroad and his extradition is not possible. 4. The decision declaring the absence is invalid when it is proved that it came from absolute inability of the accused to appear before the court. 5. When the accused appears after the announcement of the absentee's decision, the court revokes such decision. When the accused appears after the judicial examination has been declared closed, he may request to be asked. The judicial actions performed before have effects, but if the defendant requires and the court deems it necessary to take a decision, it may decide to relinquish judicial examination and to receipt the evidences required by the accused or the repetition procedural actions. 6. The absent judgment does not apply to the minor accused. … …"
- Article 491 of the Criminal Procedural Code foresees cases where the request for extradition is not accepted or refused. In this article were added two other grounds in which extradition is not allowed. More concretely, letter "ë" and letter "f" foresee that extradition is not accepted "when the criminal prosecution or the punishment is prescribed under the law of the requesting State or the requested State ", and " when the requested person was sentenced in absentia and did not give consent to be extradited ";
- Also, in the case when the requested person is sentenced in absentia and does not consent for extradition is then added to Article 491 paragraph 2 by specifying that the Ministry of Justice invites the requesting State to request recognition of its criminal decision and its execution.

4.5.1 European practice

The issue of *trial in absentia* is relevant for the purpose of the present work under two aspects. First, it might be that the first proceedings conducted in the absence of the accused violated the principle of article 6 ECHR and, thus, can be the object of reopening. Secondly, it might be that an accused, released pending the reopened proceedings, evade justice, it seems important to recall the main standards established in relation to trial *in absentia*.

According to the CM's Resolution (75) 11 of 21 May 1975, no one may be tried without having first been effectively served with a summons. The notification, moreover, must be served in time to enable the accused to prepare its defence and appear at the hearing. The only exception for which provision is made is that of cases in which the accused has deliberately sought to evade justice. Even if the accused has been served with a summons, the trial must not take place if the court considers that the personal appearance of the accused is indispensable or that there is reason to believe that the person has been prevented from appearing. The European Convention on the International Validity of Criminal Judgments, of 28 May 1979, also contains a definition of judgment rendered in absentia and lays down rules applicable to the enforcement of such judgments, dominated by the utilitarian concern to limit the possibility of such sentences being enforced without their previously being cleared.

Article 6(3) of the ECHR specifies that everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing...". Contrary to article 14 para. 3 lett. d) of the UN CCCPR, however, the ECHR does not specifically identify any right to be present in ones' trial. In the case of Colozza v. Italy[16], however, the Court clarified that "*Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person,' 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used "in court,' and it is difficult to see how he could exercise these rights without being present."* In Poitrimol v. France[17] it also clarified that *"Any waiver of the right to be present must be clear and unequivocal."* Judgments in absentia are thus legitimate under the ECHR when there is evidence that the person concerned intended to evade justice or genuinely waived its right to be present. In Colozza the Court also asserted that when domestic laws permit a trial in absentia, once the person becomes aware of the proceedings, it must be able to obtain, from a court that has heard him, a fresh determination of the merits of the case. Even when national legislation allows for trial in absentia, such as in the case of Krombach v. France[18], Governments are ready to stress the importance of the presence of the accused in the course of trials: in the above mentioned case the Government observed that "*The accused was called upon to present his or her version of the events and to reply to the questions of the judges, the jurors, and the public prosecutor. He or she could, among other things, challenge the conclusions of the expert witnesses and the depositions of the ordinary witnesses, call witnesses for the defence and request a confrontation with the victims. Lastly, in the event of a finding of guilt, the accused's presence enabled the judges to tailor the penalty to his or her personal circumstances.*"

[16]Colozza v. Italy, application no. 9024/80, 12/02/1985, available at http://hudoc.echr.coe.int/eng?i=001-57462
[17]Poitrimol v. France, application no. 4032/88, 23/11/1993, available at http://hudoc.echr.coe.int/eng?i=002-9734
[18] Krombach v. France, application no. 29731/96, 13/02/2001, available at http://hudoc.echr.coe.int/eng?i=001-114876 (Albanian version).

Recommendations

10. The new regulation of *trial in absentia* and the amendments introduced in connection with extradition seem in line with the European practice and are to be commended. However, the proper assessment relating to the compliance of the new legislation in the light of European practice and standards will only be revealed by the judicial practice.

4.6 Re-opening and execution of previous detention conviction: the national framework

According to the article 449/1, the review of final judgments is allowed at any time in the cases and under the conditions provided for by this Code, even if the sanction has been executed or is extinguished.

According to the article 454 CPrC, the court that accepts the request for review might decide to suspend the execution of conviction. Against the decision of suspension might be lodged an appeal by the parties to the Appeal Court. The decision of the Appeal Court might not be subject to further appeal. Also, based on the formulation of article 454 CPrC, the suspension of the execution of the conviction is under the discretion of the judicial authority (the court that accepts the request for re-opening). Consequently, such suspension is not automatic if the request for re-opening is accepted.

Meanwhile, according to the article 453, paragraph 4, if the court accepts the request for review, the convicted person has the same procedural position until the court that will re-examine the case will issue the decision. It is not so clear in the provision what does it mean "same procedural position". This due to the fact that in comparison with the previous CPRC, it was the High Court that examined the request for review and if these requests were accepted, the previous decision/s were abolished and the case was sent for re-examination to the lower courts. In the new CPrC the change of jurisdiction from the High Court to the First Instance Court, has also affected in the fact that the First Instance Court has no authority to abolish the previous decisions. This court has the right to accept or refuse the request for review. If the request is accepted, the court has the only authority to send it for re-trial (re-examination) from another chamber of judges of the same court or in the Appeal Court, if the request is related only with the decision of this last one.

On the other hand, the article 34, paragraph 4 of the CPrC foresees that "The quality of the defendant is reversed (regained) when the court decides to re-examine the case". It is not so clear if this article might extend its effects in the case when the request for re-opening is accepted. Such confusion comes due to the fact that article 455/2 foresees that the **provisions of the first instance trial** shall apply within the limits of the grounds presented in the request for review. In fact, such article should have made also reference in other provisions of the CPrC, including those with general character (34/4) as well the provisions of the appeal trial, provisions that might be applied *mutatis mutandis*.

4.6.1 European practice

One of the most sensitive questions arising from a violation of article 6 ECHR leading to the reopening of proceedings concerns the situation of those who are currently serving their conviction, which at the end of the retrial could very well be overturned.

According to well-established case-law on article 5 ECHR, the expression "Effected for the purpose of bringing him before the competent legal authority" qualifies all the three alternative bases for arrest or detention under Article 5 § 1 (c) (Lawless v. Ireland (no. 3) , §§ 13-14; Ireland v. the United Kingdom , § 196), which must be continuously present in order to justify remand detention. It should also be remembered that detention pursuant to Article 5 § 1 (c) must be a proportionate measure to achieve the stated aim (Ladent v. Poland , §§ 55-56).

The question is thus whether or not individuals must (instead of may) be released pending the new proceedings. The refusal to release defendants was criticised by the Parliamentary Assembly of the Council of Europe in the case of Sadak, Zana, Dicle and Dogan v. Turkey and also by the CM in an interim resolution. Relying on the presumption of innocence and the Court's judgment, the CM now considers that, in addition to the reopening of proceedings, the release of applicants is an integral part of the right to reparation "in the absence of any compelling reasons justifying their continued detention pending the outcome of the new trial".

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 CM' Resolution DH(2004)31[19] in the case of Sadak, Zana, Dogan and Dicle v. Turkey. 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.

Recommendations

11. According to the article 454 CPrC the suspension of the execution of the conviction is under the discretion of the judicial authority. Upon re-opening, however, the position of the accused shall not be that of a convicted person but of a person suspected of having committed a crime. Its status, however, remains disputable and should be clearly spelled out, also in relation to the applicability of the principles of presumption of innocence (article 6 para. 2 ECHR) and presumption in favour of liberty (article 5 ECHR). Continued detention (in the form of pre-trial detention and not in the form of final conviction) can thus be ordered only if the conditions set under article 5 ECHR are met. The current wording of the law, in particular articles 453 paras 4 and 454 CPrC seem to be open to an interpretation that is not in line with the European standards. Their phrasing should thus be reformulated. In any event, proper assessment of the interpretation of the provision will only be revealed by the judicial practice.

4.7 Use of evidence in the course of re-opening: the national framework

According to the article 455 of CPrC the court that is in charge for re-examination of the case, following the accept of the re-opening request, shall respect the provisions of trial applicable

[19] ResDH (2004) 31 of 6 April 2004 recites that "Stressing, in this connection, the importance of the presumption of innocence as guaranteed by the Convention; deplores the fact that, notwithstanding the reopening of the impugned proceedings, the applicants continue to serve their original sentences ...; stresses the obligation incumbent on Turkey, under Article 46, paragraph1, of the Convention, to comply with the Court's judgment in this case notably through measures to erase the consequences of the violation found for the applicants, including the release of the applicants in the absence of any compelling reasons".

in the first instance court and within the grounds provided in the request of review. According to the principles of the trial in first instance all the evidences are examined in the presence of the parties, at a public hearing with a view to adversarial argument. In the article 456, paragraph 2 is foreseen "When the request for re-examination is accepted, the court might abolish the decision. The decision might not be solely based by making another evaluation of evidences that ware administered in the previous trial".

4.7.1 European practice

In *Al-Khawaja and Tahery v. the United Kingdom* [GC], applications no. 26766/05 and 22228/06, the Court reiterated that article 6 para. 3 (d) ECHR enshrined the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence. As a rule, this required that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness made his statement or at a later stage of the proceedings.

Recommendations

12. The current legislation on use of evidence seems to be in line with European standards and is commended. The proper assessment of its compliance, however, will only be revealed by the judicial practice.

Other recommendations

13. The role of the civil party in the course of re-trial should be clearly spelled out, particularly of those who have acquired rights in good faith. In line with the CM's Recommendation (2000) 2 the ordinary domestic rules applicable in the re-examination of cases or reopening of the proceedings should be applicable, at least mutatis mutandis, also to cases where re-examination or reopening was ordered in order to give effect to judgments of the Court.

14. Coordination between the provision on review and those of the Criminal Code setting the statute of limitation should be coordinated as the current wording of article 67 Criminal Code does not make it clear whether the time needed to reach the statute of limitation will be calculated only with reference to the "old procedure" (that led to a finding of a violation of the ECHR) or the re-opened one.

15. For the sake of legal certainty, it would have been advisable to include transitory provisions in order to regulate the requests for review pending, at the time of entry into force of the amendments, before the Supreme Court. Such issue might also be subject of interpretation of a unifying decisions of the High Court, in analogue way with the jurisprudence of this court for the transfer of administrative cases from civil to administrative courts.

Annex I

Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights [1]

(Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to bring about a closer union between its members;

Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention");

Noting that under Article 46 of the Convention on Human Rights and

Fundamental Freedoms ("the Convention") the Contracting Parties have accepted the obligation to abide by the final judgement of the European Court of Human Rights ("the Court") in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (restitutio in integrum);

Noting that it is for the competent authorities of the respondent state to decide what measures are most appropriate to achieve restitutio in integrum, taking into account the means available under the national legal system;

Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgements shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving restitutio in integrum,

I. Invites, in the light of these considerations 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.

EXPLANATORY MEMORANDUM

Introduction

1. The Contracting Parties to the Convention enjoy a discretion, subject to the supervision of the Committee of Ministers, as to how they comply with the obligation in Article 46 of the Convention "to abide by the final judgment of the Court in any case to which they are parties."
2. The Court has held: "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach" (see inter alia the Court's judgment in the Papamichalopoulos case against Greece of 31 October 1995, paragraph 34, Series A 330-B). The Court was here expressing the well-known international law principle of restitutio in integrum, which has also frequently been applied by the Committee of Ministers in its resolutions. In this context, the need to improve the possibilities under national legal systems to ensure restitutio in integrum for the injured party has become increasingly apparent.
3. Although the Convention contains no provision imposing an obligation on Contracting Parties to provide in their national law for the re-examination or reopening of proceedings, the existence of such possibilities have, in special circumstances, proven to be important, and indeed in some cases the only, means to achieve restitutio in integrum. An increasing number of States have adopted special legislation providing for the possibility of such re-examination or reopening. In other States the courts and national authorities have developed this possibility under existing law.
4. The present recommendation is a consequence of these developments. It invites all Contracting Parties to ensure that their legal systems contain the necessary possibilities to achieve, as far as possible, restitutio in integrum, and, in particular, provide adequate possibilities for re-examining cases, including reopening proceedings.
5. **As regards the terms, the recommendation uses "re-examination" as the generic term. The term "reopening of proceedings" denotes the reopening of court proceedings, as a specific means of re-examination.**[20] Violations of the Convention may be remedied by different measures ranging from administrative re-examination of a case (e.g. granting a residence permit previously refused) to the full reopening of judicial proceedings (e.g. in cases of criminal convictions).
6. The recommendation applies primarily to judicial proceedings where existing law may pose the greatest obstacles to new proceedings. The recommendation is, however, also applicable to administrative or other measures or proceedings, although such legal obstacles will usually be less important in these areas.
7. There follow, first, specific comments relating to the two operative paragraphs of the recommendation and, secondly, more general comments on questions not explicitly dealt with in the recommendation.
Comments on the operative provisions
8. Paragraph 1 sets out the basic principle behind the recommendation that all victims of violations of the Convention should be entitled, **as far as possible, to an effective restitutio in integrum.** The Contracting Parties should, accordingly, review their legal systems with a view to ensuring that the necessary possibilities exist.
9. Paragraph 2 encourages States that have not already done so, to provide for the possibility of re-examining cases, including reopening of domestic proceedings, in order to give full effect to the judgments of the Court. The paragraph also sets out those circumstances in which re-examination or reopening is of special importance, in some instances perhaps the only means, to achieve restitutio in integrum.

[20] **E**mphasis added by the authors of this report.

10. The practice of the Convention organs has demonstrated that it is primarily in the field of criminal law that the re-examination of a case, including the reopening of proceedings, is of the greatest importance. The recommendation is, however, not limited to criminal law, but covers any category of cases, in particular those satisfying the criteria enumerated in sub-paragraphs (i) and (ii). The purpose of these additional criteria is to identify those exceptional situations in which the objectives of securing the rights of the individual and the effective implementation of the Court's judgments prevail over the principles underlying the doctrine of res judicata, in particular that of legal certainty, notwithstanding the undoubted importance of these principles.

Sub-paragraph (i) is intended to cover the situation in which the injured party continues to suffer very serious negative consequences, not capable of being remedied by just satisfaction, because of the outcome of domestic proceedings. It applies in particular to persons who have been sentenced to lengthy prison sentences and who are still in prison when the Convention organs examine the "case". It applies, however, also in other areas, for example, when a person is unjustifiably denied certain civil or political rights (in particular in case of loss of, or non-recognition of legal capacity or personality, bankruptcy declarations or prohibitions of political activity), if a person is expelled in violation of his or her right to family life or if a child has been unjustifiably forbidden contacts with his or her parents. It is understood that there must exist a direct causal link between the violation found and the continuing suffering of the injured party.

12. Sub-paragraph (ii) is intended to indicate, in the cases where the above-mentioned conditions are met, the kind of violations in which re-examination of the case or reopening of the proceedings will be of particular importance. Examples of situations aimed at under item (a) are criminal convictions violating Article 10 because the statements characterised as criminal by the national authorities constitute legitimate exercise of the injured party's freedom of expression or violating Article 9 because the behaviour characterised as criminal is a legitimate exercise of freedom of religion. Examples of situations aimed at under item (b) are where the injured party did not have the time and facilities to prepare his or her defence in criminal proceedings, where the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying, or where in civil proceedings the parties were not treated with due respect for the principle of equality of arms. Any such shortcomings must, as appears from the text of the recommendation itself, be of such a gravity that serious doubt is cast on the outcome of the domestic proceedings.

Other considerations

13. The recommendation does not deal with the problem of who ought to be empowered to ask for reopening or re-examination. Considering that the basic aim of the recommendation is to ensure an adequate protection of the victims of certain grave violations of the Convention found by the Court, the logic of the system implies that the individuals concerned should have the right to lodge the necessary requests to the competent court or other domestic organ. Considering the different traditions of the Contracting Parties, no provision to this effect has, however, been included in the recommendation.

14. The recommendation does not address the special problem of "mass cases", i.e. cases in which a certain structural deficiency leads to a great number of violations of the Convention. In such cases it is in principle best left to the State concerned to decide whether or not reopening or re-examination are realistic solutions or, whether other measures are appropriate.

15. When drafting the recommendation it was recognised that reopening or re-examination could pose problems for third parties, in particular when these have acquired rights in good

faith. This problem exists, however, already in the application of the ordinary domestic rules for re-examination of cases or reopening of the proceedings. The solutions applied in these cases ought to be applicable, at least mutatis mutandis, also to cases where re-examination or reopening was ordered in order to give effect to judgments of the Court.

In cases of re-examination or reopening, in which the Court has awarded some just satisfaction, the question of whether, and if so, how it should be taken into account will be within the discretion to the competent domestic courts or authorities taking into account the specific circumstances of each case.

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[1] Considering that the quasi-judicial functions of the Committee of Ministers under the former Article 32 of the Convention will cease in the near future, no mention of the Committee of Ministers' decisions is made. It is understood, however, that should certain cases still be under examination when the recommendation is adopted, the principles of this recommendation will also apply to such cases.