RE-OPENING OF **JUDICIAL PROCEEDINGS** IN ARMENIA FOLLOWING THE **JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS**

GUIDE

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Support for the execution by Armenia of judgments in respect of Article 6 of the European Convention on Human Rights

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GUIDE

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Guide on reopening of judicial proceedings in Armenia following the judgments of the European Court of Human Rights

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Introduction

Armenia became member state of the Council of Europe on 25 January 2001. The European Convention on Human Rights entered into force in Armenia on 26 April 2002. The first case under supervision of execution was Mkrtchyan (6562/03) - Judgment final on 11 April 2007.

To support Armenia in the execution of judgments of the European Court of Human Rights (ECtHR), the Council of Europe (CoE) implements the project "Support for the execution by Armenia of judgments in respect of Article 6 of the European Convention on Human Rights" (further – the Project). The Project is financed by the Human Rights Trust Fund and the CoE Action Plan for Armenia 2019-2022.

The overall goal of the Project is to support Armenia in establishing of accessible, full and effective justice, as understood by Article 6 of the European Convention on Human Rights (ECHR), which brings a better enjoyment of human rights to the Armenian public. The Project aims to support Armenia in the execution of ECtHR judgments in which violations of Article 6 of the ECHR are established. The major thematic groups of such judgments include improvement of access to justice, prevention of the non-execution or delayed execution of judgments of national courts, development of remedies concerning excessive length of judicial proceedings. These thematic areas are also covered by the current judicial reform in Armenia and they need further attention so as to bring the Armenian justice system closer to the European standards.

The Project aims at improvement of the national legislative framework and practice as regards the re-opening of judicial proceedings following the judgments of the ECtHR.

In that context, the international consultant of the Council of Europe Grzegorz Borkowski and the national expert Artak Asatryan were identified to draft a guide on re-opening of judicial proceedings at the national level following the judgments of the ECtHR in order to bring the national framework closer in line with requirements of the case-law of the ECtHR and other related CoE standards.

The Guide consists of two sections: "The Council of Europe standards on the re-opening of judicial proceedings following the judgments of the European Court of Human Rights" and "The re-opening procedure in the Armenian law and practice".

The international consultant drafted the section "The Council of Europe standards on the re-opening of judicial proceedings following the judgments of the European Court of Human Rights" while the national consultant was involved to draft the section on the re-opening procedure in the Armenian law and practice.

Executive Summary

This Guide is drafted within the framework of the project "Support for the execution by Armenia of judgments in respect of Article 6 of the European Convention on Human Rights". The first chapter of the guide introduces the case law of the ECHR on the reopening of national proceedings on the basis of ECHR judgments, regulations related to the relevant recommendations of the CE Committee of Ministers and legislations of the CE member states. The second chapter of the Guide deals with the norms of the Republic of Armenia legislation related to the review of judicial acts on the basis of ECHR judgments with the view to identifying their gaps, deficiencies and uncertainties and providing relevant recommendations proposals for their elimination and further improvement.

The international consultant of the Council of Europe Grzegorz Borkowski drafted the section "The Council of Europe standards on the re-opening of judicial proceedings following the judgments of the European Court of Human Rights" while the national consultant Artak Asatryan was involved to draft the section on the re-opening procedure in the Armenian law and practice.

The following legal acts have been analysed:

- European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention),
- Recommendation Rec (2000) 2 of the Committee of Ministers of the Council of Europe to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Right,
- A number of ECtHR judgments
- RA Criminal Procedure Code,
- New RA Criminal Procedure Code,
- RA Civil Procedure Code,
- RA Administrative Procedure Code,
- RA Constitutional and Cassation courts' decisions etc.

Systematic analysis, deduction, legal-comparative, critical-analytical and other methods were used in the analysis. As a result, a number of conclusions are drawn and some suggestions are made to improve the relevant regulations of RA Criminal, Civil and Administrative Procedure Codes. The overall conclusion is that some provisions regulating the process of the reopening of domestic proceedings seem to be problematic and need to be improved to avoid contradictions and problems in practice.

The following problems have been identified as a result of the study:

- All procedural codes consider judgments of the European Court of Human Rights which identify violations of the rights and freedoms of a person guaranteed by the Convention or its annexes as an unconditional basis for judicial review. The problem is that in such cases it is not

always possible to eliminate the violation or restore the situation existing before the violation (restitutio in integrum) by reviewing the judicial act. To this end, we would recommend to add in the procedural codes a clause providing for the revision of a judicial act, specifying that it may be revised if the breach has affected the outcome of the case and it cannot be remedied or the damage caused as a result cannot be compensated other than by the revision of the judicial act. As a matter of fact, such clauses exist in the procedural codes of a number of European countries. In this regard, it should be noted that the Court of Cassation has already established a precedent for a number of appeals and rejected the reopening of a number of cases, finding that a judgment or decision of the European Court of Human Rights is not a ground for reversing a judicial act.

- The Convention defines different periods for the entry into force of judgments of the ECHR, depending on whether the judgment was rendered by the Committee, the Chamber or the Grand Chamber. Hence, current procedural regulations may invoke time-related problems in terms of setting the basis for the revision of the judicial act and filing of a complaint for the review of that act. Accordingly, we would recommend to amend provisions on the deadlines for the revision of a judicial act following a judgment or decision of the ECHR, and stipulate that an appeal to review a judicial act under a new circumstance may be brought within a period of 4 or 6 months (provisionally) following a judgment or decision of an international court to which the Republic of Armenia is participant enters into force.

- One of the important issues identified was the Armenian translation of ECHR judgments, which is considered essential in the reopening proceedings by the Court of Cassation. Given the problems arising in practice with regard to the requirement to submit an Armenian translation of the ECHR judgments, we would recommend to revisit in the procedural codes the requirement to attach an Armenian translation of the judgment or decision of the international court to which the Republic of Armenia is a participant, regardless of the existence of a general provision on the language of the trial and the documents submitted during it. This will bring clarity to the legal issue at stake and will exclude misinterpretations.

- Furthermore, given that there is uncertainty with the "proper translation" of ECHR judgments into Armenian, we would recommend to clarify in the legislation that translations of SNCO "Translation Center" of the RA Ministry of Justice shall be considered as such and acceptable to the Court of Cassation. This will exclude translation of judicial decisions by the applicants at their own expense and save them from extra costs.

- In order to streamline the deadlines for revision of the judicial acts, we would recommend to translate the decisions of the ECHR or at least those made by the Committee and the Grand Chamber not in 3 but in 2 months, which will enhance filling

in the application by the applicant in terms of time.

- We would recommend in addition to the private participants in the proceedings, to add to the list of persons in the Civil Procedure Code eligible to apply for revision of the judicial act in light of new circumstances, the persons involved in the examination of the case in the ECHR that have a legitimate interest in revision of that act.

- Considering that the time limit for filing a complaint by the legal successor of a participant in the trial is not regulated in the Civil Procedure Code, we would recommend to regulate the issue in the Civil Procedure Code in a similar way to the Administrative Procedure Code.

The list of abbreviations

CE	Council of Europe
Convention	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights

Chapter 1

The Council of Europe standards on the re-opening of judicial proceedings following the judgments of the European Court of Human Rights

Introductory remarks on re-opening of judicial proceedings following the judgments of the European Court of Human Rights

As explained in the Explanatory Memorandum to the Recommendation Rec (2000) 2 of the Committee of Ministers of the Council of Europe to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Right, 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."

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.

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 proven to be important in special circumstances, 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 this possibility has been developed by the courts and national authorities under existing law.

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. 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 proceed-

ings (e.g. in cases of criminal convictions). The Manual will concentrate on the latter issue, i.e. the re-opening of the court proceedings.

The ECtHR approach to the proceedings on re-opening of a judicial case

As the European Court of Human Rights pointed in Bochan v. Ukraine (2) judgment (4-50), according to long-standing and established case-law, the Convention does not guarantee a right to have a terminated case reopened. Extraordinary appeals seeking the reopening of terminated judicial proceedings do not normally involve the determination of "civil rights and obligations" or of "any criminal charge" and therefore Article 6 is deemed inapplicable to them (see, among many other authorities, X v. Austria, no. 7761/77, Commission decision of 8 May 1978, Decisions and Reports (DR) 14, p. 171; Surmont, De Meurechy and Others v. Belgium, nos. 13601/88 and 13602/88, Commission decision of 6 July 1989, DR 62, p. 284; J.F. v. France (dec.), no. 39616/98, 20 April 1999; Zawadzki v. Poland (dec.) no. 34158/96, 6 July 1999; Sonnleitner v. Austria (dec.), no. 34813/97, 6 January 2000; Sablon v. Belgium, no. 36445/97, 86, 10 April 2001; Gorizdra v. Moldova (dec.), no. 53180/99, 2 July 2002; Kucera v. Austria, no. 40072/98, 3 October 2002; Franz Fischer; Jussy v. France, no. 42277/98, 18, 8 April 2003; Dankevich v. Ukraine, no. 40679/98, 29 April 2003; Steck-Risch and Others; Öcalan; Schelling; Hurter v. Switzerland (dec.), no. 48111/07, 15 May 2012; Dybeku v. Albania (dec.), no. 557/12, 30, 11 March 2014). This is because, in so far as the matter is covered by the principle of res judicata of a final judgment in national proceedings, it cannot in principle be maintained that a subsequent extraordinary application or appeal seeking revision of that judgment gives rise to an arguable claim as to the existence of a right recognised under national law or that the outcome of the proceedings in which it is decided whether or not to reconsider the same case is decisive for the "determination of ... civil rights or obligations or of any criminal charge" (compare and contrast Melis v. Greece, no. 30604/07, 18-20, 22 July 2010, which departs from the said approach).

This approach has been followed also in cases where reopening of terminated domestic judicial proceedings has been sought on the ground of a finding by the Court of a violation of the Convention (see, for instance, Franz Fischer, cited above). In declaring the applicant's complaint under Article 6 inadmissible in Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) (no. 32772/02, 24, 4 October 2007), the Chamber stated:

"24. ... It is clear from its case-law that this Article is not applicable to proceedings concerning an application for a retrial or for the reopening of civil proceedings (see Sablon v. Belgium, no. 36445/97, 86, 10 April 2001). The Court sees no reason why this reasoning should not also be applied to an application to reopen proceedings after it has found a violation of the Convention (see, in relation to a crim-

inal case, Franz Fischer v. Austria (dec.), no. 27569/02, ECHR 2003-VI). It therefore considers that the complaint under Article 6 is incompatible ratione materiae with the provisions of the Convention."

However, should an extraordinary appeal entail or actually result in reconsidering the case afresh, Article 6 applies to the "reconsideration" proceedings in the ordinary way (see, for instance, Sablon, 88-89; Vanyan v. Russia, no. 53203/99, 56, 15 December 2005; Zasurtsev v. Russia, no. 67051/01, 62, 27 April 2006; Alekseyenko v. Russia, no. 74266/01, 55, 8 January 2009; Hakkar; and Rizi v. Albania (dec.), no. 49201/06, 47, 8 November 2011).

Moreover, Article 6 has also been found to be applicable in certain instances where the proceedings, although characterised as "extraordinary" or "exceptional" in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings, the national characterisation of the proceedings not being regarded as decisive for the issue of applicability. Thus, in San Leonard Band Club v. Malta (no. 77562/01, 41-48, ECHR 2004-IX), Article 6 was held to be applicable to proceedings concerning a request for a new trial. The Court reasoned that the request was similar to an appeal on points of law before a Court of Cassation , the Maltese authorities did not exercise any discretionary power but were required to give a ruling on the request, and the outcome of the new trial procedure was decisive for the applicant company's "civil rights and obligations".

Similarly, in Maresti v. Croatia (no. 55759/07, 25 June 2009) the Court found that proceedings concerning a request for extraordinary review of a final judgment in a criminal case fell within the scope of Article 6. In examining the nature and specific features of those proceedings, it noted that the request for extraordinary review was available to the defendant for strictly limited errors of law that operated to the defendant's detriment, the request had to be lodged within a strict one-month time-limit following the service of the appeal court's judgment on the defendant, and reasons justifying extraordinary review were expressly enumerated in the Croatian Code of Criminal Procedure and were not subject to any discretionary decision on the part of the Croatian Supreme Court. The Court further observed that the request for extraordinary review had its equivalent in Croatian civil proceedings in the form of an appeal on points of law in civil cases, to which Article 6 applied (see paragraphs 25-28 of the above-mentioned judgment).

In sum, while Article 6 1 is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6 1 and of the safeguards of a fair trial that it affords to litigants. The Court must accordingly examine the nature, scope and specific features of the exceptional appeal in issue in the instant case.

The ECtHR case-law regarding the re-opening of court proceedings as a result of the Court's judgments was pre-

sented at the Round Table in 2015 (see below) by the Registrar of the Court Maria Tsirli (available in French only at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805921cf), which is extensively quoted below.

When commenting the field of application of the principle of restitutio in integrum, the Registrar states that the pre-eminence of restitution in kind over compensation is indeed evident in matters relating to the protection of property. However, restitution in kind can be just as, or even more preferable in cases relating to Article 6 of the Convention, guaranteeing the right to a fair trial. Thus, with regard, for example, to cases of non-enforcement of decisions of domestic justice system, the Court very often uses its power to indicate individual measures to ask the respondent State to enforce the decision that is the subject of the dispute. Then, in the field most delicate of domestic court decisions declared to be contrary to the Convention, the re-examination of the case or the reopening of domestic judicial proceedings often proves to be the most effective, if not the only one, to achieve restitutio in integrum.

Initiated by the Gençel v. Turkey of 2003 (which stated in its paragraph 27 that "when the Court concludes that the conviction of an applicant was pronounced by a court which was not independent and impartial within the meaning of Article 6 1, it considers that, in principle, the most appropriate would be to have the applicant retried in good time by an independent tribunal and impartial"), the reopening clause was used in numerous cases before being slightly modified by the Grand Chamber judgments in the cases of Öcalan v. Turkey and Sejdovic v. Italy (rendered respectively in 2005 and 2006 and concerning the independence and the impartiality of state security courts in Turkey and convictions in absentia in Italy). Since these judgments, the reopening clause has been used systematically by the Court in similar cases, but also in other criminal cases. In fact, there are several types of violation of Article 6 for which the clause can be applied: violation of the right of access to a court; infringement of the right to participate in the trial or to be heard by the court of judgment; violation of the principles of adversarial proceedings and equality of arms; infringement of the right to question witnesses for the prosecution or for the defense; violation of the right of the accused to be informed of the nature and cause of the accusation brought against him, as well as the right to dispose of the time and facilities necessary for the preparation of his defense; violation of the right to have the assistance of a defender; infringement of the right to have material gathered as a result of police entrapment are not used in criminal proceedings; violation of the right to statements taken under torture during the preliminary investigation and in the absence of a lawyer not be used in criminal proceedings, etc.

Outside the criminal field, the Court also uses the reopening clause in civil cases, administrative or fiscal, in particular in the event of a violation of the right of access to a court. That said, in civil matters, the Court does not fail to recall that it is for the Contracting States to is up to deciding the best way to execute its

judgments without unduly clashing with the principles the authority of res judicata or legal certainty, in particular in cases where the dispute affects third parties whose own legitimate interests are to be protected. While Article 6 violation cases are the area par excellence where the reopening of proceedings may be the most appropriate remedy, the Court extends the scope of use of this clause in other categories of violation of the Convention. For example, the clause of reopening has also been inserted in cases of violation of Articles 2 (Abuyeva and others v. Russia), 7 (Dragotoniu and Militaru-Pidhorni v. Romania) or 8 (Paulik v. Slovakia, Ageyevy v. Russia) of the Convention.

In most cases, the reopening clause in the event of a violation of Article 6 of the Convention is inserted in the part relating to Article 41 on just satisfaction. This provision provides that the Court may award the injured party just satisfaction if the domestic law of the State respondent only partially erases the consequences of the violation found by the Court in its judgment. Concretely, article 41 states that recourse will be had to the payment of a sum of money only in the event that the restoration of the situation as if no violation had occurred is not possible. It therefore seems logical that, in such cases, the Court recommends the reopening of the proceedings as a measure which replaces or supplements the just satisfaction, which in the circumstances is of a subsidiary nature.

In this logic, the Court uses the reopening clause by granting at the same time a sum for moral damage or uses the reopening clause but refuses to grant compensation pecuniary, considering that the finding of a violation of Article 6 1 constitutes in itself satisfaction sufficient fairness (Sejdovic v. Italy). The Court can also propose an alternative to the State: either give right to the applicant to request for a retrial or to pay compensation for non-pecuniary damage (Claes and others v. Belgium). It may also reserve the application of Article 41 in order to verify, in the framework of its competence under this article, the sufficiency, or not, of the measures adopted by the Respondent State to execute the judgment of conviction rendered against him in principle. The Barberà, Messegué and Jabardo v. Spain dating back to 1994 offers a good example of the control carried out by the Court. In this case, concerning the fairness of a procedure criminal proceedings, the Court had found a violation of Article 6 1 and had reserved the question of granting of just satisfaction. When resuming consideration of the question, it considered that the measures taken in the meantime by the authorities (reopening of domestic legal proceedings, release and acquittal of the applicants) however considerable, may not constitute in itself a restitutio in integrum or a complete reparation of the damage resulting from the detention suffered by the applicants as a direct consequence of criminal proceedings which had violated the Convention; it therefore also awarded the applicants financial compensation. Similarly, in Schuler-Zgraggen v. Switzerland, where it had concluded that a procedure was unfair concerning social security benefits and reserved the question of compensation material damage, thereafter, even though a review proce-

dure had resulted in the granting for the applicant, and this on a retroactive basis, of an incapacity pension, the Court took into account the passage of time and condemned the State to pay late payment interest for the satisfaction fair. However, even if it is clear that a separate judgment on just satisfaction can play the role of an instrument to monitor the reopening of proceedings in domestic law, the Court did not often resort to this technique, in particular with a view not to further lengthening the procedure before it.

In addition, the reopening clause is often inserted with a reference to the existence in law of a procedural review mechanism, such as for cases against the Romania (Flueraş, Niţulescu), or Russia (Vladimir Romanov, Pishchalnikov). There are also some cases where the Court does not insert a reopening clause but limits itself to noting the existence of an internal reopening mechanism (Nikolitsas v. Greece).

Finally, the Court uses Article 46 of the Convention to insert the clause of reopening. This approach aligns with that adopted by the Grand Chamber in the judgments Öcalan v. Turkey and Sejdovic v. Italy.

Another question that arises is whether this clause should be included in the provisions judgments or only in the reasoning relating to Articles 41 or 46. Initially, a few judgments had also included this clause in their operative part (Claes v. Belgium, Lungoci v. Romania); however, this practice was not widely followed. Then, in its judgment delivered in 2008 in Salduz v. Turkey, the Grand Chamber opted for the traditional approach and limited itself to inserting the reopening clause in the reasoning relating to Article 41. It is interesting, however, to note that in their concurring opinion appended to the judgment, Judges Rozakis, Spielmann, Ziemele, and Lazarova Trajkovska had considered that this clause should have been repeated also in the operative part of the judgment on the grounds that the Court must urge the domestic authorities to resort to a reopening procedure, provided, of course, that the applicant so wishes. Since the Salduz judgment, the usual practice of the Grand Chamber and of the various sections is that consisting in including the reopening clause only in the reasoning of the judgment (Cudak v.Lithuania [GC], Taxquet v. Belgium [GC], Laska and Lika v. Albania, etc.).

However, separating opinions continued to be expressed on this point, pleading for the insertion of the clause of reopening in the judgment system. Some of the judges are indeed pursuing the idea that it is the operative part of the judgment which is binding on the parties for the purposes of Article 46 1 and that it is therefore not irrelevant, from a legal point of view, that certain considerations of the Court are also included in the operative part. Be that as it may, the Court reserves the freedom to adapt its practice and even be bold when justified by the circumstances specific to each case and the nature of the violation found. Thus, in Scoppola v. Italy of 2009, challenging Articles 6 and 7 of the Convention on account of the conviction of the requiring perpetuity through the retroactive application of a legislative decree, the Great Chamber did not content itself

with asking the Respondent State to restart the trial and indicated both in the body of its judgment and in its operative part that it was incumbent on the State "to ensure that the life imprisonment imposed on the applicant be replaced by a sentence not exceeding thirty years of imprisonment".

It must be stressed that apart from the possibility mentioned earlier of deciding separately on Article 41 in order to verify that the violation found has been fully remedied, the Court practices a policy of self-restraint and voluntarily excludes itself from the dialogue between the respondent State and the Committee of Ministers. Indeed, the Court has always stressed that it has no jurisdiction to verify whether a Contracting Party has complied with the obligations imposed by one of its stops; it thus declared inadmissible ratione materiae the claims based on non-performance by the State of its judgments (Lyons v. United Kingdom (dec.)).

However, the role played by the Committee of Ministers in the field of the execution of judgments does not mean, that the measures taken by a respondent State to remedy the violation found cannot raise a new problem, not settled by the judgment and on their own be the subject of a new application which the Court may be called upon to examine (Verein gegen Tierfabriken Schweiz c. Switzerland, Hakkar v. France (dec.)). It is therefore first of all a matter of determining what constitutes a "new problem" and to detect its presence within the framework of a new request. In this case, the Court considers that there is no encroachment on the powers conferred on the Committee of Ministers by Article 46. Thus, the Court declared itself competent to hear complaints made in a number of cases following judgments it had delivered, when the domestic authorities had carried out a re-examination of the case, whether by reopening of the proceedings or by the conduct of a completely new trial.

Among the examples of its case law on the subject may be cited the above-mentioned Bochan v. Ukraine (N° 2) of 5 February 2015. In this case, the applicant complained, from the point of view of Articles 6 1 of the Convention and 1 of Protocol No. 1, of the proceedings conducted within the framework of the "appeal in light of exceptional circumstances" that, as permitted by the law Ukrainian applicable, she had formed on the basis of the judgment delivered by the Court on her first complaint which concerned the unfairness of proceedings to claim ownership real estate. In its Grand Chamber judgment, the Court held unanimously that there had been a violation of Article 6 1 of the Convention and held that there was no need to rule separately on the complaint drawn from Article 1 of Protocol No. 1. The Grand Chamber found in particular that the Supreme Court of Ukraine had distorted the findings reached by the Court in its first judgment of 2007, regarding the lack of independence and impartiality of domestic courts, so that the applicant had been unable to have her claim for ownership reconsidered in the light of these findings.

The Court has not failed to recall the importance, for the effectiveness of the system of the Convention, the establish-

ment at the internal level of procedures making it possible to reconsider a case in the light of a finding of a violation of Article 6 of the Convention. It claimed that such procedures can indeed be considered as an important element of the execution of its judgments, as governed by Article 46 and that by putting them in place a Contracting State demonstrates its commitment to the Convention and the Court's case-law. The Court also did not fail to recall recommendation no. R (2000) 2 of the Committee of Ministers (see the next part), in which the latter invites States parties to the Convention to ensure that there are adequate opportunities to have a case reopened procedure at domestic level in the event that the Court finds a violation of the Convention.

Bochan v. Ukraine (No. 2) was thus an opportunity for the Court to recall the principles guiding the distribution of competences between it, the Committee of Ministers and the States in matters of execution of the judgments and to underline its attachment to the re-examination of the case as a priority measure redress in the event of a violation of Article 6.

It stems from the case-law of the European Court of Human Rights that the reopening of domestic legal proceedings is undoubtedly the most spectacular effect that an international judgment can produce. However, this is not an absolute cure. In civil matters this measure could infringe the rights of third parties and in criminal matters, it could raise the question of the fate of the co-accused – who did not bring their case in Strasbourg – and victims, and cause difficulties due to possible loss evidence and time elapsed. Moreover, such a measure inevitably lengthens the procedure between the internal level and the European level. Hence the importance of carefully defining the scope and to ensure that the principles of res judicata and legal certainty, which constitute safeguards that are absolutely essential to the coherence of a legal system, are duly respected. The Court, as the Registrar Tsirli stated, is well aware of the delicate balance that must be maintained between the various interests at stake. If its practice in this area demonstrates the clear preference of the European judge for this method of reparation, it also illustrates its desire to preserve the prerogatives of States and of the Committee of Ministers with regard to the execution of its judgments.

The Council of Europe's standards in this regard, as well as the examples of practice of the CoE Member States are presented in the following parts.

The approach of the Council of Europe to the proceedings on re-opening of a judicial case

The Council of Europe, through its bodies, such as the Committee of Ministers of the Council of Europe or the Parliamentary Assembly of the Council of Europe, has repeatedly taken a position on the resumption of proceedings on the basis of the decision of the ECtHR, pointing to the need to establish national legal orders and mechanisms allowing for reconsideration or reopening court proceedings following the final ruling issued by the Strasbourg Court finding a violation of human rights. The above actions are not without significance for the development of practice in the application of the reopening of court proceedings on the basis of the judgment of the Tribunal.

The recommendations of the Committee of Ministers of the Council of Europe have a significant impact on the standard of implementing ECtHR decisions. They create a standard for understanding or interpreting certain rights and freedom, and may herald the adoption of an international treaty, paving the way for legally binding standards. Despite the lack of binding force, the recommendations should be recognized by the states as, the so-called, soft law because the Recommendations of the Committee of Ministers are reflecting the unanimous will of governments of Member States.

In **Recommendation Rec (2000) 2 of the Committee of Ministers of the Council of Europe to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights**, the Committee of Ministers noted 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; however, noted 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.

In the above-mentioned Recommendation, the Council of Europe Member States (the Contracting Parties) were invited to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*. The Committee of Ministers also encouraged 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 judgement 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.

In **Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies**, the Committee of Ministers welcomed that the Convention has now become an integral part of the domestic legal order of all states parties and emphasised that it is for member states to ensure that domestic remedies are effective in law and in practice, and that they can result in a decision on the merits of a complaint and adequate redress for any violation found. The Contracting Parties were recommended to:

I. scertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found;

II. review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court;

III. pay particular attention, in respect of aforementioned items I and II, to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings;

In **Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights,** the Member States were recommended, inter alia, to:

I. take the necessary steps to ensure that all judgments to be executed, as well as all relevant decisions and resolutions of the Committee of Ministers related to those judgments, are duly and rapidly disseminated, where necessary in translation, to relevant actors in the execution process,

II. identify as early as possible the measures which may be required in order to ensure rapid execution and to:

III. facilitate the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level either generally or in response to a specific judgment, and to identify their respective competences.

Finally, it is worth to mention that in **Recommendation CM/Rec(2021)4 of the Committee of Ministers to member States on the publication and dissemination of the European Convention on Human Rights, the case law of the European Court of Human Rights and other relevant texts**, the Committee of Ministers recommended that the gov-

ernments of member States:

i. ensure by appropriate means and actions that the texts relevant to the Convention system are accessible, in particular that their publication and dissemination comply with the principles set out in the appendix of this recommendation which replaces Recommendation Rec(2002)13;

ii. ensure by appropriate means and actions a wide dissemination of this recommendation to relevant authorities and stakeholders.

According to the Appendix the Recommendation, the Member States should, inter alia, ensure that all judgments of the Court to be executed in their respect are duly and promptly disseminated to relevant actors in the execution process. They should ensure that the same actors are also promptly informed, in a format deemed appropriate, of the decisions and resolutions of the Committee of Ministers in the context of the execution of judgments of the Court as well as action plans submitted by that member State. Member States should also publish these texts of the Committee of Ministers and action plans in a format deemed appropriate.

Also **intergovernmental conferences organized by the Council of Europe** are of major importance in the process of reforming the system of the Convention for the Protection of Human Rights and Fundamental Freedoms. All the conferences held so far: in 2010 in Interlaken, in 2011 in Izmir, in 2012 in Brighton, in 2015 in Brussels and in 2018 in Copenhagen (available at: https://www.coe.int/en/web/execution/political-declarations) – emphasized the importance of joint responsibility of states and the need to improve the national mechanism of executing the judgments of the Tribunal.

Department of the Execution of Judgments of the Council of Europe organised on 5-6 October 2015 a **Round Table** in Strasbourg dedicated to the reopening of proceedings following judgments of the European Court of Human Rights. The overall objective of the Round Table is to analyse the reopening of proceedings as a means of ensuring restitutio in integrum following a judgment of the European Court, to clarify the scope of the obligation to adopt such a measure, its limitations and alternatives.

In the Conclusions after the Round Table (available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805921a0), it was pointed out that:

- generally speaking, the ongoing interest of the Recommendation (2000)2 and (2004)6 so as to ensure that national law and practice permit effectively to guarantee the restitutio in integrum in the event of violations of the Convention;
- that the reopening of proceedings remains an effective way, and sometimes the only way, to that end;
- that the assessment of the necessity of the reopening takes into account the criteria adopted in the Recommendation (2000)2;
- the necessity to ensure that the

reopened proceedings can fully address the shortcomings found by the Court;

- as regards criminal proceedings, that the vast majority of states have legal provisions ensuring the possibility to ask for reopening of the proceedings impugned by the Court;
- the utility of the exchange of views in order to provide inspiration to states that still have not adopted such provisions in their reform efforts;
- the importance to have adequate procedures in place, notably in order to ensure: that the deadlines for appeal are reasonable; that the applicant's detention pending the new proceedings is not only based on the judgment but also on grounds recognized in respect of remand detention; that the consequences of the reopening are correctly determined, notably to avoid the risk of reformatio in pejus;
- the positive experience of states that have extended the effects of reopening to co-defendants, or have also opened the possibility to obtain the reopening to friendly settlements and unilateral declarations;
- as regards civil proceedings, the range of systems established, some states having broadly accepted the possibility of reopening, some others in a more ad hoc manner, some others relying on others means than reopening to address the consequences of the violations;
- the utility of the exchange of views in order to inspire states to ensure there are, in all situations where reopening is not provided for by the law, or is excluded for other reasons (legal certainty, respect of res judicata or the interests of bona fide third parties), alternative possibilities to obtain the restitutio in integrum;
- the particular interest in these situations of the possibility to get compensation for loss of opportunity;
- the close link between the findings of the Court under Article 41 and the necessity of reopening;
- the positive experience of states that have extended the effects of the reopening, or have also opened the possibility to obtain the reopening to friendly settlements and unilateral declarations;
- furthermore, the positive experience of states that have extended the possibilities of reopening to the Constitutional Court.

Following the exchange of experience at the Round Table, the Committee of Experts for Court Reform (DH-GDR) of , which had been established in accordance with Art. 17 of the Statute Council of Europe and in line with Resolution CM / Res (2011) 24281 on intergovernmental committees and subordinate bodies, their responsibilities and working methods, prepared on 12 February 2016 an Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision in the domestic legal order for the re-examination or reopening of cases following judgments of the Court (DH-GDR (2015)008 Rev, available at: https://rm.coe.int/CoERMPublicCom-

monSearchServices/DisplayDCTMContent?documentId=0900001680654d5a).

In the introductory part, it was noted that noted from the outset that the issue at stake following the Court's judgments and as regards individual measures is what can be introduced in favour of the applicant to ensure restitutio in integrum, that is for him/her to be placed back in the situation he/she would be in had the violation not happened. It should be kept in mind that States are free to choose the means by which to achieve such a result. One of those means is the reopening of proceedings or the re-examination of the situation of the applicant. It is however not the one and only means, there is indeed a plethora of examples in the Committee of Ministers' 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 he/she 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. Further on, the summary of the exchange of views and answers to questions identified by the Chair of the Committee was presented (see below).

The practice in CoE Member States regarding the re-opening of judicial proceedings

On 31 March 2015 the Committee of Experts on the Reform of the Court (DH-GDR) published a 120-pages long document called: Compilation of written contributions on the provision in the domestic legal order for re-examination or reopening of cases following judgments of the Court" DH-GDR(2015)002REV, based on the answers provided by 46 Members States – only the United Kingdom dissociated itself from the exercise conducted by the Committee of Experts on the Reform of the Court. Yet, as mentioned above, before that, on 12 February 2016 DH-GDR – the following overview of the practice in CoE Member States was presented:

I. Criminal proceedings

Thirty-three States allow the reopening of criminal proceedings, namely: 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. In thirty countries the reopening

of criminal proceedings is provided for by laws (the exceptions were: Armenia, Italy and Sweden).

Two States indicated that, 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 (Spain, judgment 245/1991 of 16 December 1991 and Italy, judgment No. 113 of 4 April 2011).

The obstacles to reopening are those of res judicata and legal certainty (finality of litigation, statute of limitation). These reasons justify the absence of the possibility to reopen proceedings in Liechtenstein and Ireland.

Reopening is never automatic but subject to specific conditions and circumstances. 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).

In a number of States it can also be initiated by state authorities, notably the Prosecutor. That is the case in Austria, Bosnia and Herzegovina, Estonia, Finland, the Republic of Moldova.

The request for reopening may be deemed inadmissible notably if the time-limit for its introduction has expired, or if the consequences of the violation have ceased to exist (See, for example, Czech Republic, Finland and Spain)

The following solutions were noted to overcome obstacles:

a. 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 in Spain

b. Res judicata and ne bis in idem – To overcome the procedural bars to reopening, such as res judicata of the domestic judgments, the principle of direct application of the Convention and the direct effects of the Court's judgments in the national legal order could be of relevance. The Court's judgments are to be considered "writ for execution" and "an exceptional circumstance" requiring extraordinary revision of judgments in the Republic of Moldova.

c. Restrictive criteria for reopening were overcome by a non-formalistic interpretation by a domestic court (Czech Republic, Poland). 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 (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. There could be two types of time-limits: a time-limit calculated as from the date of the ECtHR judgment and the one calculated as from the finalisation of a ruling of a domestic authority. Depending on legal systems, both time-limits could apply.

d. Errors in the procedure committed by the applicant and lack of information – The relevant judicial organ and parties are kept informed of the judgment finding a violation in Turkey. If a court learns that a reason for reopening criminal proceedings exists, it shall inform the convicted person or the person authorised to file the motion on his/her behalf (Bosnia and Hervcegovina). The Office of the Government Agent can help in redirecting the application in Bosnia and Hercegovina and the Republic of Moldova.

e. 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 (Bosnia and Herzegovina, France and Poland, for example). One State amended its law to this purpose and provided for an extensive list of representatives, namely France has amended its law, Law No. 2014-640 of 20 June 2014, so that concubines, children, parents, grandchildren, great grandchildren and universal legatees and legatees by universal title can also reopen proceeding as a way to address the effects of the passage of time, such as the death or absence of the person concerned. 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 Committee of Ministers to close the case (Romania).

f. In order to avoid cases of reformatio in peius, the roles of the Prosecutor and the Government Agent were mentioned by Bosnia and Herzegovina and the Republic of Moldova.

g. Successful cases of reopening were mentioned by a number of member States (see, for example, Estonia, France, Poland, Russian Federation, Slovak Republic), where the reopening of many cases in which the Court found Article 6 violations led to the annulment of the initial impugned domestic judgments and the re-examination of the case resulting in the rectification of the shortcomings identified by the Court with the same or a different outcome (e.g. acquittal, reduction or suspension of a sentence), as in Estonia, France, the Netherlands, Poland.

h. The reopening of criminal proceedings following judgments of the Court finding violations of substantive articles of the Convention led to the revision, in favour of the applicant (usually acquittal) of the initial impugned judgment (See Poland, Russian Federation, Slovak Republic).

i. The possible and actual application of the principle of beneficium cohaesionis was mentioned by Bulgaria and Czech Republic. The decision allowing the reopening of the case was thus also beneficial to the applicant's co-accused (see Czech Republic, Greece)..The possibility of reopening in respect of other accused persons in other criminal proceedings where the same violation (in terms of the combination of factual or legal circumstances) occurred was also highlighted (see Finland and Poland). It was noted that other accused persons in other criminal proceedings should submit their requests for having their proceedings reopened, i.e. it does not take place automatically by virtue of one decision allowing the reopening.

II. Civil Proceedings

The possibility of reopening civil proceedings exists in twenty-three member States, namely Albania, Armenia, Bosnia and Herzegovina, Croatia, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Latvia, Lithuania, the Republic of Moldova, Norway, Portugal, Romania, Russian Federation, San Marino, Serbia, the Slovak Republic, Spain, Switzerland and Turkey and was under consideration in one of them (in Italy, following a question introduced by the Council of State to the Constitutional Court). Among those where the possibility exists some take a cautious approach, their internal judicial system prevails and reopening is rather exceptional, e.g. in Portugal. A few States accept to reopen in exceptional cases, e.g Slovenia: reopening exceptionally on the grounds that reopening is indicated by the Court. In other States reopening can take place based on general provisions governing reopening. In Poland: depending on the circumstances of the case, a violation of the right to a fair trial established by the Court can constitute a basis for reopening under general provisions governing invalidity of civil proceedings. Family and guardianship law contains some special provisions that provide for wide possibilities of changing even final court rulings.

In some cases, general provision or general measures and ad hoc solutions are preferred (Finland). In one State, considerations have been made regarding a possible legislative reform to allow the reopening of civil proceedings following a judgment of the Court -in Greece reopening was provided through legislation explicitly mentioning Court judgments or implicitly through interpretation or general wording. Norway and Finland also have the possibility of reopening following an opinion issued by the Human Rights Committee of the United Nations.

The obstacles in States not allowing for reopening were those of res judicata (France, Greece, Ireland, the Netherlands, Poland, Slovenia), legal certainty (Greece, the Netherlands, Poland, Slovenia), third-party protection (Austria, Greece, the Netherlands, Poland), the impossibility to rectify shortcomings of the rulings adopted many years ago in view of the dynamic nature of private-law relations (Poland).

Tort against State (unlawful dispensation of justice in Belgium, the Netherlands, Poland) and compensation for loss of

opportunity (in Belgium and the Netherlands) were the alternatives to reopening.

A series of obstacles were faced and practices were developed to overcome them:

a. Time-limits and statutes of limitation in combination with the length of proceedings before the Court. An example of reopening after the period of limitation by taking into account the length of proceedings before the Court was given (Digrytė Klibavičienė v. Lithuania, Supreme Court's judgment of 22 April 2015). Indeed, as an exception, this case was reopened after nine years despite a period of limitation of five years, since the length of proceedings before the Court resulted in the deadline being missed. In addition, a legislative initiative were under consideration in that State, for the Code of Civil Proceedings to be amended in order to lift the period of limitation for the re-opening of civil proceedings on the grounds of the Court's judgments. A ten-year statute of limitation can be useful (Norway and Turkey) given the length of proceedings before the Court, although, at times, even such a timeframe may not be sufficient. In Slovakia, the principle of restitutio in integrum is applied by the Article 228 1 (d) of the Code of Civil Procedure, providing the applicants the possibility to challenge the relevant judgment of the domestic court by a motion for re-opening of the proceedings in case of the judgement of the Court in their favour. The request for the re-opening of the proceeding shall be lodged within three-month time-limit, starting from the day when the judgment of the Court became final. The determination of the start of the period on the domestic level by the final judgment of the Court prevents the problems concerning the length of proceedings before the Court.

b. For a few States third-part interest was a real concern and could be ground for the refusal to reopen proceedings. The wish was expressed that information be gathered regarding the impact that the reopening of proceedings may have on third parties who have not had the opportunity to submit observations to the European Court (Spain). It was also suggested that it should really be envisaged that the European Court of Human Rights, in cases where a possible reopening may affect third parties, invite the parties to the proceedings in accordance with Article 36 (2) of the Convention (see Croatia, Spain).

c. A few States (Germany, the Republic of Moldova, Switzerland) noted practices where third parties' interests were taken on board.

In one State, the Government Agent informs third parties whenever it becomes apparent that their interest would be affected in the proceedings before the Court, while a law provides for legal aid if they wish to appear before the Court. (Germany, Court Assistance with Costs Act of 20 April 2013). In another State, the legislation has been amended to provide for the possibility, once the re-

quest for reopening has been found admissible, of also communicating this to third parties and obliging the federal tribunal to invite each and every party to the original proceedings that led to the application to the Court to give their written observations or oral pleadings for the reopening proceedings, in particular, Switzerland; see also the Republic of Moldova.

Successful examples of reopening, mainly in cases involving the State as a defendant, were mentioned by a number of States- see Romania, Slovak Republic, Switzerland.

III. Administrative proceedings

Additional information on the reopening in respect of administrative proceedings was provided by Estonia, Finland, France, Greece, Latvia, Lithuania, Poland, Romania, Serbia and Turkey.

The criteria for reopening reflected Recommendation 2000(2), that is that when there is a (procedural and/or substantive) violation of the Convention and the need for restitutio in integrum when justified for, it is the only way to remedy the situation completely and place the person back to his/her situation before the violation. In Poland, the reopening of administrative proceedings can be also requested if a court has adopted a ruling finding a violation of the principle of equal treatment. In one State, the obligation to reopen administrative proceedings concerns the implementation of a judgment of the European Court of Human Rights or any other international or supranational court (Latvia). In one State a similar possibility is envisaged by law with respect to administrative courts proceedings (Poland). Despite the absence of specific provisions explicitly providing for the possibility of the reopening of administrative proceedings directly on the basis of Court judgments and systems' specificities, general regulations governing the reopening of administrative proceedings could be of use (for example Poland). In one State (France), the mechanism for reopening administrative proceedings was put in place by the Supreme Court, in the absence of a specific legal framework. The court in question held that when the violation found by the European Court of Human Rights concerns an administrative sanction, to which res judicata does not apply, the finding by the Court of a violation of the rights guaranteed by the Convention constitutes a new element which must be taken into consideration by the authority with the power to impose sanctions.

Consequently, when an application to this effect is made to it and the sanction imposed continues to produce effects, this authority must assess whether the continued enforcement of that sanction violates the requirements of the Convention and, if so, put an end to it, having regard to the interests for which it is responsible, the sanction and the seriousness of its effects, and the nature and gravity of the violations found by the Court.

In most cases, the application is filled in by the applicant. It is also possible for his/her representative (France, Poland) and successors (Greece) to do so. One State mentioned that a party to the administrative proceedings or any other person whom the court should have joined to

the proceedings can also request reopening provided that the infringement have affected the determination of the matter and cannot reasonably be cured, and the harm that it caused cannot be compensated, otherwise than by means of review (Estonia).

The criteria for the timeframe for filling in and submitting a request for reopening vary from three months (Greece, Latvia, Lithuania, Poland, Romania) to one year (Turkey) following the Court judgment. One State applies a time-limit of six months (Estonia). Turkey specified that application for reopening in any event can be filled in up to ten years from the date of finalisation of the domestic judgment in order to ensure legal certainty.

Applications for reopening are submitted to the relevant bodies such as the Supreme Court In Estonia or Supreme Administrative Court (in Lithuania and Poland) the administrative tribunal which issued the decision challenged by the European Court or the institution which issued the administrative act (Latvia and France) for examination and decision on reopening. In one State, if the court fails to establish newly disclosed circumstances and dismisses the application, the applicant may submit an ancillary complaint against the decision (Latvia).

The examples provided concern:

- procedural violations of Article 6 1: In two cases, the Supreme Administrative Court left its previous decision unchanged as it was established that the violation of the Convention found had no influence upon the lawfulness and validity of the decision -in Lithuania and France.
- substantial violations where the reopening could lead to recovery of the costs of detention in the expulsion centre and/or the reversal of an administrative act (Estonia: Supreme Court judgment of 8 June 2011 in administrative case No. 3-3-2-2-10 referring to the judgment of the Court of 8 October 2009 (application No. 10664/06, Mikolenko v. Estonia); administrative proceedings reopened by considering the Court's judgment finding a violation of Article 8 of the Convention –expulsion – as a "newly disclosed circumstance" - Latvia: Department of Administrative Cases of the Supreme Court on 10 August 2004, following the Court's judgment of 9 October 2003 in the case Sļivenko v. Latvia (application No.48321/99).;

The main legal and practical obstacle noted were the time limits regarding the request to reopen administrative proceedings (Lithuania, Poland). Res judicata may also constitute an obstacle to the reopening of judicial proceedings relating to administrative decisions (France).

IV. Friendly settlements and unilateral declarations

Six States: Czech Republic, Georgia, Latvia, the Republic of Moldova, Poland, Slovenia allow the reopening of criminal

proceedings following unilateral declarations or friendly settlements. One State indicated that its domestic regulations governing the reopening do not refer to "judgments" only but use a more general term "rulings" of an international body (Poland). Two States: Czech Republic, Lithuania indicated that such a possibility could be granted through an extensive interpretation by the domestic courts. Belgium indicated during the exchange of views that the possibility to reopen proceedings in case of unilateral declarations and friendly settlements was being considered with a draft law. Some States allow the reopening of civil or administrative proceedings following unilateral declarations and friendly settlements: Czech Republic (only in relation to friendly settlements), Georgia (only in relation to civil proceedings).

The very definition of friendly settlements being the final resolution of the case of the Court (Austria, Estonia, Switzerland) and ending the applicant's status of victim (Austria, Greece and Switzerland), were presented as legal obstacles for reopening. In some States, legislation in its current form provides only for reopening following the Court's judgments, e.g. Spain. This could be overcome through extensive interpretations or legislative changes- for example, in Czech Republic, Lithuania and the Republic of Moldova.

Regarding obstacles in practice, certain States explained that governments' commitments in unilateral declarations and friendly settlements cannot be imposed on the judiciary or legislative power and may not be possible for practical reasons (i.e. absence of legislation) in Czech Republic, Estonia, Poland, Turkey. In one State, the Republic of Moldova, the Government Agent explained that it was possible to work with the prosecution service in order to give effect to a friendly settlement or unilateral declaration.

To facilitate the reopening process, some States considered that more details could be given in friendly settlements and unilateral declarations notably on the subject matter of the proceedings before the Court and the relevant WECL case-law (Georgia, Poland, Spain).

Concerns were raised by Czech Republic and Latvia as to third persons/parties affected (victims, private parties,etc.). An example of a refusal of reopening was given. In Jeronovičs v. Latvia (application No. 547/02), the competent prosecutor refused the applicant's request, which was based on the government's unilateral declaration as a newly disclosed circumstance, to reopen the criminal proceedings against the third persons. This has generated a fresh application before the Court (application No. 44898/10) subject to the Grand Chamber proceedings.

Several examples of reopening were provided. For example, in December 2014, two Czech Constitutional Court decisions allowed reopening requested based on unilateral declarations. The case of Taktakishvili v. Georgia resulted in the applicant's retrial and acquittal following the government's unilateral declaration containing a passage entitling the applicant to address a domestic court with a view to reopening the case. Poland indicated a successful example of a reopening of criminal proceedings

following a unilateral declaration in the case of Sroka v. Poland under the Court's decision approving a unilateral declaration in the applicant's case. Earlier judgments were quashed and criminal proceedings discontinued in respect of the applicant having found that the act of which he had been accused no longer constituted a criminal offence, since, in the meantime, the relevant statutory provision had been repealed.

As mentioned at the beginning of this part, there are plenty of examples presented by the Council of Europe Member States in 120-pages long Compilation of written contributions on the provision in the domestic legal order for re-examination or reopening of cases following judgments of the Court, prepared by DH-GDR.

The comparative legal analysis of the document allows for the distinction of several models of the reopening of criminal proceedings on the basis of a ruling by the ECtHR, systematized according to three differentiating criteria. However, the distinction made is not disjoint in a logical sense.

The first criterion relates to the source of the standards on which the procedure is reopened. As a consequence, two models may be distinguished: the classical model and the dynamic judicial interpretation model. The classical model assumes the existence of a statutory basis for the reopening of court proceedings on the basis of a decision of the ECtHR. The model of dynamic judicial interpretation is a model in which there is no clear statutory basis for the reopening of judicial proceedings as a result of the decision of the ECtHR. Only the application of an appropriate dynamic interpretation by the courts leads to the reopening.

The second criterion is the existence of a specific condition for the opening of the reopening procedure. The effect model and the propter nova model should be distinguished here. The effect model, presupposes that in order for the proceedings to be resumed, it is necessary to have the grave, serious consequences of the infringement, which only reopening can remove. Model propter nova is a state in which the law does not explicitly provide for the reopening of proceedings on the basis of a decision by the ECtHR, however, either as a result of the statutory definition or judicial interpretation the grounds for a resumption of propter nova – i.e. evidence of new facts, new circumstances or new information, it is understood as a Strasbourg judgment finding a violation of the Convention.

Finally, the third criterion is based on the nature of the determining authority for renewal. Therefore, a judicial model (appropriate for almost all countries) and the prosecution model (specific to Latvia) and the commission model (specific to France and Norway) can be distinguished. The latter two differ from the judicial model in that it is not a court, but either a prosecutor or a specially created commission for this purpose evaluates the applications for renewal on the basis of ECtHR decisions.

The re-opening procedure in the Armenian law and practice

1. In the second chapter of the guide, we have set the task to review domestic legislative norms governing the issue of re-opening of cases in the light of the rulings and judgments of the European Court of Human Rights, identify the gaps and inadequate provisions, which in practice can cause problems, or as a result of which some practical problems have already been identified, and make appropriate recommendations for their elimination and further streamlining. To this end, we will refer to the relevant provisions of the RA Criminal Procedure Code[1], the new RA Criminal Procedure Code[2], the RA Civil Procedure Code[3], the RA Administrative Procedure Code[4], decisions of the RA Constitutional and Cassation Courts and other relevant legal acts.

2. Before referring to the regulations of the Procedural Codes, it should be noted that the issue at stake was also referred to by the RA Constitutional Court in a number of its rulings. In particular, in the decision No. CCD-1099 of May 31, 2013, the High Court states: "… the legal constitutional content of the judicial acts' revision mechanism is that it ensures restoration of violated rights under Constitution and/or Convention. The latter, based on the basic principles of the rule of law, requires elimination of the negative consequences for the victim as a result of the violation, which in turn requires the restoration of the situation that existed before the violation (restitutio in integrum). In case the Constitutional and/or Convention right of a person has been violated by a judicial act that has entered into force, the restoration of that right before the violation of the law presupposes the creation of a situation for the person that existed in the absence of the judicial act.

3. Below we will separately discuss provisions of the Procedural Codes pertaining to the revision of judicial acts following ECHR judgments.

Criminal Procedure Code

4. Chapter 491 of the RA Criminal Procedure Code (Criminal Procedure Code) entitled "Review of Judicial Acts upon Newly Emerged or New Circumstances" deals with this issue. Notably, all procedural codes consider as a new circumstance the ECtHR judgment on the basis

1 Adopted by the RA National Assembly on July 1, 1998.
2 Adopted by the RA National Assembly on July 30, 2021, and will enter into force from July 1, 2022.
3 Adopted by the RA National Assembly on February 9, 2018.
4 Adopted by the RA National Assembly on December 5, 2013.

of which the case should be reviewed (re-opened).

5. According to Article 4261 of the Criminal Procedure Code, only a judicial act that has entered into legal force must be subject to revision upon new circumstances5. Judicial act of the court of first instance must be reviewed upon new circumstances by the court of appeal, and judicial acts of the court of appeal and Court of Cassation , by the Court of Cassation .

6. According to Article 4262 of the Criminal Procedure Code, the following persons shall be eligible to lodge an appeal for the revision of a judicial act upon new circumstances:

1. persons interested in the case related to that circumstance, except for criminal prosecution bodies;

2. persons who at the time when the relevant judicial act was issued by an international court to which the Republic of Armenia is a participant, were eligible to apply to an international court in accordance with the requirements (terms) of an international treaty;

3. Prosecutor General of the Republic of Armenia and his (her) deputies.

7. In the light of new circumstances, judicial acts may be reviewed when the fact of violation of a person's right under the international treaty ratified by the Republic of Armenia was substantiated by valid judgment or decision of an international court acting on the basis of an international treaty ratified by the Republic of Armenia. Subsequently, the new circumstance in such case shall be deemed verified from the moment the judgment of the given international court, to which the Republic of Armenia is a participant, enters into force.

8. An appeal to review the judicial act upon new circumstances may be filed within 3 months. Calculation of the three-month period shall start from the date of delivery of the judgment or decision of the international court, to which the Republic of Armenia is a participant, to person that applied to the court in manner prescribed by the rules of that court (Article 4266 of the Criminal Procedure Code).

9. In accordance with paragraph 3 of Rule 77 of the ECtHR Rules of Court, the judgment shall be transmitted to the Committee of Ministers. The Registrar shall send copies to the parties, to the Secretary General of the Council of Europe, to any third party, including the Council of Europe Commissioner for Human Rights, and to any other person directly concerned.

10. Recurring back to the provisions of Article 4266 of the Criminal Procedure Code, there are gaps in them, which in practice can cause problems. Thus, the ECtHR Registry sends to the parties both

5 It should be noted that the RA Constitutional Court, by its decision of February 4, 2011 CCD-935, declared the term "solely" (in Article 4261 (1) of the RA Civil Procedure Code) invalid and inconsistent with provisions of Article 18 (1) of the RA Constitution, to the extent that it precludes the review of other final legal acts in manner prescribed by law under newly emerged or new circumstances, thereby endangering the right of an individual to effective state remedies, in particular against the competent state authorities in pre-trial proceedings.

the final judgment that has entered into force and those that have not yet entered into force. This depends on which body made the judgment - the Committee, the Chamber or the Grand Chamber. Judgments of the Committee and the Grand Chamber are final and shall enter into force upon their adoption. With regard to judgments made by the Chamber, under Article 44 of the Convention there are three scenarios for their entry into force. According to paragraph 2 of the mentioned article, the judgment of the Chamber should be considered final:

a. when the parties declare that they will not request that the case be referred to the Grand Chamber; or

b. three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

c. when the panel of the Grand Chamber rejects the request to refer under Article 43.

11. It follows from the above that the ECtHR Registry delivers to the parties in one case a final decision which has already entered into force (Committee, Grand Chamber), which confirms the new circumstance, while in the second case it delivers a decision which can take effect in up to three months period or at a later date, depending on what further steps the parties take in relation to that judgment (declare that they will not request referral to the Grand Chamber; they will not appeal the judgment within three months after it has been made; or in the event of an appeal, the Grand Chamber will review or reject the review of the Chamber judgment). Therefore, provision in Article 4266 of the Criminal Procedure Code according to which calculation shall start from the date of delivery of the judgment or decision of the international court, to which the Republic of Armenia is a participant, is not acceptable in view of the above analysis that judgments which have not yet entered into force may be served on the parties by the ECtHR Registry. The rationale is that the parties would have the opportunity, as needed, to appeal the judgment of the Chamber within three months to the ECtHR Grand Chamber.

12. In order to address this issue, we would recommend to make an amendment to the Criminal Procedure Code, stipulating **that an appeal to review a judicial act under a new circumstance may be brought within a period of 4 or 6 months (provisionally) following a judgment or decision of an international court to which the Republic of Armenia is participant enters into force.** As a result, the problem seems to be solved, as there is no need to differentiate between a judgment of the Committee, the Chamber or the Grand Chamber, in order to understand whether it has already entered into force at the time of delivering the appeal or not, etc. The proposed period will be sufficient even for the delivery of the judgment that has already entered into force to the parties and lodging of an appeal for the review of the judicial act on that basis.

13. The term "person who applied to the Court" used in Article 4266 of the Criminal Procedure Code also needs to be clarified. It is not clear whether the term "person who applied to the Court" refers only to the applicant. In particular, whether another person involved in the

examination of the case at the ECtHR after the applicant's death will be regarded as a "person that applied to the Court". At the same time, it should be noted that in the aforementioned rule of the Rules of Court the term "parties" is used, which is more inclusive; it refers to both the applicant and the person involved in the case after his/her death. In this regard, it should be noted that the recommendation from the previous paragraph solves this problem as well, as it states that a review appeal can be brought within 4 or 6 months after the entry into force of the ECtHR judgment, without specifying to whom the judgment should be sent. As to whom the Court will send the judgment, will remain in the scope of the regulation of Rules of Court.

14. Furthermore, while it seems clear from the aforementioned arrangements on which date the three-month period will begin for the applicant, there is uncertainty as to the timing of the appeal by the RA Prosecutor General or the deputy thereof. In practice, the RA Prosecutor's Office is informed about the decision from the letter of the RA Representative before the ECtHR. But even in these cases, problems with calculation of the time period do not disappear, as the Representative of Armenia before the ECtHR him(her)self is usually not aware of the date of service of the ECtHR decision to the applicant, and, therefore, cannot indicate date of expiration of the three-month period. Hence, if the RA Prosecutor General or the deputy thereof wishes to lodge a reopening appeal the only thing that can be done is to arrange the process in "within a safe period". This, obviously, cannot be an adequate solution to the problem. The recommendation in paragraph 11 above, seems to solve this problem as well. Thus, if we set a four-month or six-month period for the review of a judicial act after the entry into force of the ECtHR judgment, there will be no problems for either the applicant or the Prosecutor General or his/her Deputy in terms of starting and counting that period.

15. Article 4267 of the Criminal Procedure Code sets out criteria for appeals to review judicial acts upon new circumstances. Thus, an appeal to review a judicial act upon new circumstances must provide:

1. name, surname, address or place of residence, position of the person who lodged the appeal;
2. name of the court to which the appeal is addressed;
3. day, month, year of the judicial act subject to review;
4. expounding of the new circumstance that served as the basis for the revision of the judicial act;
5. subject matter of applicant's appeal;
6. list of documents attached to the appeal;
7. applicant's signature.

16. The appeal shall be supported by materials attesting the new circumstance, as well as other materials (Article 4267, par. 2).

17. In this regard, it should be noted that Article 15.4 of the Criminal Procedure Code stipulates that persons participating in criminal case (except for a witness) must submit all court documents in Armenian or another language with a

proper Armenian translation. In case of non-compliance with the mentioned requirement, the judicial documents shall not be considered or approved by the body conducting the criminal case, and in the cases provided for by this Code, shall return them to the persons who submitted them.

18. This issue was raised during the discussions organized within the framework of the preparation of the Guide. As a result, it became clear that the Court of Cassation pays attention to the language of the documents attached to the complaint, in particular, the judgment of the ECtHR.

19. What happens is that the requirement of the Court of Cassation to submit an Armenian translation of the ECtHR judgment in parallel with the English or French text, seems to further shorten the three-month period. In this context, it should be noted that there is no requirement for translation of ECtHR judgments in the RA legislation. Moreover, there is no requirement to translate ECtHR judgments into national official languages in the relevant recommendations of the Council of Europe Committee of Ministers. The latter only recommend to translate the judgments and decisions at stake, which the Republic of Armenia has done within three months after the entry into force of almost all judgments of the ECtHR. However, case studies show that, as a rule, the translated text of the ECtHR judgment is available to the public in the last days of the three-month period.

20. Furthermore, concerning the requirement of Article 15 (4) of the Criminal Procedure Code, the term "proper translation" remains vague, to put it mildly. In particular, ECtHR judgments are translated through the "Translation Center" SNCO of the Ministry of Justice of the Republic of Armenia, but they are not official translations, which is usually the case for official translations of normative legal acts under the requirements of the RA Law on Normative Legal Acts and other legal acts. Also, there is a question what criteria should be used to assess the "adequacy" of that translation if the applicant decides to translate the ECtHR judgment on their own or even in person. As a matter of fact, during the discussions organized within the framework of the study, it was mentioned that in one case the appellant submitted a judgment to the Court of Cassation , translated personally, which, however, was not considered a proper translation by the Court of Cassation and the appeal was dismissed. In other words, under the established practice, translations made by the "Translation Center" SNCO of the RA Ministry of Justice are deemed proper translation of the ECtHR judgments.

21. Summing up this issue, it should be noted that in the event only translations of the Translation Center of the Ministry of Justice are deemed "proper", the applicant or the Prosecutor General or his/her Deputy have a very limited time to file a complaint, as they will have to wait for the Armenian translation of the judgment. To this end, we would recommend, first to streamline in the procedural codes the requirement to attach the Armenian translation of the ECtHR judgment, without prejudice to provisions of Article 15 (4) of the Criminal Procedure Code. This would bring clarity to the issue at stake and exclude ambiguities. Moreover, having regard that the Court

of Cassation considers exclusively translations of the ECtHR judgments by the MoJustice Translation Center as "proper", we would recommend to introduce here a legislative clarification, which will prevent translation of the ECtHR judgments by the appellants at their own.

22. Referring again to recommendation made in paragraph 12 above, it will in fact solve the time problem related to translations. In particular, within three months after the translation of the ECtHR judgment by the MoJustice Translation Center and its publication on the relevant websites, the applicants and the Prosecutor General or his/her Deputy will still have time to lodge an appeal for the revision of the case. Moreover, in order to make the deadlines for revision of the judicial act more predictable, it is proposed to translate judgments of the Committee and the Grand Chamber not in 3 but in 2 months, enhancing preparation of the appeal for the appellant in terms of time.

23. According to par. 3 of Article 4267 of the Civil Procedure Code, the appellant must duly send a copy of the appeal together with the copies of the materials attesting the newly emerged or new circumstance to the participants of the trial (except for the investigator and the investigating body).

24. Based on the new circumstances, an authorized person may lodge appeal on behalf of the interested person, who together with the appeal must submit to the court a document attesting their competencies. (Article 4267 (4) of the Criminal Procedure Code): The term "interested person" used in this provision further increases the existing uncertainty. After all, who can lodge appeal to review the case other than the applicant? The answer to this question in the current Criminal Procedure Code is not clear, which in practice can cause problems when a non-applicant lodges a re-opening appeal.

25. Article 4268 of the Criminal Procedure Code provides new provisions for initiating judicial review upon new circumstances. According to that article, the court shall review a judicial act upon new circumstances based on the decision to initiate review. The court shall reject the initiation of review if:

1. the appeal was filed in violation of the deadline provided for in this Code, and no motion was submitted to restore it;
2. the newly emerged circumstance is apparently missing;
3. (paragraph 3 repealed)
4. no new evidence was presented attesting the new circumstance as a basis for reviewing the judicial act, and the court is not aware of the existence of such a circumstance; or
5. the appeal was filed or signed by an ineligible person or it was not signed at all.

26. The court shall decide to reject the initiation of the review the case within 10 days after receiving the appeal. Decision to reject the initiation of review may be appealed in accordance with the procedure established by the Code.

27. In the review initiated upon a new circumstance, after examining of the case, the court shall issue a judicial act in accordance with the general procedure established by the Code. In a judicial act

resulting from the review, the court may not change the final part of the revised judicial act solely if it stipulates with substantiated arguments that the circumstances provided for in Article 426.4 of the Code could not substantially affect the outcome of the case. Judicial act of the Court of Appeal may be appealed to the Court of Cassation in accordance with the general procedure established by law (Article 4269 of the Criminal Procedure Code).

28. Summing up the analysis of the current Criminal Procedure Code, it should be noted that the possibilities to include recommendations on elimination of gaps, shortcomings in the regulations on revision of judicial acts in light of the new circumstances in the Code do not seem realistic, as the new Criminal Procedure Code will enter into force on July 1, 2022, unless a later date is set by the legislator for the new code to enter into force. The analysis of the shortcomings of the current Code was based on the assumption that they are almost identical to the problems of the new Criminal Procedure Code, and further changes can and should be made namely in the new Code.

New RA Criminal Procedure Code

29. The proceeding for revision of a case upon new circumstance is included in Chapter 49 of the new RA Criminal Procedure Code, which is entitled "Exceptional review". The list of judicial acts that are subject to exceptional review has been significantly expanded in the wording of the new Code (Article 401). According to Article 402 (1) (3-4) of the Code, the following persons have the right to lodge an exceptional review appeal: ….

1. the person who was a private participant in the given proceedings, whose legitimate interests are related to the alleged new circumstance or the alleged fundamental violation or the alleged new emerging circumstance;
2. …
3. a private participant in the given proceedings, who at the time of making the relevant judicial act by the international court, to which the Republic of Armenia is a participant, had the right to apply to an international court in accordance with the requirements of the international treaty;
4. Prosecutor General of the Republic of Armenia and the deputies thereof.

30. Moreover, instead of the person mentioned in Article 402 (1) (3), an exceptional review appeal may be submitted by his/her authorized person (proxy), who must also submit to the court the document attesting their powers.

31. The analysis of the aforementioned provisions of the new Code shows that in their case, too, the scope of persons to lodge a re-opening appeal on the basis of the ECtHR judgment is limited. Thus, the Code stipulates that person must have been a private party to the judicial proceedings. According to Article 6 (13) of the Code, private participants in the proceedings are the defendant, legal representative to the defendant, lawyer, victim, property respondent, legal representative of the victim and property respondent and the authorized representative.

32. As we can see, these arrangements also severely restrict chances of the person involved in the examination of the appeal to lodge an appeal for reopening the case in the event of the death of the applicant who was the initiator of the appeal to the ECtHR. In particular, consider the situation where, for example, following murder the legal successor of the victim, having exhausted the effective domestic remedies, applied to the ECtHR, claiming that there had been numerous procedural violations during investigation of the criminal case, which later served as a basis for identification by the ECtHR of a violation of the procedural aspect on the protection of the right to life. In the example given, if we assume for a moment that the applicant had died before the ECtHR had rendered a judgment and that another person with victim status under ECtHR case-law had been involved in the examination of the complaint, it remains unclear whether the latter would have an opportunity to file an application for the exceptional revision of the case. Evidently, the Code does not provide for regulation in such circumstances. The situation in the context of the circumstances described above is unclear also in the event of the applicant's death following a decision of the ECtHR. We would recommend to add to the list of those eligible to lodge an appeal for reviewing a judicial act on the basis of a new circumstances the persons involved in the examination of the case in the ECtHR, who have a legitimate interest in the review of that act.

33. According to Article 403 (1) (5) of the new Criminal Procedure Code, an appeal under new circumstances may be brought, in the event violation of the right of a person provided for in the international treaty of the Republic of Armenia was confirmed by the valid judgment or decision of international court in which the Republic of Armenia is a participant, or accepted by the friendly settlement or unilaterally recognized by the Republic of Armenia. As matter of fact, in contrast to the current Criminal, Civil and Administrative Procedure Codes, the new Criminal Procedure Code mentions explicitly among the grounds of an exceptional review of the judicial act under the new circumstance, the fact of violation of the right of a person under international treaty of the Republic of Armenia as envisaged by the friendly settlement or unilateral declaration. In this regard, it should be noted that while the current legislation does not specifically focus on the above grounds, the wording "the fact of violation of a right of a person provided for in the international treaty of the Republic of Armenia was confirmed by the valid judgment or decision of international court" includes recognition of the fact of violation of the rights established by an friendly

settlement or a unilateral declaration as the friendly settlement or a unilateral declaration are confirmed by a decision of the European Court. In this regard, it would be appropriate to refer to Grigoryan and others v. Armenia, Application No. 40864/06. The Government of the Republic of Armenia made a unilateral declaration regarding this complaint, which was adopted by the ECtHR and on the basis of which the Court, by its decision of 08.11.2018, struck out the application from the list of cases to be examined. Subsequently, the applicants in the case lodged an appeal with the Court of Cassation to review the judicial act, stating that the judgment of the European Court of Human Rights was a new circumstance within the meaning of Article 419 (1) (2) of the RA Civil Procedure Code as "the fact of violation of the right of a person envisaged by the international treaty ratified by the Republic of Armenia (...)was substantiated by the judgment of the court acting on the basis of the international treaty ratified by the Republic of Armenia ...". In relation to this appeal, the Court of Cassation stated that «(...) As a result of the literal interpretation of the words and expressions of the above-mentioned norm, in other words, due to the expression "substantiated" used in the Article 419 (1) (2) of the RA Civil Procedure Code not to consider the European Court's decision on a unilateral declaration or friendly settlement as a ground for reopening a case under a new circumstance may be an overly formal interpretation. In this regard, the Court of Cassation considers it necessary to emphasize that both the friendly settlement and the unilateral declaration are approved by the European Court, and the fulfilment of the conditions stipulated in them is under the control of the Committee of Ministers6."

34. With regard to deadlines, under Article 405 of the new Criminal Procedure Code, an appeal for an exceptional review on the basis of an ECHR judgment can be lodged within four months. Calculation of the four-month period shall start from the day of the delivery of the judgment or decision of the international court, to which the Republic of Armenia is a participant, to the person who applied to that court in the manner prescribed by the regulations of that court.

35. As we see in the new Code, the deadline for filing a case review appeal has been extended by one month, from three to four months. However, as a result of this, the problems we raised within the framework of the study of the norms related to the current Criminal Procedure Code have not been settled. Therefore, to avoid overlapping, we would suggest including in the new Code the recommendations on addressing the shortcomings and gaps in the existing Code.

36. Review of acquittals or decisions to discontinue prosecution is permitted during the statute of limitations for criminal liability. The exceptional review of the judicial act with the request to prove the innocence of the convict or their committing a lesser crime is not limited in time. The death of a convict is not an

6 For more details on the decision of the ECtHR on a unilateral declaration or friendly settlement as a basis for reopening the case, see the decision of the Court of Cassation of October 19, 2021 on revising the ruling of the Chamber of Civil and Economic Affairs of the Court of Cassation of 07.04.2006.

obstacle to conducting an exceptional review to restore the rights of the convict or other persons. (Article 404 (3-5) of the new Criminal Procedure Code).

37. The appeal of the exceptional review must be submitted to the Court of Cassation , or to the Court of Appeal, if the appealed judicial act was made by the court of first instance. In case of a review appeal by the Prosecutor General of the Republic of Armenia or the deputy thereof, copies of the review appeal and attached materials shall be duly sent to the persons who were private participants in the proceedings. In case of an exceptional review appeal by a private participant in the proceedings or a person authorized by him based on the decision of the ECtHR, copies of the appeal and the attached materials shall also be sent to the Prosecutor General of the Republic of Armenia or the deputy thereof. The documents confirming that copies of the appeal and the attached materials were sent to the mentioned addressees shall be attached to the appeal for exceptional review (Article 406).

38. An exceptional review proceeding based on an exceptional review appeal shall be initiated by a decision of a competent court. Exceptional review shall be carried out within a reasonable time.

39. In case of conducting the proceedings through the oral procedure, the person who filed the appeal, the authorized person thereof, Prosecutor General of the Republic of Armenia and private participants of the given proceedings shall be notified about the place and time of the court session.

40. Initiation of an exceptional review shall be rejected by a decision if there are any of the following grounds:

1. the appeal was not brought in line with the requirements set forth in Article 355.1 or 2, or Article 406 of the Code within the period established by the competent court;
2. the appeal is overdue, and in case of initiation, the motion to restore the missed deadline of the appeal was rejected;
3. the appeal was filed or signed by an ineligible person;
4. the appeal was brought against a judicial act that is not subject to exceptional review.

41. The decision to initiate or reject the initiation of review shall be made by the competent court within one month after receiving the appeal, and shall be sent to the appellant and the persons referred to in Article 406 (2) of the Code.

42. The decision of the Court of Appeal on waiving the initiation of an exceptional review may be appealed by the interested person to the Court of Cassation in accordance with the special review procedure established by this Code (Article 407).

43. Based on the results of the exceptional review, the competent court shall completely or partially overturn the appealed judicial act, transferring the proceedings to the relevant lower court or terminating the criminal prosecution, and terminate the proceedings as well, as needed.

44. The court conducting the exceptional review has the right not to overturn the appealed judicial act only if it substantiates with a strong argument that the violation registered by the decision

of the ECtHR could not substantially affect the outcome of the proceedings.

45. A court decision rendered as a result of an exceptional review shall enter into force from the date of its publication. The judicial act of the Court of Appeal may be appealed by the interested person through cassation.

46. A court decision rendered as a result of an exceptional review shall be sent within a reasonable time to the person who lodged the appeal and to the private participants in the given proceedings.

47. In case the appealed judicial act is overturned by an exceptional review and the proceedings are transferred to a lower court, the proceedings shall be conducted on a general basis, within the limits set by the court conducting the exceptional review.

Civil Procedure Code

48. Chapter 58 of the Civil Procedure Code deals with the review of judicial acts upon new circumstances. According to Article 415 of the Code, judicial acts of a Court of First Instance and of the Court of Appeal having entered into legal force, which are subject to appeal, orders on payment, as well as the decisions rendered by the Court of Cassation on returning the cassation appeal, leaving it without consideration, dismissing the cassation appeal and the decisions rendered based on examination of the cassation appeal may be reviewed based on newly emerged or new circumstances7.

49. The judicial act delivered by a Court of First Instance having entered into legal force shall be reviewed by the Court of Appeal upon newly emerged or new circumstances. The judicial acts delivered by the Court of Appeal or by the Court of Cassation having entered into legal force shall be reviewed by the Court of Cassation upon newly emerged or new circumstances (Article 416).

50. According to Article 417 of the Code, persons having the right to lodge an appeal for reviewing a judicial act upon newly emerged or new circumstances shall be:

51. (i) persons participating in the case and the legal successors thereof, where the disputed legal relationship or that established by a judicial act allows legal succession;

(ii)Prosecutor General and the deputy thereof, in cases provided for by law.

52. In this context, questions arise, such as whether the Prosecutor General or the deputy thereof have the right to appeal for the review of a judicial act following a ECtHR judgment in a civil case, or the above wording refers to newly emerged circumstances. If so, in what cases can such an appeal be lodged by the latter? This is important because the Code article uses the term "in cases provided for

7 Pursuant to the decision of the RA Constitutional Court CCD-1573 of 27.01.21, paragraph 1 of Article 415 of Civil Procedure Code was recognized as contradicting Articles 61 and 75 of the RA Constitution and void to the extent that it precludes the review of judicial acts of the Court of Appeal which have entered into force, but are not subject to appeal upon new circumstances.

by law", which creates ambiguity. First, what law and what cases are we talking about? While it can be assumed that it is a matter of bringing an appeal in the field of protection of state interests, in this case, its connection with the ECtHR judgment remains unclear. Based on the above, we would suggest to refer to "newly emerged" and "subjects having the right to review a judicial act on the basis of new circumstances" in two separate articles, in order to avoid any ambiguity.

53. According to Article 419 of the Code, "new circumstances shall be a basis for reviewing a judicial act, where: …

2) in a judgment or a decision, having entered into legal force, of an international court operating based on international agreements ratified by the Republic of Armenia, has been substantiated the fact that a person's right, as defined in the international agreement ratified by the Republic of Armenia, has been violated, or where the person, at the moment of entry into force of the given judgement or decision, has had the opportunity to exercise that right in compliance with the requirements (time limits) provided for by international agreements.

54. Appeal on reviewing a judicial act upon emerged or new circumstances may be lodged within a three-month period. Calculation of the three-month period shall begin on the date on which the judgment is served on the person who has applied to that court in the manner prescribed by the judgment of the international court in which the Republic of Armenia is participant. In this regard, we will probably not make a separate analysis, as we have already presented the problems related to a similar article of the Code above, and it would be desirable for them to be resolved in the Code as well.

55. Furthermore, Article 420 (2) of the Code defines that an appeal on reviewing a judicial act may not be lodged where twenty years have passed since the entry of the judicial act into legal force. The mentioned time limit shall not be restored.

56. According to Article 421 of the Code, an appeal on reviewing a judicial act upon newly emerged or new circumstances shall be compiled in writing, in compliance with the requirements of Article 16 (2) of the Code. The appeal must be legible.

57. In the appeal on reviewing judicial acts upon newly emerged or new circumstances shall be included the following:

1. name of the court whereto the appeal is addressed;
2. names of the person having lodged the complaint and persons participating in the case, the addresses of their residence (location);
3. name of the court having delivered the judicial act against which the appeal is lodged, the number of the case and the year, month, day of delivering the judicial act;
4. expounding of the newly emerged or new circumstance serving as a basis for reviewing the judicial act and substantiation of the reason it must be a basis for reviewing the judicial act;
5. claim of the person having lodged the appeal;

6. (6) list of documents attached to the appeal.

58. The following shall be attached to the appeal:

1. document attesting the powers of the representative, if not available in the case and where the application has been signed by the representative;

2. evidence confirming newly emerged or new circumstance;

3. document attesting to the fact of legal succession where the appeal has been lodged by the legal successor of the person participating in the case;

4. a motion on restoring the term for lodging an appeal where the appeal has been lodged in violation of the time limit as provided for by part 1 of Article 420 of this Code;

5. evidence of having sent the appeal to the court having delivered the judicial act, except for the case where the appeal is lodged against a judicial act delivered by the Court of Cassation ;

6. evidence of having sent or handed the appeal and the attached documents to other persons participating in the case.

59. Motions on restoring the term for lodging an appeal, as well as other motions of the person having lodged the appeal may also be submitted by being included in the appeal.

60. The appeal on reviewing a judicial act upon newly emerged or new circumstances shall be signed by the person having lodged it or the representative thereof.

61. According to Article 422 of the Code, the court shall render a decision on returning the appeal lodged for reviewing a judicial act under newly emerged or new circumstances within a one-month period after receiving it, where:

1. requirements provided for by Article 421 of this Code have not been observed;

2. an appeal has been lodged against the judicial act of a lower court where there is a judicial act of a higher court that has entered into legal force with regard to the given case or the given issue;

3. existence of a newly emerged or new circumstance has not been obviously substantiated within the scope of the appeal.

62. The appeal of the review of the judicial act shall also be waived by the Court of Appeal and the Court of Cassation on the grounds established by Articles 371 and 395 of the Code, respectively.

63. In the decision of the court on returning the appeal lodged for reviewing a judicial act shall be indicated all prima facie contraventions made in the appeal. In case of rendering such decision, only the decision on returning the appeal for reviewing a judicial act shall be sent to the person having lodged the appeal.

64. In case of eliminating the committed contraventions and lodging an appeal again within a two-week period following receipt of the decision on returning the appeal on the grounds of contravention of the requirements of Article 420 of the Code, lodging an appeal upon expiry of the defined time limit and not containing a motion on restoring the

defined time limit or having lodged an appeal against more than one judicial act, the court shall, within a month time, render a decision on initiating proceedings for reviewing the judicial act upon newly emerged or new circumstances. In case of lodging the appeal over again, new time limits shall not be provided for elimination of contraventions.

65. The decision of the Court of Appeal on returning the appeal lodged for reviewing a judicial act may be appealed against in cassation procedure within two weeks after receiving it. Where the Court of Cassation cancels the decision, the court shall render a decision on initiating proceedings for reviewing a judicial act upon newly emerged or new circumstances within a three-day period after receiving the case.

66. The Court of Appeal shall reject the appeal for review of the judicial act on the grounds and in accordance with the procedure established by Article 372 of the Code. The Court of Cassation shall leave without consideration the appeal for reviewing a judicial act and shall reject to accept for proceedings in compliance with the grounds and the procedure as prescribed by Articles 396 and 397 of the Code.

67. Where there are no grounds for returning an appeal lodged for reviewing a judicial act, leaving it without consideration or dismissing it, the Court of Appeal shall render a decision on accepting the appeal lodged for reviewing the judicial act upon newly emerged or new circumstances for proceedings within one month period after receiving the appeal, and the Court of Cassation - within a three-month period.

68. The court shall send the decision on accepting for proceedings the appeal lodged for reviewing the judicial act to the person having lodged it and to other persons participating in the case after rendering the decision.

69. By the decision on accepting for proceedings the appeal lodged for reviewing the judicial act, or during examination of the case, the court may, on its own initiative or upon motion of a person participating in the case, suspend execution of the judicial act or a part thereof.

70. Suspension of execution of the judicial act appealed against or a part thereof shall be retained until the judicial act rendered in the result of the appeal enters into legal force, and in case the proceedings for reviewing the judicial act are terminated - before announcement of the judicial act on that.

71. The person participating in the case shall have the right to send a response or submit it to the court and other persons participating in the case within a two-week period after receiving the decision of the court on accepting for proceedings the appeal lodged for reviewing a judicial act upon newly emerged or new circumstances.

72. The response to the appeal lodged for reviewing a judicial act must comply with the requirements prescribed by Articles 369 or 398 of this Code respectively.

73. The person submitting the response may attach evidence to the response to the appeal lodged for reviewing a judicial act.

74. The response shall be attached to

the response submitted, and, in case evidence has been submitted, also confirmation on having sent the copies of that evidence to other persons participating in the case.

75. Response shall be signed by the person having submitted it or by representative thereof. A document attesting powers of the representative shall be attached to the response signed by the representative.

76. While reviewing judicial acts upon newly emerged or new circumstances, the Court of Appeal and the Court of Cassation shall examine the case in the procedure of review in compliance with the rules defined for examination of cases in a relevant court prescribed by the Code, unless otherwise provided by the Chapter on the review of a judicial act upon newly emerged or new circumstances.

77. During examination of the appeal on reviewing a judicial act, the court shall study the evidence existing in the case.

78. For the purpose of determining availability or absence of grounds of the appeal lodged for reviewing a judicial act, the court shall evaluate the evidence examined and may consider new evidence as confirmed, where it is possible to arrive to such conclusion based on the evidence examined.

79. When determining availability of grounds for the review of a judicial act upon new circumstance, the court shall reverse the judicial act being reviewed and remand it to the respective court for new examination, if it is not possible to amend it.

80. When reviewing the judicial act on the basis of the judgment of the ECtHR, the court may not reverse the judicial act, only if it substantiates that it could not in fact affect the outcome of the case.

81. When reversing the judicial act being reviewed, the court shall amend it where the facts confirmed in the case make it possible to deliver a new judicial act without new examination of the case.

82. In the result of examination of the appeal lodged for reviewing a judicial act upon newly emerged or new circumstances, the court shall render a decision which must comply with the requirements of Articles 381 and 406 of the Code, respectively.

83. The judicial act of the Court of Appeal may be appealed against in the Court of Cassation pursuant to the general procedure prescribed by law.

ADMINISTRATIVE PROCEDURE CODE

84. Chapter 25 of the RA Administrative Procedure Code deals with the reopening of court cases under a new circumstance.

85. Pursuant to Article 182.1 (3) of the Code of Administrative Procedure, new circumstances are grounds for review of a judicial act if, by a judgment or decision of an international court acting on the basis of an international treaty ratified by the Republic of Armenia confirmed the fact of violation of a person's right pro-

vided by international treaty ratified by the Republic of Armenia.

86. A judicial act of an Administrative Court that has entered into legal force shall be reviewed by the Court of Appeal under a new circumstance, unless that judicial act has been reviewed by the Court of Appeal or the Court of Cassation before it enters into legal force. Decisions of the Courts of Appeal and Cassation that have entered into legal force shall be reviewed under new circumstances by the Court of Cassation .

87. An application for the review of a judicial act under emerged or new circumstances may be launched by:

1. participants of the trial, as well as their legal successors, if the disputed legal relationship allows legal succession;
2. ...
3. persons who, at the time of the issuance of the judicial act by the international court where the Republic of Armenia is participant, may apply to an international court in accordance with the international treaty (Article 184 of the Code).

88. Article 185 of the Administrative Procedure Code deals with the terms of reviewing a judicial act under emerged or new circumstances. According to that article, an application for review of a judicial act under emerged or new circumstances may be submitted within 3 months after the relevant ground appears.

89. In contrast to the current new Criminal Procedure and Civil Procedure Codes, which considered the start of the appeal period for reviewing a judicial act, the date of service of a judgment or decision on a person applying to that court in accordance with ECtHR regulations, the Administrative Procedure Code stipulates that an application for review of a judicial act may be submitted within 3 months after the relevant grounds appear. In such case, the basis is the valid judgment or decision on violation of a right or freedom guaranteed by the Convention. In the case of regulations of the Administrative Procedure Code, most of the problems can arise in the case of the judgments of the Committee and the Grand Chamber, because, as already mentioned above, they are final and come into force from the moment of issuing. In this context, it should not be forgotten that they have yet to be properly delivered to the applicant and must be translated by the Translation Center of the RA Ministry of Justice. In such circumstances, the possibility of bringing a complaint to review the judicial act within three months on the basis of a new circumstance seems very unrealistic. Therefore, in order to avoid problems in practice, we would suggest expanding the recommendation made in paragraph 12 above to the provisions of the Administrative Procedure Code.

90. Legal successor of an individual participating in the proceedings may submit an application for review of a judicial act under the emerged or new circumstances within 3 months after being recognized as such, if the legal successor did not exercise his/her right to submit an application because of death (Article 185 (2)). As a matter of fact, the deadline for the legal successor to file a complaint for review of a judicial act is not regulated in the Administrative Procedure Code

and the Code needs to be streamlined in this regard.

91. An application for review of a judicial act may not be lodged if twenty years have elapsed since the entry into force of the judicial act.

92. An application for review of a judicial under the emerged or new circumstances shall be made in writing, stating:

1. name of the court to which the application is addressed;
2. names of the person submitting the application and participants in the proceedings;
3. year, month, date and case number of the judicial act subject to review;
4. grounds for reviewing the case under the emerged or new circumstances, as well as substantiations concerning their impact on the outcome of the case;
5. subject matter of the claim in the application;
6. list of documents attached to the application.

93. Attached to the application shall be the fact of new circumstance or evidence confirming the new circumstance, as well as other additional evidence that has not been previously presented. In cases provided by law, the application shall be accompanied by a document confirming the payment of the state fee related to its examination or the code certifying the transfer of the state fee to the relevant treasury account issued by the settlement company, and where the law provides for the possibility of postponing or deferring the payment of the state fee or reducing its amount, the application must include a relevant motion.

94. The application must be signed by the person submitting it or his/her representative.

95. The application and the attached documents and materials shall be filed with the relevant Court.

96. In the absence of grounds for dismissing the application, the Court shall make a decision on accepting the application for proceedings within fifteen days following the day of receiving it.

97. Within three days after the decision to accept the application is made, it must be sent to the participants of the proceedings, at the same time informing them of their right to respond to the application.

98. Parallel to sending the decision to accept the application for proceedings, the participants of the trial shall be notified about the time and place of the court session.

99. Articles 188-190 of the Code of Administrative Procedure establish norms on the grounds for dismissing the application, the procedure for submitting the response to the application and the procedure for reviewing judicial acts under the emerged or new circumstances.

CONCLUSION

100. Summarizing the study conducted and highlighting the gaps, shortcomings and uncertainties in the national regulations concerning the review of judicial acts following the ECtHR judgments, we have arrived at the following conclusions and recommendations:

- all procedural codes consider judgments of the European Court of Human Rights which identify violations of the rights and freedoms of a person guaranteed by the Convention or the protocols thereto, as an unconditional basis for review of a judicial act. The problem is that in such cases it is not always possible to eliminate the violation by reviewing the judicial act or restitutio in integrum. In light of this, we propose to add in the procedural codes a clause for review of a judicial act, noting that ***it can be reviewed if the violation had an impact on the outcome of the case and it cannot be eliminated or the resulting damage cannot be compensated other than by a revision of the judicial act***. As a matter of fact, such conditions exist in the procedural codes of a number of European countries[8]. In this regard, it should be noted that the Court of Cassation rejected the reopening of the case on a number of appeals, finding that the judgment or decision of the European Court indicating a violation is not a ground for reversing or quashing the judicial act.[9]
- We would recommend to amend provisions on the deadlines for the revision of a judicial act following a judgment or decision of the ECtHR, and stipulate that ***an appeal to review a judicial act under a new circumstance may be brought within a period of 4 or 6 months***.
- Given the problems arising in practice with regard to the requirement to submit an Armenian translation of the ECtHR judgments, we would recommend ***to revisit in the procedural codes the requirement to attach an Armenian translation of the judgment or decision of the international court to which the Republic of Armenia is a participant, regardless of the existence of a general provision on the language of the trial and the documents submitted during it.*** This will bring clarity to the legal issue at stake and will exclude misinterpretations.
- Furthermore, given that *there is uncertainty with the "proper translation" of ECtHR judgments into Armenian, we would recommend* ***to clarify in the legislation that translations of SNCO "Translation Center" of the RA Ministry of Justice shall be con-***

8 See, for example, Article 366 (1) (7) of the Estonian Criminal Procedure Code.

9 See, for example the decision of the Court of Cassation of November 7, 2019 on criminal case No. ECD/0190/06/08, the decision of the Court of Cassation of October 19, 2021, the decision of the Chamber of Civil and Economic Affairs of the Court of Cassation of 07.04.2006 on grounds for review under new circumstances, etc.

sidered as such and acceptable to the Court of Cassation. This will exclude translation of judicial decisions by the applicants, requesting revision of the judicial acts at their own expense and save them from extra costs.

- In order to streamline the deadlines for revision of the judicial acts, we would recommend ***to translate the decisions of the ECHR or at least those made by the Committee and the Grand Chamber not in 3 but in 2 months***, which will enhance filling in the application by the applicant in terms of time.

- We would recommend in addition to the private participants in the proceedings***, to add to the list of persons in the Civil Procedure Code eligible to apply for revision of the judicial act in light of new circumstances, the persons involved in the examination of the case in the ECtHR that have a legitimate interest in revision of that act***.

- Considering that the time limit for filing a complaint by the legal successor of a participant in the trial is not regulated in the Civil Procedure Code, we would recommend ***to regulate the issue in the Civil Procedure Code in a similar way to the Administrative Procedure Code.***

About the Project

SUPPORT FOR THE EXECUTION BY ARMENIA OF JUDGMENTS IN RESPECT OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

January 2021- December 2022

The project aims to support Armenia in the execution of the European Court of Human Rights (ECtHR) judgments in which violations of Article 6 of the Convention are established. The major groups of such judgments include improvement of access to justice, prevention of the non-execution or delayed execution of judgments of national courts, development of remedies concerning excessive length of judicial proceedings.

The project also supports the Court of Cassation of Armenia in building effective procedures related to interaction with the ECtHR, with a focus on the implementation of Protocol No. 16 to the ECHR.

Overall, the Project aims to support the judicial reform in Armenia to strengthen judicial independence and the effectiveness of legal proceedings and promote access to justice in line with the European standards.

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