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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

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

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

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AUSTRIA / AUTRICHE

Criminal Proceedings

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

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

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

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

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

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

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

Civil Proceedings

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

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

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

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

Administrative Proceedings

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

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE

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

- **Criminal proceedings**

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

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

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

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

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

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

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

- **Civil proceedings**

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

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

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

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

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

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

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

CYPRUS / CHYPRE

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

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

CZECH REPUBLIC / REPUBLIQUE TCHEQUE

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

Le régime juridique de la réouverture

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

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

La pratique de la réouverture

- La Cour constitutionnelle s'est montrée plutôt libérale dans sa façon de juger si les conditions de recevabilité, notamment celles relatives à l'effacement des conséquences de la violation, sont réunies. La réouverture a donc jusqu'à maintenant toujours été accordée à moins que le demandeur n'ait été autorisé par la loi à faire la demande (en particulier si le demandeur n'était pas partie à la procédure devant la Cour de Strasbourg), la demande n'ait souffert de vices ; la Cour constitutionnelle a décidé

dans un seul cas d'opposer au demandeur de réouverture l'effacement des conséquences de la violation couplée avec l'octroi de la satisfaction équitable par la Cour de Strasbourg, ne partageant pas le point de vue du demandeur que l'intérêt public exige l'examen de son recours constitutionnel initial. À une exception près, il est possible de dire que la Cour constitutionnelle ne s'est pas vraiment penchée sur cette question.

- Elle a accordé la réouverture tant des affaires pénales que civiles. Sur les treize affaires ré-ouvertes,[1] il a été fait droit au recours constitutionnel initial dans sept cas et l'affaire renvoyée aux tribunaux ordinaires. Nous n'avons pas connaissance du résultat de ces procédures, mais il est connu qu'en l'affaire *Melich et Beck c. République tchèque*, la réouverture a, certes, abouti à l'annulation des décisions des tribunaux ordinaires et au réexamen de l'affaire pénale au fond, mais le procès s'est terminé de la même manière qu'avant, au mécontentement des intéressés (voir affaires n° 35450/04, arrêt du 24 juillet 2008, et n° 18136/11, décision du 4 juin 2013).
- Il est à noter que la Cour constitutionnelle a même appliqué le principe de *beneficium cohaesionis* en décidant de la réouverture d'une affaire pénale également au bénéfice du co-accusé du requérant. Le recours constitutionnel initial a ensuite été déclaré manifestement mal fondé.
- En ce qui est de la réouverture après règlement à l'amiable ou déclaration unilatérale du Gouvernement, cette possibilité semblait exclue par la loi modifiée. Récemment saisie de deux demandes de réouverture après déclarations unilatérales du Gouvernement, la Cour constitutionnelle s'est néanmoins penchée en faveur des requérants. Leurs recours constitutionnels initiaux ont toutefois été nouvellement déclarés irrecevables pour défaut manifeste de fondement.
- Il est possible de dire que la demande de réouverture est devenue une pratique courante, même dans des affaires où il est permis de douter de l'utilité d'une telle démarche.
- Il convient de noter que dans bien des affaires concernées la Cour de Strasbourg a relevé les vices de procédure commis par la Cour constitutionnelle elle-même. Il n'est donc guère surprenant qu'une fois ces vices réparés, les recours constitutionnels fassent leur chemin habituel, le plus souvent celui menant vers une décision d'irrecevabilité.

Les lacunes ou problèmes

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

- D'abord, pour les raisons spécifiées plus haut, le système de la réouverture est greffé sur le recours constitutionnel initialement déposé devant la Cour constitutionnelle. Or, il se peut que la Cour de Strasbourg déclare recevable une requête dans une affaire qui n'a pas été préalablement examinée par la Cour constitutionnelle (p. ex. *Bucheň c. République tchèque*, n° 36541/97, arrêt du 26 novembre 2002). Dans cette hypothèse la réouverture semble exclue, sauf créativité de la Cour constitutionnelle.
- Ensuite, il paraît que la loi ne consacre pas assez clairement la protection des droits acquis de bonne foi. Il est, certes, fait référence au principe précité, prévu dans le code

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

de procédure civile, voulant que la nouvelle décision en l'affaire ne puisse pas porter atteinte aux relations juridiques des personnes autres qu'une partie à la procédure. Mais la réouverture crée précisément le risque d'une remise en cause des droits acquis par une partie à la procédure initiale devant les tribunaux ordinaires. La loi ne dit pas clairement comment aborder la pondération des intérêts privés en jeu. Ce constat ne signifie pas forcément l'impossibilité de trouver une solution équilibrée qui ne serait pas au détriment des droits acquis de bonne foi.

- Enfin, une tension existe entre, d'un côté, la portée du recours constitutionnel nouvellement examiné, telle qu'initialement définie (voire la portée des griefs soumis à la Cour de Strasbourg dont elle n'a accueilli souvent qu'une mince partie), et, de l'autre côté, la portée de l'examen après la réouverture, car il y a souvent une attente bien plus grande chez les requérants par rapport à ce qui découle objectivement de l'arrêt de la Cour de Strasbourg. Cette tension est une source de malentendus.

ESTONIA / ESTONIE

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

1. Criminal proceedings

Legal basis

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

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

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

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

Case-law

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

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

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

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

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

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

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

Meaning of friendly settlements (unilateral declarations)

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

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

2. Civil (and administrative) proceedings

Legal basis

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

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

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

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

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

Case-law

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

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

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

FRANCE

Dans la perspective de la réunion du DH-GDR des 27 au 29 mai prochain, je vous prie de bien vouloir trouver une présentation des mécanismes de réouverture des procédures civiles et pénales à la suite d'un constant de violation de la Cour européenne des droits de l'homme.

Compte-tenu des délais extrêmement contraints, des compléments à cette première analyse suivront, des consultations étant encore en cours au sein de la Cour de cassation notamment.

1) Procédures pénales

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

a) Sur le droit existant

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

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

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

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

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

A l'issue d'une audience publique, la commission se prononçait sur le caractère justifié de la demande.
Si elle estimait la demande justifiée, la commission procédait ainsi :

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

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

Les conditions du réexamen ne sont pas modifiées.

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

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

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

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

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

Sur les demandes de suspension de l'exécution de la condamnation, l'article 625 du code de procédure pénale dispose que : « *La commission d'instruction et la formation de jugement peuvent saisir la chambre criminelle d'une demande de suspension de l'exécution de la condamnation. Le condamné peut également demander la suspension de l'exécution de sa condamnation à la commission d'instruction et à la formation de jugement, qui transmettent sa demande à la chambre criminelle. Les membres de la chambre criminelle qui siègent au sein de la cour de révision et de réexamen ne prennent pas part aux débats ni à la décision. /La chambre criminelle, lorsqu'elle ordonne la suspension de l'exécution de la condamnation, peut décider que cette suspension est assortie de l'obligation de respecter tout ou partie des conditions d'une libération conditionnelle prévues aux articles 731 et 731-1, y compris, le cas échéant, celles résultant d'un placement sous surveillance électronique mobile./ Elle précise dans sa décision les obligations et interdictions auxquelles est soumis le condamné, en désignant le juge de l'application des peines sous le contrôle duquel celui-ci est placé. Le juge de l'application des peines peut modifier les obligations et interdictions auxquelles est soumis le condamné, dans les conditions prévues à l'article 712-6./ Ces obligations et interdictions s'appliquent pendant une durée d'un an, qui peut être prolongée, pour la même durée, par la chambre criminelle./ En cas de violation par le condamné des obligations et interdictions auxquelles il est soumis, le juge de l'application des peines peut saisir la chambre criminelle pour qu'il soit mis fin à la suspension de l'exécution de la condamnation. Il peut décerner les mandats prévus à l'article 712-17 et ordonner l'incarcération provisoire du condamné en application de l'article 712-19. La chambre criminelle doit alors se prononcer dans un délai d'un mois. Si elle ne met pas fin à la suspension de l'exécution de la condamnation, elle peut modifier les obligations et interdictions auxquelles le condamné est soumis./ Si la formation de jugement de la cour, statuant en réexamen, annule la condamnation sans ordonner la suspension de son exécution, la personne qui exécute une peine privative de liberté demeure détenue, sans que cette détention puisse excéder la durée de la peine prononcée, jusqu'à la décision, selon le cas, de la Cour de cassation statuant en assemblée plénière ou de la juridiction du fond. Cette décision doit intervenir dans le délai d'un an à compter de la décision d'annulation de la cour de révision et de réexamen. Faute de décision de la Cour de cassation ou de la juridiction du fond dans ce délai, la personne est mise en liberté, à moins qu'elle ne soit détenue pour une autre cause. Pendant ce même délai, la personne est considérée comme placée en détention provisoire et peut former des demandes de mise en liberté dans les conditions prévues aux articles 148-6 et 148-7. Ces demandes sont examinées dans les conditions prévues aux articles 148-1 et 148-2. Toutefois, lorsque la formation de jugement de la cour de révision et de réexamen a renvoyé l'affaire devant l'assemblée plénière de la Cour de cassation, les demandes de mise en liberté sont examinées par la chambre de l'instruction de la cour d'appel dans le ressort de laquelle siège la juridiction ayant condamné l'intéressé* ».

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

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

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

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

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

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

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

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

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

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

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

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

L'intéressé a déposé une demande le 14 janvier 2013 tendant, d'une part, au réexamen de la décision définitive en date du 11 octobre 2007 par laquelle la cour d'assises des Bouches-du-Rhône l'a déclaré coupable d'assassinat et l'a condamné à vingt ans de réclusion criminelle, d'autre part, à la suspension de l'exécution de cette condamnation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

La Commission de réexamen a déclaré recevable sa demande, fait droit à la demande de réexamen de la décision de la cour d'assises des Hauts-de-Seine du 2 juin 2004 en

renvoyant l'affaire devant la cour d'assises de Paris mais rejeté la demande de suspension de l'exécution de la condamnation.

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

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

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

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

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

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

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

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

2. Procédures civiles

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

Aucun texte législatif n'est intervenu pour permettre la réouverture d'une procédure civile après un constat de violation par la Cour européenne des droits de l'homme.

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

Ainsi qu'il a été rappelé lors des discussions sur le projet de déclaration de Bruxelles, la France n'est pas favorable à la possibilité de rouvrir les procédures au niveau national.

Dès lors, les questions relatives à la réouverture des procédures civiles à la suite d'une condamnation de la Cour européenne des droits de l'homme paraissent sans objet.

Dans un arrêt du 30 septembre 2005 « *La chambre sociale [de la Cour de cassation] a (...) jugé que «* ***la décision du Comité des ministres du Conseil de l'Europe ou l'arrêt de la Cour européenne des droits de l'homme dont il résulte qu'un jugement rendu en matière civile et devenu définitif a été prononcé en violation des dispositions de la Convention européenne de sauvegarde de droits de l'homme et des libertés fondamentales n'ouvre aucun droit à réexamen de la cause »***[2].

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

La deuxième chambre civile de la Cour de cassation a réaffirmé ce principe dans un arrêt du 17 octobre 2013 aux termes duquel les juges ont estimé qu'« *un arrêt de la Cour européenne des droits de l'homme dont il résulte qu'un jugement rendu en matière civile et devenu définitif a été prononcé en violation des dispositions de la Convention européenne de sauvegarde de droits de l'homme et des libertés fondamentales n'ouvre aucun droit à réexamen de la cause* »[3].

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

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

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[2] Soc., 30 septembre 2005, n° 04-47.130, Bull. 2005, V, n° 279 (rejet). A signaler, cependant, deux arrêts de la chambre criminelle : dans la première affaire, il était soutenu qu'un arrêt de la Cour EDH condamnant la France faisait obstacle à ce que la personne poursuivie puisse faire l'objet de sanctions pénales. La Cour a répondu qu' « un arrêt de la Cour européenne des droits de l'homme constatant le non-respect du délai raisonnable au sens de l'article 6.1 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales est sans incidence sur la validité des procédures relevant du droit interne » (Crim., 3 février 1993, n° 92-83.443, Bull. crim. 1993, n° 57). La chambre criminelle a confirmé cette position un an plus tard dans des termes similaires : « les décisions rendues par la Cour européenne des droits de l'homme instituée par l'article 19 de la Convention européenne des droits de l'homme et des libertés fondamentales n'ont aucune incidence directe en droit interne sur les décisions de juridictions nationales. » (Crim., 4 mai 1994, n° 93-84.547, Bull. crim. 1994, n° 166, rejet)

[3] 2e Civ., 17 octobre 2013, pourvoi n° 12-22.957

GERMANY / ALLEMAGNE

Code of Criminal Procedure:

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

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

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

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

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

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

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

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

Code of Civil Procedure:

Section 580
Action for retrial of the case

An action for retrial of the case may be brought:

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

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

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

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

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

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

7. Where the party

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

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

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

Section 586
Period for filing an action

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

ITALY / ITALIE

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

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

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

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

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

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

IRELAND / IRLANDE

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

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

LIECHTENSTEIN

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

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

LITHUANIA / LITUANIE

➢ Criminal proceedings

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

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

Before the entry into force of the Code of Criminal Procedure of 2003 the reopening of the criminal cases was regulated by the Code of Criminal Procedure of 1961, as amended in this regard in 2001. Overall the possibility for the reopening of the criminal cases exists in Lithuanian legal system for 14 years. During this entire period 6 criminal cases on the ground of the judgments of the ECtHR have been reopened – in one of them criminal proceedings were discontinued (on the ground of the judgment of GC in the case of *Ramanauskas v. Lithuania*), in 3 of them – persons previously convicted by the domestic courts were acquitted (on the ground of the judgments in cases *Birutis and Others v. Lithuania*, *Malininas v. Lithuania* and *Lalas v. Lithuania*), in 2 of them – the judgments of the domestic courts were left unchanged (on the ground of the judgment in case of *Daktaras v. Lithuania* and *Butkevičius v. Lithuania*).

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

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

some practical difficulties occurred during resumed procedure of assessment of evidentiary after all these years.

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

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

- **Civil proceedings**

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

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

Before the entry into force of the Code of Civil Procedure of 2003 the reopening of the civil cases was regulated by the Code of Civil Procedure of 1964, as amended in this regard in 2002. Since 2002 civil proceedings had been reopened on the ground of the judgments of the ECtHR in 3 cases – in one of them additional pecuniary damage to the amount of just satisfaction awarded by the ECtHR was adjudged (on the ground of the judgment in the case of *Jucys v. Lithuania*), in another civil case the dismissal from work of the claimant (ex-KGB officer, in respect of whom the legislative restriction to be employed in private sector was found to be in violation of the Convention) was recognized as unlawful and constituting just satisfaction in itself (on the ground of the judgment in the case of *Rainys and Gasparavičius v. Lithuania*), and in the third one – the civil proceedings, previously dismissed by the Lithuanian courts claiming that they have no jurisdiction on the ground of State immunity, which was found incompatible with Article 6 § 1 by the Grand Chamber judgment in *Cudak* case, were reopened on the ground of *Cudak* judgment and examined on the merits, finding the claimant's dismissal from work unlawful and awarding pecuniary compensation in this regard.

Currently one more request for the reopening of the civil proceedings is pending before the Supreme Court of Lithuania on the ground of the judgment of the ECtHR in the case of *Digrytė Klibavičienė v. Lithuania*, where a person concerned claims additional pecuniary compensation due to the violation of the Convention found.

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

One practical obstacle is related with the period of limitation of 5 years for the reopening of the civil proceedings under Article 368 § 2 mentioned above due to the length of the proceeding before the ECtHR.For example, in the case of *Digrytė Klibavičienė* the request for the reopening was submitted in 2015 (the judgment of the ECtHR became final in 2015), while the final decision in the civil proceedings the request for reopening of which is submitted was adopted yet in 2006. One could expect that the Supreme Court would interpret a related provisions of the Code of Civil Proceeding without excessive formalism. In addition, a legislative initiative currently being under consideration should be mentioned, whereby the Code of Civil Proceedings shall be amended providing for no period of limitation of 5 years for the reopening of civil proceeding on the ground of the judgments of the ECtHR.

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

– What are the positive outcomes and remaining gaps?

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

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

THE REPUBLIC OF MOLDOVA / REPUBLIQUE DE MOLDOVA

Criminal proceedings

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

The criminal proceedings could be reopened in two occurrences:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Civil proceedings

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

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

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

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

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

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

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

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

THE NETHERLANDS / PAYS-BAS

Criminal proceedings

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

So far, four applications for review of a final judgment have been brought on the basis of Article 457 § 1 (b). The first application resulted in a successful reopening of the case. Due to the established violation by the Court in the case *M.M. v. the Netherlands*[4], the Supreme Court decided to reduce the fine and accompanying term of default detention in this case.[5] The second application was withdrawn by the applicant, because it had not been submitted within the prescribed time limit.[6] The third application resulted in a reduction of the sentence as well, after the Supreme Court set aside the judgment.[7] As a result of the most recent application based on the case *Vidgen v. the Netherlands*[8], the Supreme Court set aside the judgment and ordered the suspension of the execution of the final judgment and referred the case back to the Court of Appeal.[9] From the Conclusion of the Attorney General in the second case, it can be deduced that difficulties might arise in determining when something has taken place from which it can be inferred that the convicted person is aware of the Court judgment. It follows however from the Explanatory Memorandum, that such an open wording was considered necessary to ensure a real possibility for the convicted person to file an application for reviewing the case when a violation has been established by the Court.

Civil proceedings

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

[4] ECHR 8 April 2003, appl. no. 39339/98.
[5] HR 27 September 2005, NJ 2007/453.
[6] HR 20 February 2007, NJ 2007/373.
[7] HR 10 February 2009, NJ 2009/167.
[8] ECHR 10 July 2012, appl. no. 29353/06.
[9] HR 4 June 2013, NJ 2013/333.

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

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

It should be observed that the Netherlands has rarely been confronted with Court judgments which represent this situation. Furthermore, there are other ways of providing for a judicial remedy in civil cases. For instance, the State can be sued for tort (unlawful dispensation of justice). It is clear from the Supreme Court's case law that stringent criteria are applied when deciding whether a party to proceedings is eligible for compensation on grounds of unlawful dispensation of justice. The State is held liable only if no legal remedies remain open and the fundamental principles of law were so badly neglected when preparing the decision that the parties can no longer be said to have had their case heard in a fair and impartial manner. In one case this resulted in compensation for the applicant on this ground.[10]

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

NORWAY / NORVEGE

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

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

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

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

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

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

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

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

POLAND / POLOGNE

1. Criminal proceedings

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

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

Legal regulations in force

The Polish Code of Criminal Procedure contains the following provision:

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

As interpreted by the Supreme Court, this provision applies not only to the rulings of the ECtHR but also *e.g.* the UN Human Rights Committee, the Court of Justice of the European Union and the International Court of Justice.

The reopening is not automatic, but only upon request and only to the benefit of the applicant, and is based on the case-by-case assessment of whether such a need arises. As clarified by the Supreme Court, the need to reopen the proceedings arises in each case where the ECtHR finds that a ruling adopted in criminal proceedings violates the Convention. The Supreme Court has also referred in its case-law to the gravity, scope and weight of the shortcomings identified by the ECtHR, which require the adjustment of the final ruling to the standards of the Convention. In an interpretative resolution, the Supreme Court has pointed to two types of violations found by the ECtHR, which justify the reopening:

– procedural shortcomings which have occurred in the course of criminal proceedings which in view of their structural and complex character could have had an impact on the content of the final ruling in the domestic proceedings;

– substantive shortcomings in which the findings of the violation of the Convention have resulted from the very content of the final ruling adopted in the domestic proceedings.

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

In some cases, the Supreme Court, when ordering the re-examination of the case, has given some guidance to the trial courts, for instance referring to the need to ensure all

rights to the accused or how the trial court should proceed when taking certain evidence measures.

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

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

As the Supreme Court noted, the "need" in the meaning of Article 540 para. 3 may also arise in order to prevent a finding of another violation of the Convention in another judgment against Poland. The Supreme Court also held that the need to reopen proceedings following a ruling of an international body should not be perceived only and exclusively from the point of view of the formal execution of judgments' dimension. What is at stake is also the realisation of human rights' guarantees that lie at the basis of the rulings of the ECtHR. The finding of a human rights violation by the ECtHR should produce effects in other cases where the same violation of the Convention has taken place. This will in consequence ensure full realisation of the principle of subsidiarity of the Convention system, according to which domestic authorities are in the first place responsible for ensuring to everyone within their jurisdiction appropriate protection of his/her rights guaranteed by the Convention.

The realisation of such an obligation should be not only prospective (for the future) but also retrospective – in relation to already closed criminal proceedings. Otherwise, as the Supreme Court noted, the protection of human rights would not be full and this would lead to unjustified differentiation of the situation of the accused depending on whether their cases were examined before or after the ruling of the ECtHR.

One should however note that this approach is applied by the Supreme Court only to the ECtHR's rulings in respect of Poland and it has refused to reopen criminal proceedings on the basis of the ECtHR's judgments adopted in respect of other States Parties. This is based on the understanding that the ECtHR's judgments bind *inter partes*. **The Polish authorities would be interested if under regulations or jurisprudence of other countries there is a possibility to reopen criminal proceedings on the basis of the ECtHR's judgments adopted in respect of other States Parties.**

Furthermore, according to the jurisprudence of the Supreme Court, the assessment of whether the same violation of the Convention has occurred in a given case should be done in a restrictive manner bearing in mind the extraordinary character of the institution of reopening. In essence this applies to situations where the violation of the Convention is so similar (from the point of view of the combination of legal and factual circumstances) to the violation found by the ECtHR in respect of another person that if the accused would lodge his/her own application with the ECtHR, he/she would receive, on the same grounds, a favourable ruling finding a violation of the Convention.

Scope of application of Article 540 para. 3 under the case-law of the Supreme Court

Under the case-law of the Supreme Court, a possibility of the reopening applies not only to the accused but also to the former accused and not only to criminal proceedings but also to proceedings in which the applicant was refused compensation for unjustified pre-trial detention. It was confirmed in the judgment of 12 June 2012 in which the Supreme Court went beyond the literal interpretation of Article 540 § 3 CPC and invoked the need to interpret the law in view of its purpose and in the light of Article 46 of the Convention. It noted *inter alia* that the institution of reopening was introduced to Polish law to ensure respect for international obligations of Poland, including those based on Article 46 of the Convention. Such an approach enabled the implementation of the ECtHR's judgment finding a violation of Article 5 § 5 of the Convention.

Examples of successful reopening in such cases

By 1 March 2015 the Supreme Court has examined app. 20 requests for reopening on this basis and in the vast majority of cases admitted such requests. Only two requests were not admitted: in one case it was due to the fact that the ECtHR's finding concerned excessive length of criminal proceedings and of pre-trial detention; in the other case the applicant did not comply with formal requirements despite the court's order.

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

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

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

No difficulties have been encountered so far.

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

Article 540 § 3 of the Code of Criminal Procedure refers to "a ruling of an international body". It is therefore possible to reopen the proceedings also in case of ECtHR's decisions approving unilateral declarations. Opinions of the legal doctrine differ however as to whether this possibility could also apply in case of friendly settlements (no such cases have been examined so far). **The Polish authorities would be interested in regulations or examples of jurisprudence of other countries in this respect.**

Example: On 23 July 2012 the Warsaw Court of Appeal reopened criminal proceedings in respect of the applicant considering that such a need had arisen from the ECtHR's decision approving a unilateral declaration in the applicant's case. The court considered that such a decision provided a basis for reopening and also took into account the unequivocal acknowledgment by the Polish Government that the applicant's freedom of expression had been violated. At the same time the Warsaw Court of Appeal quashed

earlier judgments and discontinued criminal proceedings in respect of the applicant considering that the act he was accused of did not constitute a crime as the relevant statutory provision had been repealed in the meantime.

2. Civil proceedings

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

The reopening of civil proceedings on the basis of the ECtHR's judgment has not been addressed in the Polish law. Although there was an example of successful reopening of civil proceedings relying on the ECtHR's judgment, eventually the Supreme Court adopted an interpretative resolution whereby it considered that the Polish law does not provide for such a possibility. It did not rule out however that other means of *restitutio in integrum* could apply in such cases.

What were the obstacles?

On 30 November 2010 a resolution of 7 judges of the Supreme Court was adopted whereby the Supreme Court excluded a possibility of the reopening of civil proceedings directly on the basis of the ECtHR's judgment. It noted that the Convention did not impose an absolute obligation to introduce such a possibility in civil cases leaving a margin of appreciation to domestic law-makers. The Supreme Court questioned the adequacy of such a solution in civil proceedings invoking the need to respect the stability of final judgments and the rights acquired *bona fidae* by third parties.

Following this resolution a discussion on this issue has continued. However, no progress has been achieved so far and the following arguments have been put forward against amending the law:

– there is no obligation to introduce such a possibility under the Convention, also as interpreted by the ECtHR[11],

– principles of *res iudicata, ne bis in indem* and the stability of final judgments constitute important values and form part of the fundamental principle of the rule of law;

– civil proceedings are of particular nature as compared to criminal or administrative court proceedings as the departure from the principle of *res iudicata* in such proceedings could affect relations between the parties whereas the burden of such departure would be shifted on third parties;

– third parties do not participate in the proceedings before the ECtHR and are deprived of a possibility to defend their interests in these proceedings;

– in view of the dynamic nature of private-law relations, rectification of shortcomings of the rulings adopted many years ago may be unrealistic and impossible;

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

– in civil proceedings it would be more appropriate to establish adequate compensatory procedures instead (*nb.* some possibilities to seek compensation in case of unlawful final judgments are already secured under the Polish law).

How have the obstacles been overcome?

The obstacles have not been fully overcome, nevertheless there are some alternative possibilities open for the applicants.

Firstly, as the Supreme Court observed in the above mentioned interpretative resolution, in some situations other legal remedies could be available to the applicant, for instance an action against enforcement of a final domestic judgment, a complaint for declaring a final court ruling to be incompatible with the law12 and an action for compensation against the State Treasury on the basis of the so-called court delict.

Secondly, depending on the circumstances of the case, a violation of the right to a fair trial can constitute at the same time a basis for reopening under general provisions governing invalidity of civil proceedings. Some of these provisions concern aspects of the right to a fair trial in the meaning of Article 6 of the Convention (*e.g.* violation of the right to an impartial court or deprivation of the party of a possibility to act)[13].

Example, in the decision of 17 October 2007 the Supreme Court held that the ECtHR's judgment finding a violation of the party's right to a fair trial could constitute a circumstance justifying the reopening of the proceedings in view of their invalidity. It transpired from the ECtHR's judgment that the manner in which the domestic court had examined the applicant's request for legal aid in the cassation proceedings was not compatible with the requirement of due diligence. The Supreme Court, assessing the case in the light of the findings of the ECtHR, considered that the applicant had been deprived of a possibility to act in the impugned civil proceedings within the meaning of Article 401 point 2 of the Code of Civil Procedure.

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

What are the positive outcomes and remaining gaps?

The assessment of the reopening in civil proceedings should be nuanced and should be carried out from many angles. A simple repetition of criminal-law regulations or automatic approach could lead to undesirable consequences potentially leading to a breach of equally important principles of *res iudicata*, legal stability and protection of rights of third parties. A possibility and the scope of reopening in civil proceedings

[12] Final judgment's incompatibility with the law extends also to situations of incompatibility with the provisions of international law binding upon Poland.

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

should be carefully considered, on the one hand, taking into account the nature, extent and gravity of the violations found by the Court, and on the other hand various individual and general interests at stake.

The following issues merit an in-depth examination and the Polish authorities would be interested in the following information on legal regulations or jurisprudence of those States Parties that have introduced a possibility of reopening of civil proceedings on the basis of the ECtHR's judgment:

Firstly, how have the law-makers tried to strike a fair balance between conflicting values, i.e. between the gravity of the violation found and the need to ensure legal security and stability? Flexibility seems to be particularly important.

Secondly, is the reopening of civil proceedings limited only to cases where the ECtHR explicitly indicated such a need or is it left to a decision of domestic courts assessing *ad casu* whether such a need arises from the Court's judgment?

Thirdly, in the context of protection of third parties and bearing in mind the principle of citizens' confidence in the State, does this possibility depend on who the third party is, *i.e.* only the State Treasury (which is represented by the Government Agent in the proceedings before the Court) or also other persons?

Fourthly, does the law or jurisprudence differentiate a possibility of reopening depending on the nature of and 'what is at stake" in the civil proceedings? For instance, a decision to reopen the divorce proceedings or the proceedings in which the validity of elections was confirmed, could produce far-reaching and destabilizing effects for the legal system.

Finally, in some situations irreversible effects could have occurred in the meantime. For instance, it could be hardly possible to restore the previous situation in case of complex economic processes (insolvency, dissolution or merger of legal persons, *etc.*) or property relations (e.g. if the property at stake has been subject to several *bona fideae* transactions in the meantime, *etc.*). Again, it would be useful to get information how this issue is addressed.

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

The above interpretative resolution of the Supreme Court does not envisage such a possibility within the current legal framework (see information above).

3. Supplementary information concerning administrative proceedings

Bearing in mind that according to the ECtHR's case-law some administrative proceedings may be qualified as falling under "determination of … civil rights and obligations" within the meaning of Article 6 § 1 of the Convention, we would like to share some information and experience related to the reopening of administrative proceedings. At the outset it would be useful to clarify that in Poland administrative courts exercise judicial supervision over administrative decisions issued by administrative authorities. In consequence, there are separate procedural regulations governing administrative proceedings before administrative authorities and administrative court proceedings. A possibility of the reopening is therefore relevant in respect of both administrative decisions and judgments of administrative courts.

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

1. The Act on proceedings before administrative courts provides for a possibility to reopen **administrative court proceedings** following the ECtHR's ruling:

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

This provision refers to a "ruling of an international body", which means that the scope of its application is not limited to judgments only but could cover also decisions of the ECtHR. This was confirmed implicitly in the judgment of the Supreme Administrative Court of 9 October 2014. In that case the court examined a possibility of reopening following a friendly settlement concluded in the proceedings before the ECtHR. The request for reopening was rejected due to the lapse of the maximum statutory time-limit, the applicability of Article 272 § 3 to the ECtHR's decisions in respect of friendly settlement was however not questioned by the Supreme Administrative Court.

The time-limit for lodging a request for reopening is three months from the date of serving the ruling of the ECtHR (or of other international body) on the applicant or his representative. There is also a maximum time-limit for lodging a request for reopening which is five years from the date in which the impugned ruling of a domestic court has become final, the only exception being in case a party was deprived of a possibility to act or was not properly represented. This maxim time-limit applies generally, not only to the reopening based on a ruling of the ECtHR.

2. One can demand reopening of **administrative proceedings** in case of a court ruling finding a violation of the equal treatment principle, in accordance with the 2010 Act on implementation of some legal provisions of the European Union in respect of equal treatment, if the violation of the equal treatment principle has affected the outcome of the proceedings terminated by a final administrative decision.

The term "court ruling finding violation of the principle of equal treatment" should be understood broadly, covering not only domestic courts but also the ECtHR or CJEU.

* * *

The above possibilities of reopening proceedings of administrative courts or authorities on the basis of the ECtHR's rulings are relatively new under Polish law and so far only one request was examined, which however has not led to the reopening of the administrative court proceedings at stake (see below).

What were the obstacles / How have they been overcome?

1. The main obstacle encountered so far was linked with the maximum five-year time-limit for reopening of administrative court proceedings. This time-limit is calculated from the date in which the impugned domestic court's ruling has become final (the only exception being in case the party was deprived of a possibility to act or was not properly represented). Bearing in mind the duration of the proceedings before the ECtHR this

could be an obstacle, as was demonstrated in the case examined by a judgment of the Supreme Administrative Court of 9 October 2014.

On that occasion the Supreme Administrative Court expressed an opinion that the introduction of such a maximum time-limit did not raise any doubts as to its constitutionality in view of the need to protect the stability of legal relations in a democratic society. **It would be useful to receive information whether similar or longer time-limits apply in other countries.**

2. As regards the reopening of administrative proceedings on the basis of the ECtHR's judgment, this is specifically envisaged by law only in cases related to a violation of equal treatment principle.

However, general regulations governing the reopening of administrative proceedings may cover many shortcomings to which the ECtHR's rulings under Article 6 of the Convention may refer. For instance, it is possible to reopen administrative proceedings in case a decision was adopted by an official or public administration authority who should have been excluded from the proceedings, or a party did not participate in proceedings without his/her fault, of a decision was based on another court ruling or decision which had subsequently been changed or revoked (see also footnote no. 3 above).

Also, one cannot exclude that as a result of the reopening of administrative court proceedings following a ruling of the ECtHR, also flawed administrative decisions, violating the Convention, may be quashed.

What are the remaining gaps?

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

In so far a possibility to reopen administrative proceedings on the basis of the ECtHR's ruling is concerned, it applies only in case of violations of the equal treatment principle. There is no provision in the Code of Administrative Procedure that would explicitly refer to a possibility of reopening of administrative proceedings following any judgment of the ECtHR.

It would be useful to receive information how the issue of reopening is resolved in other countries which have separate procedures applicable before administrative authorities and administrative courts.

PORTUGAL

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

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

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

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

Cette circonstance peut créer (du reste, a déjà créé) des conflits, notamment, dans les cas où la Cour suprême de justice décide de rejeter les demandes de révision soumises par ceux qui ont réussi à obtenir une décision déclarant une violation de la Convention.
Effectivement, une requête est actuellement pendante devant la Cour, concernant l'éventuel violation des articles 6 § 1 et 46 § 1 de la Convention, car la Cour suprême n'a pas admis un recours extraordinaire en révision d'un jugement précédent où la requérante a été condamnée[14].

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

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

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

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

En outre, on peut envisager de possibles problèmes lorsque la partie requérante demande la révision de la décision interne définitive sans que la partie adverse et d'autres intéressés dans la procédure interne aient eu la possibilité d'intervenir dans la procédure menée par la Cour.
La création dans les systèmes juridiques nationaux des moyens permettant le réexamen des affaires, notamment à travers la réouverture des procédures, répond aux recommandations du Comité de Ministres[15], mais elle peut devenir une source de problèmes si on ne reconnait pas aux Etats, qui ont mis en œuvre des tels moyens, une marge d'appréciation.

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

ROMANIA / ROUMANIE

Procédures pénales

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

Droit interne pertinent

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

Les conditions de recevabilité pour la demande de révision :

– la Cour européenne a constaté la violation d'un droit prévu dans la Convention en l'espèce ;

– la partie intéressée continue de souffrir des conséquences graves à la suite de la décision nationale, conséquences qui ne peuvent être remédiées que par la révision de celle-ci ;

– délai pour l'introduction de la demande - 3 mois à partir du moment de la publication de l`arrêt de la Cour dans le Journal Officiel.

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

Mesures intermédiaires :

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

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

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

Exemples réussis de réouverture des procédures pénales

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

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

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

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

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

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

Reiner et autres (1505/02) – l'iniquité de la procédure pénale en raison de la condamnation des requérants pour le chef d'infraction de meurtre, sur la base des preuves à charge (témoins) que les intéressés n'ont pu interroger ou faire interroger ni au stade de l'instruction, ni pendant les débats ; la même procédure pénale a été analysée par la Cour dans l'affaire *Agache et autres* (2712/02) (les proches de la victime) et a conclu à la violation procédurale de l'article 2 (absence d'enquête effective) ; à la demande d'un des

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

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

Botea (40872/04) – le caractère inéquitable d'une procédure pénale en raison du fait que, lorsqu'elles ont condamné le requérant à une peine d'emprisonnement, les juridictions roumaines se sont fondées de manière décisive sur des enregistrements audio dont l'authenticité était contestée par la défense et n'avait jamais été confirmée au moyen d'une expertise technique
Ciobanu (4509/08) – le refus du tribunal de déduire de la peine infligée au requérant la période afférente à l'assignation à domicile exécutée à l'étranger (en Italie) en vertu d'un mandat d'arrêt international émis par les instances roumaines
Potcovă (27945/07) – la condamnation du requérant sur la base des déclarations données en absence d'assistance juridique, en dépit du fait qu'il était en custodie de la police.

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

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

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

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

Procédures civiles

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

Droit interne pertinent

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

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

Exemples réussis de réouverture des procédures civiles

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

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

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

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

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

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

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

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

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

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

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

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

Ce n'est pas le cas pour la Roumanie

RUSSIAN FEDERATION / FEDERATION DE RUSSIE

Reply to question 1.

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

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

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

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

Examples of successful reopening cases.

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

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

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

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

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

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

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

Reply to question 3.

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

SLOVAK REPUBLIC / REPUBLIQUE SLOVAQUE

➢ Criminal proceedings

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

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

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

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

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

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

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

- **Civil proceedings**

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

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

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

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

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

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

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

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

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

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

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

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

SLOVENIA / SLOVENIE

Reopening of criminal proceedings

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

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

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

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

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

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

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

The reopening of proceedings in civil cases (where applicable Civil Procedure Act) in order to facilitate execution of the ECHR's judgments is currently not explicitly provided for by the existing legal provisions. This is the traditional view of the Constitutional Court of the Republic of Slovenia[16] and legal theory.

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

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

SPAIN / ESPAGNE

Criminal proceedings

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

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

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

In that case the Constitutional Tribunal considered that the judgment of the ECHR declares violation of the right to a fair trial in criminal matters (art 6.1 of the Convention) and that entails that there has been a violation of art 24.1 of the Spanish Constitution, with the effect of declaring the nullity of the whole criminal procedure, which has to trace back to the point where the violation took place. In the instant case, it had to go back to the moment when the public hearing begun.
The Constitutional Court developed this jurisprudence in its judgements on cases 96/2001, 240/2005, 313/2005 and 197/2006, as a consequence of several judgments of the ECHR.

National Courts have followed this criteria ever since.

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

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

At present, the Parliament is examining a Bill introduced by the Ministry of Justice, aiming at giving a new wording to this article of the Law on Criminal Proceedings enhancing clarity on this matter.

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

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

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

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

Civil proceedings

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

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

When the ECHR affects final judgments, it is now impossible to reopen the case as such. But nowadays the Parliament is examining a Bill introduced by the Government to insert in the Law on Civil Procedure the possibility to request the revision of a final judgment following an ECHR judgment.

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

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

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

– What are the positive outcomes and remaining gaps?

On this issue we would refer to our previous answer

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

We have not registered any example.

SWEDEN / SUEDE

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

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

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

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

SWITZERLAND / SUISSE

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

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

Art. 122 Violation de la Convention européenne des droits de l'homme

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

a. la Cour européenne des droits de l'homme a constaté, dans un arrêt définitif, une violation de la CEDH ou de ses protocoles;

b. une indemnité n'est pas de nature à remédier aux effets de la violation;

c. la révision est nécessaire pour remédier aux effets de la violation.

Art. 124 Délai

1 La demande de révision doit être déposée devant le Tribunal fédéral:

…

c. pour violation de la CEDH, au plus tard 90 jours après que l'arrêt de la Cour européenne des droits de l'homme est devenu définitif au sens de l'art. 44 CEDH;

…

Art. 127 Echange d'écritures

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

Art. 128 Arrêt

1 Si le Tribunal fédéral admet le motif de révision invoqué, il annule l'arrêt et statue à nouveau.

2 Si le Tribunal fédéral annule un arrêt qui avait renvoyé la cause à l'autorité précédente, il détermine les effets de cette annulation à l'égard d'un nouveau jugement de l'autorité précédente rendu entre-temps.

3 Si le Tribunal fédéral statue à nouveau dans une affaire pénale, l'art. 415 CPP est applicable par analogie.

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

Procédures pénales

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

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

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

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

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

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

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

Non.

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

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

Procédures civiles

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

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

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

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

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

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

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

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

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

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

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

N/A

TURKEY / TURQUIE

CRIMINAL PROCEEDINGS

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

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

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

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

CIVIL PROCEEDINGS

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

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

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

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

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