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## Res judicata and reopening of proceedings after ECtHR judgments and the role of the ECtHR in the supervision of the execution of its judgments

### Reopening of proceedings on national level

In order to reopen proceedings on national level after a finding of a violation by the ECtHR in cases where the domestic courts had settled a dispute in a final ruling, the basic general premise is a case is brought to the relevant national court in compliance with domestic procedural rules.

If it is a question of mere repayment or monetary compensation the situation will alternatively be resolved directly by the Government and has not to be passed through the courts..

A valid ground for extraordinary review may in my country, Sweden, as well as in some other Conventions states – such as Latvia – include the introduction of new circumstances in the form of a judgment from an international court. In most Convention states domestic legislation explicitly provides for the right to request the review or reopening of *criminal* proceedings on the basis of the finding of a violation by an international court, albeit there may be certain conditions attached to that right, such as the respect for deadlines.[[1]](#footnote-1)

It should be borne in mind that conditions for re-opening may differ depending on whether the ECtHR has found a “procedural violation” on the basis of i.a. Article 2, 3 , 6 or 8, or if it is a question of a “material violation”.

Some examples of extraordinary review in Sweden took place some years ago after the ECtHR judgment in the *Zolothukin* case, where the application of the *ne bis in idem* principle was applied in a manner that – according to the viewpoint of Swedish courts and subsequently also by the ECtHR[[2]](#footnote-2) – meant a reversal of the previous perception in cases of criminal liability for tax fraud in combination with tax surcharges. Here a number of applications for extraordinary review were brought to the Supreme Administrative Court and to the General Supreme Court respectively and granted in cases where the violation of the principle had taken place after the judgment in *Zolothukin[[3]](#footnote-3)*. As a parenthesis could be mentioned that the *ne bid* discussion on European level never went into the complication of the respect for the principles surrounding *lis pendens*.

In the situation where it is obvious that a violation found in a judgment by the ECtHR also affect other individuals the right to reopening on extraordinary grounds is less obvious.

The problem arises when other individuals and parties to the previous domestic proceedings are adversely affected by the upheaval of a judgment that has gained legal force. In such situations it may not be possible according to domestic law to reverse the previous judgment, i.a. on account of subsequent developments (forced adoption, compulsory custody of children by social services: the best interests of the child) or the respect for the other parties’ rights (the principle of *ne bis in idem* when somebody has been acquitted in violation of the procedural rights for victims and their relatives under Article 2), and the only avenue would then be the payment of damages.

### Indications of measures to be taken that are laid down in the ECtHR’s judgements

Basically the ECtHR’s judgments are declaratory in the sense that they state whether or not the Court has found a violation of the Convention. They do not bind national courts, and it is the State as such which is obliged to discharge its obligations under Article 46 of the Convention. The ECtHR does not have the jurisdiction to order the reopening of proceedings.[[4]](#footnote-4) However, it may indicate that where a violation is found of Article 6 retrial or reopening of the case represents in principle an appropriate way of redressing the violation.

It’s a fundamental principle that anyone who is the victim of a violation of the Convention shall be put back into the situation that existed before the violation took place – *restituto in integrum* - and if this is not possible just satisfaction should be awarded in accordance with Article 41. Since the beginning of the 20 hundreds the ECtHR started to lay down retrial clauses in the reasoning of the judgments (but not yet in the operative part), originally in a series of Turkish cases on Article 6 (*Gencel* clause, subsequently in *Öcalan*). Later on the ECtHR stated that reopening of domestic proceedings is a “key means” for the proper execution of judgments, while complying with “the procedural safeguards in the Convention” (*Verein gegen Tierfabriken VgT v Switzerland (No2)* GC 2009). Further developments are that specific re-trial clauses are laid down in the operative part of the ECtHR judgments (i.a. *Lungoci* and *Maaksimov*).

In my experience the ECtHR is cautious in doing this, mindful of the problems that may arise. Obviously, however, such indications are helpful for the Committee of Ministers’ supervision of the execution of judgments.

In the judgment against Ukraine (2013) in the case of *Volkov* the ECtHR decided not to demand the reopening of judicial proceedings on domestic level in a case where the applicant had been dismissed from his post as judge in the Supreme Court and the ECtHR found violations of articles 6 and 8. The reason was that reopening was likely not to be dealt with in accordance with Convention principles and therefor the ECtHR held that the State must secure the applicant’s re-instatement to his post as soon as possible. This proved problematic although it was eventually effectuated. One may ask if the ECtHR foresaw if such a re-instatement could be legally possible without infringing on other judges’ rights.

### The role of the ECtHR in the supervision of the execution of its judgments

Formally speaking the ECtHR has no independent role in the execution of its own judgments. The execution mechanism is put entirely on the political level through the supervision by the Committee of Ministers. The Court may, however, be involved under Article 46 if the CoM considers that a State refuses to abide by a judgment. Up to date this has rarely happened; there are only two judgments so far, the latest being *Kavala v Turkey* (2022) concerning violations of Article 5. The first judgment was in *Ilgar Mammadov v Azerbaijan* in 2019 where the Court found violations on account of the failure to execute a judgment finding violations of i.a. Articles 5 and 6 (no reopening ordered).

Having said that, the ECtHR is well informed about the execution or lack thereof in subsequent cases dealing with the same topic and may therefore take that into account and even highlight that in new rulings.

### Conclusions

The respect on domestic level for the *res judicata* principle is in my opinion not restricted by the reopening clauses in the ECtHR judgements, regardless of whether they are inserted in the reasoning or the operative part. A domestic court cannot refrain from assessing the legality accordance to domestic law and principles for retrial. Notably a finding of a violation by the ECtHR does not automatically have to be considered as a new circumstance that would allow for extraordinary appeal, especially in situations where private third parties would be negatively affected.

This is said with reservation for the fact that as to date there have been no judgments in infringement proceedings from the ECtHR dealing with the issue of non-compliance of judgments “ordering” reopening. If such reopening is ordered in the operative part of a judgment there may be a risk or chance, depending on how one sees it, that the nonexecution will be the object for infringement proceedings.

1. Moreira Ferreira v Portugal (No. 2), §§ 34–39. [↑](#footnote-ref-1)
2. Lucky Dev v. Sweden. [↑](#footnote-ref-2)
3. However, as a parenthesis: the ruling in *A and B v. Norway* may have reversed the ne bis situation again. [↑](#footnote-ref-3)
4. Moreira Ferreira (No. 2), § 48. [↑](#footnote-ref-4)