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REOPENING CASES FOLLOWING JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: ROOM FOR A EUROPEAN CONSENSUS?

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ABSTRACT

Background: *The reopening of domestic criminal, civil, and administrative proceedings following European Court of Human Rights findings of a violation of the ECHR is an extraordinary remedy; its application is debatable in the Contracting States to the Convention. The overall objective of this article is to analyse the availability of the reopening of proceedings as a means of ensuring* restitutio in integrum*, i.e., the restoration of the* status quo ante *for a victim of violation or awarding compensation that would be sufficient in order bring the victim of a violation back to their position as if no violation had been committed.*

Methods: *This article focuses on the examination of whether reopening a case following an adversarial ECtHR judgment is available as a remedy in the national legal systems throughout Europe. The method is comparative analysis without claiming to be exhaustive. Where analysed data made it possible, certain generalisations were made.*

Results and Conclusions: *The research allowed us to conclude that in contrast to the successful implementation of the CoE CM Recommendation, in part related to making available reopening in criminal proceedings to the benefit of a victim of a violation of the ECHR in almost every member state, the reopening of civil and administrative proceedings remains available only in half of the member states, where it faces significant limitations aimed at protecting* res judicata *and interests of good faith third parties (the* bona fide *third parties). Also, it has become subject to a test of effectiveness as a legal remedy compared to compensation measures.*

Keywords: *finality of judgments,* beneficium cohaesionis, erga omnes *effect*, res judicata, restitutio in integrum*, rule of law*

1 INTRODUCTION

The right to have unfair or otherwise unjust proceedings reopened[1] is generally recognised throughout Europe with respect to criminal cases, and many states also have rules for the reopening of civil and administrative judicial proceedings following a judgment of the European Court of Human Rights (hereinafter the Court or ECtHR) finding a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention or ECHR), taking due account of the requirements of legal certainty and the rights of good faith third parties.[2] However, the extent to which this remedy is provided in national legislation and applied by courts remains unclear. As Nico Krisch noted in his widely cited paper, it has long been the case in most of Europe that reopening proceedings after they have been closed by a final judgment faces high hurdles, and the ECtHR finding a Convention violation in a given case generally does not suffice.[3]

The rules on finality with developed doctrines of *res judicata*, estoppel, or other neighbouring ideas supporting legal certainty are found in many national legal systems; however, there is

1 For the sake of clarity and use of unified terminology, the term 're-examination' is used in this paper as a generic term. The term 'reopening of proceedings' denotes the reopening of court proceedings which had resulted in a judgment that had become res judicata, as a specific means of re-examination. The term 'retrial' covers procedural means that allow for a case already decided by the court of final instance to be re-examined in essence if it becomes necessary after the reopening of the proceedings. Reopening has broader meaning and may include or be followed by retrial and other proceedings, such as reopening of investigation.

2 The European Court of Human Rights. Questions & Answers for Lawyers (2020) 17. <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_STRAS/PDS_Guides___recommendations/EN_PDS_2020_guide-CEDH.pdf> accessed 18 February 2022.

3 N Krisch, 'The open architecture of European human rights law' (2008) 71(2) Modern Law Review 183-216

no uniformity in contents and scope. In Europe, the ECtHR's case-law has done a great job of harmonising national laws on the matter. For the Court, finality is a part of the rule of law. From that principle, the ECtHR derives legal certainty, which requires, *inter alia*, respect for *res judicata*.[4]

Probably because of this immense impact of the Court's case-law on both promoting standards of fundamental rights' protection and guarding the value of finality of judgments, scholars have focused primarily on the effect that the ECtHR decisions have on the development of the law,[5] but not on the outcome of a particular domestic proceeding that led to cases having been brought before the ECtHR. This calls for further examination.

In this paper, we will try to discover whether it is in the discretionary power of the member states of the Council of Europe (hereinafter the CoE) to decide whether they wish to go beyond what they are obliged to do in terms of Art. 41 of the ECHR and allow the reopening of proceedings, and whether denying or providing access to reopening of domestic court proceedings when a violation of the ECHR established by the Court is commonly accepted in Europe.

The article is structured as follows. It begins by analysing the view of the ECtHR on the matter in Part II of this paper and sheds some light on changes in the Court's rhetoric regarding the role of reopening of domestic judicial proceedings as a measure of *restitutio in integrum*. According to the ECtHR, its findings of a violation of Art. 6 of the ECHR do not inevitably require the reopening of the domestic criminal proceedings, which is even more true for civil and administrative court cases. Yet, it is, in principle, the proper and often the most effective way of discontinuing or eliminating the violation and making available redress for its effects. According to the Court, this position is supported by the wide range of remedies in Europe, enabling individuals to apply for the reopening of a criminal case which has been concluded by a final judgment following a finding by the Court of a violation of the Convention. In that regard, the Court noted that there is no uniform approach among the member states as regards the access to the reopening of proceedings after they have been closed by a final judgment. The ECtHR also observed that in most of the member states, the reopening of proceedings is not available by default and is subject to certain admissibility criteria, whose observance is in the domain of domestic courts, which have a broader margin of appreciation in that area.[6]

Parts III and IV of this article systematically analyse the wide variety of approaches adopted throughout the member states with respect to making the reopening of domestic court proceedings available and establishing limitations and preconditions aimed at protecting important values other than the restoration of a violated fundamental right of a person.

The article relies on expert reports, as well as legal statutes regulating the reopening throughout the European countries and the relevant literature. In 2015, the Committee of Experts on the Reform of the Court arranged a sharing of data amongst the CoE's member states in order to identify good practice and details of how practical or procedural barriers to the reopening of domestic courts proceedings had been addressed. These data contained in the respective country reports[7] have been used as one of the sources of information for this

4 K Gusarov, V Terekhov 'Finality of Judgments in Civil Cases and Related Considerations: The Experience of Ukraine and Lithuania' (2019) 4(5) Access to Justice in Eastern Europe 9.

5 V Komarov, T Tsuvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021) 1(9) Access to Justice in Eastern Europe 79-101.

6 *Moreira Ferreira v Portugal (no 2)* App no 19867/12 (ECtHR, 11 July 2017) <https://hudoc.echr.coe.int/eng?i=001-175646> accessed 18 February 2022.

7 *Reopening of proceedings following a judgment of the European Court of Human Rights. Country Reports at the Round table.* Strasbourg, 5-6 October 2015 <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/echr-system/implementation-and-execution-judgments/reopening-cases> accessed 22 January 2022.

paper, accompanied by the analysis of more recent legislative changes. Where analysed data made it possible, certain generalisations were made. The last part of the article assesses the development of approaches of European legislators and judiciary towards reopening a case as an appropriate remedial measure.

2 REOPENING AS A *RESTITUTIO IN INTEGRUM*: THE ECTHR PERSPECTIVE

Art. 46 para. 1 of the ECHR stipulates that the contracting parties 'undertake to abide by the final judgment of the Court in any case to which they are parties'. This entails for the member states the following three types of obligations:

- to pay the sums awarded by the Court under Art. 41 of the ECHR (just satisfaction);
- to ensure an end to the violation and that the consequences have been erased to the extent possible (individual measures);
- to refrain from future violations similar to those found in the judgment (general measures).

In *Lyons and Others v. The United Kingdom*, the ECtHR recalled that based on Art. 46 of the Convention, the member states had undertaken to abide by the final judgments of the ECtHR in any case to which they were parties, execution being supervised by the Committee of Ministers of the Council of Europe (hereinafter the CoE CM). It follows, *inter alia*, that a judgment in which the ECtHR finds a breach of the Convention or its Protocols imposes on the respondent state a legal obligation not just to pay those concerned the amount of money awarded by way of just satisfaction but also to choose, subject to supervision by the CoE CM, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to cease and eliminate the violation established by the ECtHR and to redress the effects as far as possible. The ECtHR reiterated that, subject to monitoring by the CoE CM, the respondent state remained free to select the means by which it would discharge its legal obligation under Art. 46 of the ECHR, provided that such means would be compatible with the conclusions set out in the Court's judgment. For its part, the ECtHR cannot assume any role in this dialogue. The Court noted in particular that the ECHR did not give it jurisdiction to direct a state to open a new trial or to quash a conviction.[8]

Thus, the ECHR neither guarantees the right to the reopening of proceedings nor contains any provisions demanding that member states establish reopening mechanisms in their national laws.

It is widely recognised that only in exceptional cases can the Court impose an obligation on a state to take specific individual action, such as reopening unfair or otherwise unjust proceedings.[9] In general, the ECtHR recognises that, with respect to the reopening of domestic proceedings, it does not have jurisdiction to request such a measure. However, where a person has been convicted following proceedings that have entailed a violation of Art. 6 of the ECHR, the Court may state that the reopening of the proceeding, if requested,

8 *Lyons and Others v The United Kingdom* App no 15227/03 (ECtHR, 8 July 2003) <https://hudoc.echr.coe.int/eng?i=001-23303> accessed 18 February 2022. See also § 43 *in Pisano v Italy* (Striking Out) App no 36732/97 (GC ECtHR, 24 October 2002) <https://hudoc.echr.coe.int/eng?i=001-60706> accessed 18 February 2022; § 249 in *Scozzari and Giunta v Italy* App nos 39221/98 and 41963/98 (GC ECtHR, 13 July 2000) <https://hudoc.echr.coe.int/eng?i=001-58752> accessed 18 February 2022. See also § 46 in *Saïdi v France* App no 14647/89 (ECtHR, 20 September 1993) <https://hudoc.echr.coe.int/eng?i=001-57839> accessed 18 February 2022; § 44 in Pelladoah v the Netherlands App no 16737/90 (ECtHR, 20 September 1994) <https://hudoc.echr.coe.int/eng?i=001-57902> accessed 18 February 2022.

9 The European Court of Human Rights. Questions & Answers for Lawyers (n 3) 16.

represents, in principle, an appropriate remedy.[10] Only recently and only in exceptional cases has the ECtHR started to order such specific remedies in its judgments, i.e., to specify them in the operative provisions. However, even in these cases, the ECtHR only orders the reopening of domestic proceedings if the respective national legal order envisages this possibility. The ECtHR case law suggests, though, that the issue of ordering this way of redressing violations of the Convention by the Court remains disputed among its judges.[11]

Most recently, in *Melgarejo Martinez de Abellanosa v. Spain*, the ECtHR, in its judgment of 14 December 2021, noted that it had consistently held that where a person has been the victim of proceedings that have entailed a violation of Art. 6 of the ECHR, the most appropriate remedy would, in principle, be a retrial or the reopening of the case, at the request of the interested person.[12]

On the other hand, in some of its judgments, the ECtHR has itself explicitly ruled out the reopening of proceedings concluded by final judicial decisions following a finding of a breach of the requirements of Art. 6 of the ECHR.[13] According to the Court, the ECHR does not generally guarantee a right to have a terminated case reopened, and, importantly, Art. 6 of the Convention is not applicable to proceedings concerning an application for the reopening of civil proceedings which have been terminated by a final decision.[14] This is because, in so far as the matter is covered by the principle of *res judicata* of a final judgment in national proceedings, it cannot in principle be maintained that a subsequent extraordinary application or appeal seeking revision of that judgment gives rise to an arguable claim as to the existence of a right recognised under national law or that the outcome of the proceedings involving a decision on whether or not to reconsider the same case is decisive for the 'determination of ... civil rights and obligations'.[15] Indeed, the ECtHR had built up a unique doctrine of permitted reversal of finality, where priority is always given to stability and immutability of a final decision. Departure from the general rule is only possible when made necessary by circumstances of substantial and compelling character. Such is the case where some fundamental errors are present, and no other remedy is available to address them.[16] And, as we might deduce from the above analysis of the ECtHR on the matter, the Court generally hesitates to give any express opinions on whether there are any such remedies.

10 Council of Europe/European Court of Human Rights. Guide on Article 46 of the European Convention on Human Rights. Binding force and execution of judgments (2021) para. 15 <https://www.refworld.org/pdfid/6048e29d2.pdf> accessed 22 January 2022.

11 *Sejdovic v Italy* App no 56581/00 (ECtHR, 10 November 2004). This judgment was later watered down by the Grand Chamber. See *Sejdovic v Italy* App no 56581/00 (GC ECtHR, 1 March 2006); *Moreira Ferreira v Portugal* (n 7); R Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2020) 30(4) The European Journal of International Law 1129-1163.

12 *Melgarejo Martinez de Abellanosa v Spain* App no 11200/19 (ECtHR, 14 December 2021) <https://hudoc.echr.coe.int/eng?i=001-214033> accessed 18 February 2022. See also § 27 in *Gençel v Turkey* App no 53431/99 (ECtHR, 23 October 2003) <https://hudoc.echr.coe.int/eng?i=001-65950> accessed 18 February 2022.

13 § 66 in *Henryk Urban and Ryszard Urban v Poland* App no 23614/08 (ECtHR, 30 November 2010) <https://hudoc.echr.coe.int/eng?i=001-101962> accessed 18 February 2022; §§ 47-51 in *Moreira Ferreira v. Portugal* (n 7); §§ 311-314 in *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (GC ECtHR,1 December 2020) <http://hudoc.echr.coe.int/eng?i=001-206582> accessed 18 February 2022.

14 § 86 in *Sablon v Belgium* App no 36445/97 (ECtHR, 10 April 2001) <https://hudoc.echr.coe.int/eng?i=001-63932> accessed 18 February 2022. See also § 24 in *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* App no 32772/02 (ECtHR, 4 October 2007) <http://hudoc.echr.coe.int/eng?i=001-82559> accessed 18 February 2022.

15 §§ 44-45 in *Bochan v Ukraine* (no 2) App no 22251/08 (GC ECtHR, 5 February 2015), <http://hudoc.echr.coe.int/eng?i=001-152331> accessed 18 February 2022. See also Council of Europe/European Court of Human Rights. Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb). Updated to 31 August 2021 (2022) 20-21 <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 22 January 2022.

16 K Gusarov, V Terekhov (n 5) 11.

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Thus, although the ECtHR continues to reiterate that it does not have authority to order the reopening of domestic judicial proceedings, it is clear that the ECtHR still could state that the reopening of the case and even the subsequent retrial, if requested, may represent an appropriate remedy in principle. Moreover, in exceptional cases, the very nature of the violation of conventional rights may be such as to provide with no real alternative as to the measures required to remedy it, except for the reopening of the respective proceeding, and this will prompt the Court to indicate only one such measure. On the other hand, as already mentioned, in some of its judgments, the Court has itself explicitly ruled out the reopening.

In order to provide some clarity with respect to this seemingly controversial approach, the Court set out general principles related to reopening. With regard to domestic criminal proceedings, those principles might be summarised as follows:

(a) Where an individual has been convicted following proceedings that have entailed a violation of Art. 6 of the ECHR, a retrial or the reopening of the case if requested represents, in principle, an appropriate way of redressing the violation. However, the specific remedial measures, if any, required of a respondent state in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law.

(b) It is not for the ECtHR to indicate how any new trial is to proceed and what form it is to take. The respondent state remains free to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he/she would have been in had the requirements of the Convention not been disregarded, provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence.[17]

On a more general scale, including in civil and administrative proceedings, the principles above transformed into a set of criteria of when the ECtHR may consider the reopening as a proper remedy, which took the form of Recommendation No. R (2000) 2 of 19 January 2000, adopted by the CoE CM (hereinafter the CoE CM Recommendation), where the latter invited member states to introduce mechanisms for re-examining cases in which the Court had found a violation of the ECHR, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is on the merits contrary to the Convention, or

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.[18]

As we may notice, there is no mention of the value of *res judicata* and *bona fide* third-party interests in the CoE CM Recommendation. They are out of this equation, as it deals with calculating forces moving towards the necessity of reopening and aimed at finding

17 *Moreira Ferreira v Portugal* (n 7).

18 Recommendation No R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights (adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies)<https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06>accessed 3 January 2022.

out whether reopening is an effective remedy. However, each time the ECtHR returns to the question of reopening domestic court proceedings, it will inevitably face the necessity of finding a balance between two sets of opposing values: on the one hand, there is the effective protection of a violated fundamental right, and on the other hand, there is the value of finality of a judgment in a domestic court proceeding. And, since it is not for the ECtHR to weigh these values upfront, it will likely never undertake the task of giving any specific criteria regarding how these values might be reconciled. Legislators and, to an even greater degree, domestic judicial bodies struggle to reconcile these values, too. That is why the further analysis will be dedicated to searching for similarities and, if possible, general tendencies towards a unification of approaches to availability of reopening of court proceedings throughout European countries.

3 REOPENING OF CRIMINAL PROCEEDINGS IN MEMBER STATES

3.1. Availability of reopening

In the majority of the member states, procedural law provides access to the reopening of criminal proceedings if a violation of the ECHR has been found by the ECtHR by directly naming it or in other wordings that have been interpreted by domestic courts as encompassing the ECtHR judgments. Specific provisions naming the ECtHR finding of a violation of the ECHR as the reason for reopening are in criminal procedural laws of Albania,[19] Austria,[20] Germany,[21] Estonia,[22] Lithuania,[23] the Netherlands,[24] Georgia,[25] Greece,[26] Portugal,[27] Romania, San Marino, Slovenia,[28] Spain,[29] Switzerland,[30] and Turkey.[31]

19 I Roagna, E Skendaj, 'The legal framework for the re-examination and re-opening of criminal proceedings following the finding of a violation by the European Court of Human Rights: An assessment of the legal framework of Albania' (Council of Europe November 2017) 14 <https://rm.coe.int/assessment-fairness-of-criminal-proceedings/16808b7c68> accessed 19 February 2022.

20 § 363(a)(1) of the CrCP of Austria.

21 § 359 (9) of the CrCP of Germany.

22 § 366 (7) of the CrCP of Estonia.

23 Art. 456 of the Lithuanian CrCP of 2003 as reported in *Reopening of proceedings following a judgment of the European Court of Human Rights. Country Reports at the Round table* (n 8).

24 Art. 457 § 1 (b) of the CrCP of Netherlands <https://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf> accessed 4 February 2022.

25 Execution of Rulings of the European Court of Human Rights and the United Nations Treaty Bodies in Georgia. Report (Tbilisi 2020) § 18 <http://ewmi-prolog.org/images/files/3904MonitoringExecutionoftheEuropeanCourtRulings.engop.pdf> accessed 4 February 2022.

26 H Keller, A Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 508.

27 Art. 449, §1(g) of the CrCP of Portugal.

28 Art. 416, of the CrCP of Slovenia.

29 Art. 954 of the CrCP of Spain.

30 Art. 122 of the Federal Law of 17 June 2005 on the Federal Supreme Court <https://www.fedlex.admin.ch/eli/cc/2006/218/fr#art_122> accessed 4 February 2022.

31 Arts. 311 to 323 of the CrCP of Turkey (Law no 5271). In particular, the criminal proceeding was reopened following *İşeri and Others v Turkey* (no 29283/07). Procedural law in Turkey (Art. 172 § 3 of the CrCP) also specifically prescribes that 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, e.g., following *Ümran Durmaz v Turkey* (no 3621/07). See Turkey country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

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The reopening of criminal proceedings following the judgment of an international body is envisaged by the procedural laws in Poland[32] and Ukraine,[33] and reopening following the judgment of an international court is provided in Norway.[34]

In Belgium,[35] Serbia,[36] and Slovakia, an ECtHR judgment might be regarded as a novel fact and thus constitute the ground for reopening a criminal proceeding.[37] Also, in the Russian Federation, the reopening is available if new facts are revealed, and an ECtHR judgment finding a violation of the ECHR is listed among those new facts that give access to the reopening procedure.[38]

In some countries, although the law contains no specific rules providing access to the reopening of proceedings following a judgment of the ECtHR (e.g., in Sweden[39] and Finland[40]), general provisions of the procedural codes regarding extraordinary appeals, provisions concerning the annulment of a judgment issued as a result of a proceeding conducted with grave procedural errors, and provisions regarding a reversal of a final judgment in a criminal proceeding on the grounds of a substantive error apply respectively.[41]

Thus, currently, thirty -four member states allow the reopening of domestic criminal proceedings following a judgment of the ECtHR.[42]

Ireland and Liechtenstein are among the few European countries that rigorously adhere to

32 Art. 540 § 3 of the CrCP of Poland. According to well established case-law, those provisions encompass the ECtHR judgments. See Poland country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8). See also M Dziurda, A Gołąb, T Zembrzuski, 'European Convention of Human Rights and Fundamental Freedoms: Impact on Polish Law Development' (2021) 1(9) Access to Justice in Eastern Europe 42; L Garlicki, I Kondak, 'Poland: Human Rights between International and Constitutional Law' in Iulia Motoc, Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016).

33 Art. 459 (3)(2) of the CrCP of Ukraine <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 4 February 2022.

34 Section 391 § 2 of the Criminal Procedure Act of Norway. Act of 22 May 1981 No 25 with subsequent amendments, the latest made by Act of 21 June 2013 No 84 <https://www.legislationline.org/download/id/8290/file/Norway_Criminal_Procedure_Act_1981_am2013_en.pdf> accessed 4 February 2022.

35 Art. 441 of the CrCP. See H Keller, A Stone Sweet (n 27) 294.

36 Art. 473 of the CrCP. However, specific provisions are in the Law on Minor Offences (Art. 280, § 1(5)). See Serbia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

37 Section 394 §§ 1 and 4 of the CrCP, reported in Slovakia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8). See also H Keller, A Stone Sweet (n 27) 582.

38 Art. 413, § 4(2) of the CrCP <http://www.consultant.ru/document/cons_doc_LAW_34481> accessed 4 February 2022.

39 The reopening of the criminal proceedings can be granted according to Chapter 58, Section 2 of the Swedish Code of Judicial Procedure as a 'relief for substantive defects'. In 2013, the Supreme Court specifically found that reopening could be granted in certain situations based on Art. 13 of the Convention. See Sweden country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

40 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

41 Ibid.

42 Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, and Ukraine. See *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8). See also I Roagna, E Skendaj (n 20) 9.

the *res judicata* principle with respect to criminal proceedings in as much as their laws do not provide for access for reopening following ECtHR judgments.[43]

Having no doubt that *res judicata* constitutes a valuable principle in criminal proceedings, we might still ask ourselves whether there are any means other than the reopening of proceedings by which the judiciary is able to ensure the existence of adequate ways of achieving *restitutio in integrum* insofar as possible. Among those, the following come to mind:

a) a range of individual measures that aim at mitigation of negative consequences of unjust conviction and may be sufficient to offer adequate redress in criminal matters: rehabilitation; unconditional release or, if this is not possible, release on parole; restoration of rights; procedural acceleration; acts of clemency and reduction of sentences (amnesty, public excuse or pardon); an agreement not to enforce the respective domestic measure, or other forms of waiver or abstention from enforcement of certain judgments; the clearing up of information in public records, in particular, the rectification of criminal records if it is not conditional on a final judgment being reopened and if it leads to the certain ending of restrictions on individuals' rights;

b) tort liability as a compensation measure.

Nevertheless, the reopening, in general, is recognised as the most effective remedy for achieving *restitutio in integrum* because it might result in a decision on the innocence, i.e., the acquittal of a victim, due to possible full re-establishment of the person's status before the violation of the ECHR. For this reason, an application to reopen the domestic criminal proceedings in favour of a victim of unjust conviction formally may be filed even after the convicted person has served a sentence and with no regard to the statute of limitations, and even after amnesty or pardon.

In practical terms, according to the case-law in many countries (e.g., in Greece and Ukraine), reopening is ordered only if the violation of the ECHR has negative outcomes for the judgment of the criminal court that impacted the main course of the proceedings and were within their main issues, namely the question of guilt and criminal liability, and the defects of the judgment cannot be rectified in any other way than through re-examination of the case or its parts. It is for this reason that the Supreme Court in Ukraine normally refuses to reopen following findings of an ECHR violation related to the excessive length of proceedings or some procedural error, e.g., those related to the application of preventive measures, such as pre-trial detention, holding that these violations do not affect the final judgment.

To sum up, reopening might be ordered when the proceedings were unfair or otherwise significantly unjust, or their outcome breached the requirements of the ECHR, which is in line with the CoE CM Recommendation. In contrast, procedural defects in criminal matters which did not directly and significantly affect the final judgment on the merits normally would not justify a reopening.

3.2. Competent court

State bodies having authority to provide a review of final judgments in criminal proceedings following the ECtHR findings differ throughout Europe: those are either courts or administrative bodies, structurally and functionally independent of courts and investigation

43 Ireland and Liechtenstein country reports in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

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authorities. Among court options, the most common are those of entrusting the highest courts that are dealing with questions of law (supreme courts or, in some jurisdictions, constitutional courts) or the same court that issued the final judgment with the task of deciding upon reopening, such as:

a) the Constitutional Court (in the Czech Republic),

b) the Supreme Court or other common court of highest instance (the Supreme Court of Appeal in Belgium,[44] the Supreme Court in Estonia,[45] Cyprus, Lithuania,[46] and the Netherlands,[47] the Federal Supreme Court in Switzerland, Grand Chamber of the Supreme Court in Ukraine, Presidium of the Supreme Court in Russian Federation[48]),

c) the court that issued a final judgment (Serbia, Slovakia, and Portugal, where it is for the Supreme Court to authorise the reopening first[49]).

In Norway, in order to separate the judiciary from the task of deciding upon applications to reopen criminal proceedings that have resulted in legally enforceable convictions, probably for the reason of potential bias of courts in this matter, an independent administrative body (the Norwegian Criminal Cases Review Commission, NCCRC) was established in 2004 and vested with the authority to decide upon the said applications.[50] When the NCCRC has reopened a case, it is referred for re-examination to a court district other than the district of the court that issued the original judgment.[51] Organisations similar to NCCRC were created in England in 1995 and in Scotland.[52] This shows that bestowing the power of granting access to reopening final judgments on the judiciary is not the only way of dealing with this matter throughout Europe.

In the majority of countries in which it is for the highest court instance to decide upon reopening, once it allows reopening, the same court will either rule on the essence of the case itself (usually if no evidence needs to be re-evaluated and no new facts need to be ascertained) or refer the case to the trial court or the court of appeal responsible for the breach of the requirements of the ECHR while entering a final judgment on factual matters of the case. If procedural errors in a criminal matter that resulted in an ECtHR judgment and a subsequent reopening of the domestic criminal proceeding took place at a pre-trial stage, the case might even be referred to the Office of the Attorney General or other authority responsible for criminal investigation for a new pre-trial proceeding to be conducted (e.g., in Estonia[53]).

Thus, although the reopening of court proceedings is one of the individual measures, its significance to the development of the rule of law is so important that in many member states, the question of granting access to it remains subject to the highest court instances, so

44 H Keller, A Stone Sweet (n 27) 294.

45 § 365 (1) of the CrCP of Estonia.

46 Art. 458 of the Lithuanian CrCP of 2003.

47 Art. 457 § 1 (b) of the CrCP of Netherlands.

48 Art. 415 §5 of the CrCP of the Russian Federation.

49 Portugal country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

50 The Norwegian Criminal Cases Review Commission. Annual Report 2019 <www.nsd.uib.no/polsys/data/filer/aarsmeldinger/AE_2019_13683.pdf> accessed 4 February 2022.

51 U Stridbeck, S Magnussen, 'Prevention of wrongful convictions: Norwegian legal safeguards and the criminal cases review commission' (2012) 80(4) University of Cincinnati Law Review 1384.

52 In the Interests of Justice. An inquiry into the Criminal Cases Review Commission. 2021 Report by the Westminster Commission on Miscarriages of Justice <https://appgmiscarriagesofjustice.files.wordpress.com/2021/03/westminster-commission-on-miscarriages-of-justice-in-the-interests-of-justice.pdf> accessed 4 February 2022.

53 § 373 (1)-(2) of the CrCP of Estonia.

that their case-law can guide lower courts in order to avoid in future the fundamental errors that led to the respective ECtHR judgment.

3.3. Who can seek reopening?

In the majority of member states, access to the reopening of domestic criminal proceedings is provided either to the applicant to the ECtHR or to the public prosecutor or some other public authority,[54] and legislative reforms in this matter are in progress in other states.[55] Generally speaking, we might distinguish three groups of persons who are allowed to seek reopening:

a) the victim of the violation (if we narrow down this notion to an applicant to the ECtHR him or herself being a party in the domestic proceeding, then we might recognise that the access to reopening is provided in all member states where reopening following the ECtHR judgment is allowed);

b) family members in cases of the absence or death of the victim of the violation, other persons related to the victim (the list of these related persons or representatives differs significantly in various jurisdictions);

c) governmental agents (the Attorney General in Austria,[56] Estonia,[57] the Chancellor of Justice as one of the Supreme Guardians of law in Finland[58]). Apart from convicted persons (their direct relatives) whose complaint to the ECtHR was successful, access to the reopening procedure is also available to the Attorney General (upon the request of the Minister of Justice) in Belgium.[59] In Russia, it is for the President of the Supreme Court to initiate the reopening before the Presidium of the said court.[60]

This is generally in line with the margin of appreciation the ECtHR recognises to states in determining who can initiate the reopening.

Access to reopening might be open to the convicted person, his/her close relatives or lawyers, or the prosecutor or other governmental agent, but only in the interests of the convicted person (or, broadly speaking, a victim of the violation), as no *reformatio in peius*[61]

54 Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, Spain, Switzerland, the 'former Yugoslav Republic of Macedonia', Turkey, Ukraine, and the United Kingdom.

55 Review of the implementation of Recommendation (2000) 2 of the Committee of Ministers to the Member States on re-examination and reopening of certain cases at domestic level following judgments of the European Court of Human Rights Rapporteur: A Scheidegger. Paras 4 and 8 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066b42a> accessed 3 January 2022. See also I Roagna, E Skendaj (n 20) 15.

56 § 363a(2) of the CrCP of Austria.

57 § 367(2) of the CrCP of Estonia.

58 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

59 However, for the sake of legal certainty the reopening shall not affect rights of third parties. See H Keller, A Stone Sweet (n 27) 294.

60 Art. 415 § 5 of the CrCP of Russian Federation. We believe though that the functions of this official need to be separated, as in case of Russia the President of the Supreme Court plays more of an independent procedural role, but not represents any party to the criminal proceeding interested in reopening.

61 *Reformatio in peius* (from Latin *reformatio*, 'change', and *peius*, 'worse') is an expression used in law meaning that a decision from a court of appeal is amended to a worse one. The prohibition of *reformationis in peius* expresses a request to prohibit the deterioration of the procedural status of the accused person who lodged an appeal or for whom the appeal was lodged by another authorized person. See J Jelínek, K Klíma (eds), *Protection of fundamental rights and freedoms in criminal procedure* (Leges 2020) 60.

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is allowed.[62] Criminal proceedings ended with an enforceable conviction may be reopened only to the benefit of a convicted person in Albania,[63] Bosnia and Herzegovina,[64] Norway, Poland,[65] and Serbia.[66] Specific provisions allowing reopening of the proceedings upon respective requests of the prosecutor, convicted person or relatives of the deceased convicted person exist in the Netherlands.[67] To sum up, *reformatio in peius* following reopening is prohibited in many member states.[68]

Thus, the procedural laws or case-law on reopening in many European countries seem to recognise the right to initiate reopening only to the benefit of the victim of the violation established by the ECtHR, which is in line with the CoE CM Recommendation, and the margin of appreciation the Court recognises to states in determining this issue. Still, this leaves us with the questions of (1) who is the victim of the violation for the purposes of recognition of the right to request reopening, and respectively (2) whether the definition of the victim narrowed down to the convicted person in the initial domestic criminal proceeding who was an applicant to the ECtHR shall remain intact.

3.4. Erga omnes effect and beneficium cohaesionis

According to the classic interpretation of the member states' obligation to 'abide by the final judgment of the Court in any case to which they are parties', the judgments of the Court are only formally binding *inter partes* and do not have a binding *erga omnes* effect across the states that are not parties to the respective case, which is different from the member states obligation to integrate the Court's case-law into their national law.[69] With regard to this problematic issue of reopening of domestic court proceedings, Z. Varga even points out that 'retrial following ECtHR judgments is only possible in the single case concerned by the ECtHR judgment'.[70]

The rationale behind this approach is that the inconsistency of a final domestic judgment with the ECtHR case-law is considered a matter of interpretation and application of the law. Thus, since misinterpretation of law cannot serve as a reason to reopen criminal proceedings where a final judgment has already been delivered, therefore, the abovementioned inconsistency is not a reason for reopening. This is true for the majority of the member states.[71] In Germany, the Federal Constitutional Court, in its 2019 decision, expressly ruled that the constitutional law of Germany did not require that the binding effect of a final judgment (*res judicata*) be lifted in the event that the ECtHR issued a judgment in proceedings concerning other

62 H Keller, A Stone Sweet (n 27) 508.

63 Art. 449 para. 2 of the CrCP of Albania as reported in I Roagna, E Skendaj (n 20) 17.

64 Art. 327 § 1(f) of the CrCP of Bosnia and Herzegovina of 2003.

65 Also upon the request of a next of kin to the deceased convicted person.

66 Art. 473 of the CrCP of Serbia.

67 Art. 458 of the CrCP of Netherlands.

68 Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Luxembourg, Moldova, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Sweden, Turkey, and the United Kingdom. See Review of the implementation of the CoE CM Recommendation (n 56) para 12.

69 MA Oddný, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28(3) European Journal of International Law 821.

70 Z Varga 'Remedies for violation of EU law by member state courts. What place for the Köbler doctrine?' (Doctoral Thesis, Eötvös Loránd University 2016) 102.

71 In particular, for Ukraine. Also Sweden, Georgia (see § 19 of the Execution of Rulings of the European Court of Human Rights and the United Nations Treaty Bodies in Georgia Report (n 26)).

applicants finding a violation of the ECHR.[72] Also, in Ukraine, the Grand Chamber of the Supreme Court consistently reiterated in its rulings that access to the reopening procedure might have been granted only to a successful applicant to the ECtHR.[73]

However, the case-law in several countries is on the path of developing some exceptions from this general approach. The ECtHR judgment in *Del Rio Prada v. Spain,*[74] in which the Court specified that Art. 7 of the Convention also sets down the principle that the criminal law must not be extensively construed to an accused person's detriment, for instance, by analogy, had *erga omnes* effect in Spain, where the ECtHR judgment resulted in the reopening of all the domestic cases where the jurisprudence had been the same. In Poland, the jurisprudence of the Supreme Court developed an approach according to which access to reopening is not only available to the applicant who is the victim of a violation of the ECHR in the criminal proceedings as established by the ECtHR but also to other individuals in a similar situation (i.e., *de facto erga omnes* effect).[75] There is a similar situation in Finland, where access to reopening is also granted to other accused persons in other criminal cases in which the same violation of the ECHR was found (when it comes to the combination of factual and legal aspects). The Supreme Court has, in various proceedings, taken into consideration the case-law of the ECtHR in general, i.e., not only related to Finland, as a ground for reopening when no application to the ECtHR has been lodged against Finland.[76] However, even in this case, the reopening does not take place automatically by virtue of an ECtHR judgment serving as a ground for the reopening: an accused person still needs to lodge an individual request.

In Estonia, access to reopening of criminal proceedings is available to persons whose applications with the Court in a similar matter and on the identical legal ground are pending or who have the right to lodge such an application, taking into consideration the provisions of Art. 35(1) of the ECHR.[77] In Belgium, apart from convicted persons (their direct relatives) whose complaints to the ECtHR were successful, access to the reopening procedure is also available to other persons who were convicted on the basis of the same facts and evidence.[78]

Apart from the classic understanding of *erga omnes* effect of ECtHR findings, it is also important to reveal the problem of the *beneficium cohaesionis*[79] effect of ECtHR judgments, which is related more to the acceptance of this doctrine in domestic procedural law of the member states, rather than to the nature and effect of the ECtHR judgments. The application of the *beneficium cohaesionis* doctrine in reopening procedures following the ECtHR findings was detected in Bulgaria and the Czech Republic, where, consequently, an ECtHR

72 BVerfG, Beschlussder 3. Kammer des Zweiten Senats vom 13. Februar 2019-2 BvR 2136/17-, Rn. 1-35, <http://www.bverfg.de/e/rk20190213_2bvr213617.html> accessed 18 February 2022.

73 See, e.g., case No 36-46749 [2019] Supreme Court <https://reyestr.court.gov.ua/Review/81139247> accessed 4 July 2022; case No 05-54к2001 [2020] Supreme Court <https://reyestr.court.gov.ua/Review/86989428> accessed 4 July 2022.

74 Del Río Prada v Spain App no. 42750/09 (GC ECtHR, 21 October 2013), §§ 78-80 <https://hudoc.echr.coe.int/eng?i=001-127697> accessed 18 February 2022.

75 See Spain and Poland country reports in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

76 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

77 § 367 (2) of the CrCP of Estonia.

78 However, for the sake of legal certainty the reopening shall not affect rights of third parties. See H Keller, A Stone Sweet (n 27) 294.

79 *Beneficium cohaesionis* ('benefit of attachment') is a Latin phrase, which means that effects of appeal or recourse trial also relate to co-defendants, who have not filed the appeal. See L Çukaj, D Laçi, 'Reviewing, as an Extraordinary Mean of Appeal' (2020) 5(2) European Journal of Multidisciplinary Studies 74-91.

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finding served as a ground for the reopening of the whole domestic criminal proceeding with respect to and to the benefit of the applicant as well as the applicant's co-accused.[80]

However, on a general scale, procedural laws in European countries do not provide *beneficium cohaesionis* explicitly in cases of reopening following ECtHR judgments, even though, from the case-law and jurisprudence related to the application of procedural rules on other forms of appeal, beneficial effects of the review might be applicable to other defendants who have not lodged the appeal or requested the review. This is because the legal provisions on extraordinary review of final judgments following the ECtHR findings and possible retrial after a domestic case is reopened are rather general and not burdened with details. Normally, it is for the domestic courts to elaborate on whether certain aspects of other procedures of review are applicable *mutatis mutandis*, namely whether *beneficium cohaesionis* is applicable in such cases.

3.5. Unilateral declaration and friendly settlement as a ground for reopening

The wording of procedural laws in many European countries (e.g., Austria, Slovak Republic, Spain, Switzerland, Turkey, and Ukraine) is such that a criminal proceeding is to be reopened only if there is a final judgment of the ECtHR in which it finds a violation of the ECHR. Hence, friendly settlements or unilateral declarations may not be considered a proper formal ground for reopening. In some countries (e.g., Estonia[81]), this approach was established in jurisprudence. In Germany, the Federal Constitutional Court ruled that a friendly settlement reached in proceedings before the ECtHR cannot be considered to constitute a finding of a violation of the Convention or of its Protocols within the meaning of respective provisions of the Code of Criminal Procedure (§ 359 (6)). This also holds true for cases where the settlement facilitated by the ECtHR relied on a previous judgment against Germany in a similar case.[82] Although there is no specific provision related to the reopening following a unilateral declaration or friendly settlement, the situation is unclear in Lithuania and Russia, as there is no case-law regarding this matter.[83] Nevertheless, reopening following unilateral declarations or friendly settlements is, in principle, possible in a significant number of member states (Czech Republic, Georgia, Latvia, Moldova, Poland, and Slovenia).[84]

This variety of approaches provides no path to a definitive conclusion about the prevailing trends in the development of domestic procedural laws. This is because, in contrast to the formal meaning of an ECtHR judgment as the one establishing a member state's obligation to introduce an individual and, in case the violation has a widespread character, general measures, unilateral declarations, and friendly settlements are closely linked to the procedures before the ECtHR and should mark their finality. This is especially true with respect to friendly settlements.

3.6. Time limits

In contrast to the compelling unity of the member states' approaches toward the availability of reopening stands the matter of time limits during which the reopening is available. Domestic

80 I Roagna, E Skendaj (n 20) 18.

81 The judgment of the Constitutional Review Chamber of the Supreme Court of 22 February 2011 in a constitutional review case no. 3-4-1-18-10, as reported in Estonia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

82 BVerfG (n 73).

83 Lithuania and Russia country reports in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

84 I Roagna, E Skendaj (n 20) 8.

criminal procedural laws and case-law greatly differ in whether any reasonable time limit has to be established at all, as well as in what event to be taken as its starting point: 90 days after the ECtHR judgment becomes final (in Switzerland[85]); three months (in Cyprus), six months (in Albania,[86] Austria, Belgium,[87] Estonia, Finland[88]), or one year after the ECtHR judgment becomes final (in Spain[89]); three months after the convicted person became aware of the ECtHR judgment (in the Netherlands[90]); 30 days after the person became aware of the final ECtHR judgment (in Ukraine[91]).

In some member states, the procedure is not restricted by any time limits, at least explicitly in procedural laws (in Bosnia and Herzegovina, Greece,[92] Poland, and Russia[93]).

Thus, we may point out that the time limits for seeking reopening, if they are applied at all and are clearly defined in the procedural laws, share several qualities throughout the European countries: they are reasonable, and they also take into account the length of the proceeding before the ECtHR such that they are linked with the moment the respective ECtHR judgment becomes final, or a person seeking reopening becomes aware of it.

4 REOPENING OF CIVIL AND ADMINISTRATIVE PROCEEDINGS

4.1. Why not reopen?

Due to the almost axiomatic difference in values that are at stake in criminal and civil proceedings, the importance of *res judicata,* if compared to other aspects of these types of court procedures, differs greatly as well. Exactly because of this predominant value of *res judicata* in civil and, to a lesser extent, in administrative proceedings, we will not face the same unity among the member states in allowing the reopening of civil and administrative proceedings as we witnessed earlier with respect to reopening of criminal proceedings.

Nevertheless, access to reopening is envisaged more or less explicitly in procedural laws of many countries (Bosnia and Herzegovina,[94] Bulgaria,[95] Estonia,[96] Georgia,[97] Germany,[98]

85 Art. 124 of the Federal Law on the Federal Supreme Court (n 31).

86 I Roagna, E Skendaj (n 20) 13.

87 H Keller, A Stone Sweet (n 27) 294.

88 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

89 Art. 954 of the CrCP of Spain.

90 Netherlands country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

91 Art. 461 (5)(2) of the CrCP of Ukraine (n 24).

92 H Keller, A Stone Sweet (n 27) 508.

93 According to Art. 414 § 1 of the CrCP of Russian Federation the reopening for the benefit of the convicted person is not bound with any time limits.

94 Art. 231a of the Non-contentious Proceedings Act of BiH.

95 Art. 303, § 1, 7 of the CCP of Bulgaria, and Art. 239 of the Code of administrative proceedings of Bulgaria.

96 § 702(2) of the CCP of Estonia, §§ 204(1) and 240(2) of the Code of administrative proceedings of Estonia.

97 In civil, but not administrative proceedings. See § 18 of the Execution of Rulings of the European Court of Human Rights and the United Nations Treaty Bodies in Georgia Report (n 26).

98 § 580(8) of the CCP of Germany.

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Lithuania,[99] the Republic of Moldova,[100] Portugal,[101] Romania, Serbia,[102] Spain,[103] Republic of North Macedonia,[104] Slovak Republic,[105] Switzerland,[106] and Turkey[107]).

Procedural laws in a significant number of countries do not distinguish ECtHR findings as a separate ground for reopening but still provide access for reopening on more or less general grounds that are applicable to ECtHR judgments. Norwegian[108] and Ukrainian[109] procedural laws refer to an international court (international judicial body) finding a violation of an international treaty as the ground for reopening. Czech law envisages the right to request the case to be reopened before the Constitutional Court following a judgment of an international court delivered in the proceeding subsequent to the domestic case. This procedure seems to apply primarily to the ECtHR judgments.[110] Also, in Finland, there are no specific rules providing for the reopening of domestic civil proceedings following an adverse judgment of the ECtHR. The Code of Judicial Proceedings contains only general provisions concerning extraordinary appeal in a civil matter, as well as rules regarding the annulment of a judgment that is already *res judicata* on the grounds of significant procedural errors and provisions regulating the reversal of a final judgment based on a substantive error in the contents of a decision.[111]

In Latvia, a judgment of the ECtHR can serve as a ground for the reopening of a final judgment with the possibility of a subsequent 'adjudication of matters *de novo*', i.e., the retrial in view of newly discovered facts in terms of the Latvian procedural law.[112] Similarly, in Lithuania, both administrative and civil procedure codes provide explicit grounds for reopening and subsequent retrial of the case where a judgment by the ECtHR finds the violation of the ECHR by a final domestic decision.[113] In a similar manner to new facts, the

99 Art. 366 § 1(1) of the Lithuanian CCP of 2003. Also for administrative proceedings Art. 153 § 2(1) of the Law on Administrative Proceedings.

100 Art. 449(h) of the Code of Civil Proceedings of Moldova, as amended on 11 November 2021 <http://continent-online.com/Document/?doc_id=30397949#pos=6;-141> accessed 4 February 2022.

101 Art. 771, §1(f) of the CCP of Portugal.

102 Art. 426 of the CCP of Serbia.

103 Art. 510 of the CCP of Spain. Access to reopening is available in Spain for administrative cases according to § 2 of section 102 of the Spanish Administrative Procedure Act, as amended by Organic Law no 7/2015 of 21 July 2015, as specified in *Melgarejo Martinez de Abellanosa v Spain* (n 13).

104 Art. 400 of the Law on civil proceedings of the Republic of North Macedonia, adopted in 2005 as reported in Z Stoileva, 'Reopening of civil proceedings following a judgment of the European Court of Human Rights in Republic of North Macedonia' (2021) 9(15-16) JUSTICIA–International Journal of Legal Sciences 108.

105 Section 228 § 1 (d) of the CCP of Slovak Republic, as reported in Slovak Republic country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

106 Art. 122 of the Federal Law on the Federal Supreme Court (n 31).

107 Art. 375 of the CCP of Turkey (Law no 6100). Retrial of respective civil cases following the ECtHR judgments of Dilipak and Karakaya v Turkey (App nos 7942/05 and 24838/05) and Ruhat Mengi v Turkey (App nos 13471/05 and 38787/07) was reported. See Turkey country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

108 Section 31-3 §1(d) and section 31-4 (b) of the Act relating to mediation and procedure in civil disputes of Norway (The Dispute Act) of 2005. Last consolidated 1 January 2018 <https://lovdata.no/dokument/NLE/lov/2005-06-17-90/KAPITTEL_6#KAPITTEL_6> accessed 4 February 2022.

109 Art. 423, para 3(2) of the CCP of Ukraine <https://zakon.rada.gov.ua/laws/show/1618-15#Text>; Art. 361, para 5(3) of the Code of Administrative Procedures <https://zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 4 February 2022.

110 Act on the Constitutional Court, § 119 according to Z Varga, 'Retrial in the Member States on the Ground of Violation of EU Law' (2017) 1 ELTE Law Journal 62.

111 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

112 Art. 353. para 6 of the Code of administrative proceedings of Latvia; Art. 479 para. 6 of the CCP of Latvia as reported by Z Varga (n 111) 76.

113 Chapter XVIII Art. 366 para. 1. Of the Lithuanian CCP as reported by Z Varga (n 111) 77.

ECtHR judgments are regarded in Estonia[114] and the Russian Federation as formal grounds for reopening of civil proceedings.[115] In many of the above states, access to reopening of civil and administrative proceedings was provided through legislative changes implementing the CoE CM Recommendation.

Meanwhile, in a significant number of the member states, where *res judicata* is valued at the highest, the legislator traditionally sees no practical reason in adopting changes allowing cases to be reopened as a result of the ECtHR findings. The rationale behind this is that the state remains liable for the violation of fundamental rights and may be obliged to compensate for the damages suffered; thus compensation mechanism is more effective and, what is more important, does not require the distortion of the finality of domestic court judgments.

However, in several member states, liability claims are considered as offering only secondary, subsidiary relief in cases where primary actions aimed at *restitutio in integrum* by way of restoration of *status quo ante* have not succeeded. The current jurisprudence of the German Federal Supreme Court reflects this view.[116] Similarly, in Poland, the declaration of the unlawfulness of a final domestic judgment – which is a procedural element of a liability claim – can only be introduced if a claimant has used all remedies available to them in order to restore the initial rights before lodging the liability claim. The liability of the state is therefore regarded as a secondary remedy.[117]

On the other end of the spectrum, in terms of the availability of the reopening, there are a significant number of European countries that do not grant access to the reopening of civil and administrative proceedings on the ground of their inconsistency with the ECHR found by the ECtHR. In Slovenia, where the *res judicata* principle is traditionally valued in jurisprudence, and legal doctrine, the reopening of civil and administrative proceedings (where the Civil Procedure Act is applicable) on the ground of the adverse ECtHR findings is currently not explicitly provided for by the existing procedural rules.[118] There is a similar situation in Austria[119] and Cyprus.

In Sweden, the procedural law did not originally provide for the reopening of domestic cases following decisions by international courts. It remains unclear how far the general provisions on reopening of civil cases[120] could be applied for such purposes, nor was there any jurisprudence on the subject. Historically, if the Chancellor of Justice or a court found that a national authority had acted wrongly in dealing with a particular case, they could provide compensation.[121] In addition, the government could make *ex gratia* compensation payments to citizens.[122] The situation has not changed since 2013, when certain amendments

114 § 702 (1) and § 702 (2)(8) of the CCP of Estonia.

115 Art. 392 § 4(4) of the CCP of Russian Federation.

116 BGH, Urteil, 09/10/2003, III ZR 342/02, NJW 2004, S. 1241

117 Art. 4241, § 1 of the CCP of Poland according to Z Varga (n 111) 98. Until recently, the situation was different, as judgments of the Strasburg court was not listed in Art. 401 of the CCP of Poland among formal grounds for reopening and according to the case-law of the Supreme Court should not be treated as such. See H Keller, A Stone Sweet (n 27) 582.

118 Slovenia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

119 Austria country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

120 Chapter 58 of the CCP of Sweden.

121 Under Chapter 3, section 2 of the Tort Liability Act of Sweden.

122 International Covenant on Civil and Political Rights, Human Rights Committee, Seventy-fourth session, Summary record of the 1989th meeting, 20 March 2002, Consideration of reports submitted by States parties under Art. 40 of the Covenant (continued), Fifth periodic report of Sweden (CCPR/C/SWE/2000/5, CCPR/C/74/L/SWE) <http://docstore.ohchr.org> accessed 4 February 2022.

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regarding reopening were made in criminal justice, which, however, did not affect civil proceedings.[123]

In Greece, the Code of Civil Procedure does not allow for civil proceedings to be reopened in domestic courts should there be a finding of a violation of the Convention by the ECtHR.[124] The Areios Pagos (Greek Supreme Court of Cassation) has ruled that an adverse ECtHR judgment can serve as a ground to reopen a domestic judicial proceeding ended with a final judgment only in criminal matters. As for administrative or civil disputes, an adverse ECtHR judgment can only give rise to compensation but cannot serve as a ground to reopen a final judgment.[125]

In a similar manner, no access to reopening civil proceedings following an ECtHR judgment is provided by the procedural law in Ireland, Liechtenstein, and the Netherlands.[126] In the Netherlands, however, the Parliament of the Netherlands initiated introducing amendments to the General Administrative Law Act (Art. 8:88) in order to open access for reviewing judgments of administrative courts, in particular following the ECtHR judgments. However, the Dutch Government held that there was no reason for such a measure, in view of [...] the right to sue the state as liable for errors made by the highest administrative courts.[127] Also, in the Netherlands, it is clear from the Supreme Court's jurisprudence that the state can be sued for tort as a result of the unlawful dispensation of justice. Although, in practical terms, the state is held liable only if no other effective remedy remains open and only in exceptional cases where the fundamental principles of law were so badly neglected when conducting the respective judicial proceeding and adopting the judgment that the parties can no longer be said to have had their case heard in a fair and impartial manner, at least in one reported state liability case, this resulted in compensation having been paid to the applicant on this ground.[128]

According to Z. Varga, in several member states (e.g., Bulgaria, Czech Republic, Estonia, Greece, Spain and Netherlands), there is an *expressis verbis* established hierarchy between reopening with a possible subsequent retrial and state liability. In Bulgaria, the procedural law opens access to retrial only if it is necessary to remedy an injustice suffered.[129] Under Czech law, an application for reopening on the ground of violation of fundamental rights may be regarded as inadmissible if the consequences of the violation have already been remedied, e.g., by providing just satisfaction.[130] In Estonia, although the law formally provides the right to request the reopening of domestic court proceedings, as was mentioned before, it tends to prioritise liability claims over retrials.[131] The Riigikohus (Supreme Court in Estonia) stated, concerning ECHR violations, that reopening of cases is only possible if

123 Sweden country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

124 A. Firmansyah, 'Molla Sali v. Greece: a pyrrhic victory following just satisfaction judgment?' (*Strasbourg Observers*, 15 July 2020) <https://strasbourgobservers.com/2020/07/15/molla-sali-v-greece-a-pyrrhic-victory-following-just-satisfaction-judgment/> accessed 26 January 2022. See also H Keller, A Stone Sweet (n 27) 509.

125 Z Varga (n 111) 74-75.

126 C Drion, 'IV.2 Remedies under Dutch law for violation of human rights in civil proceedings: state liability and/or reopening the case?' in *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Leiden, Brill Nijhoff 1999) 202.

127 Z Varga (n 111) 80-81.

128 See Court of Appeal, The Hague 17 July 1997, NJK 1997/75 as reported in the Netherlands country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

129 Art. 303 of the CCP of Bulgaria and Art. 239 of the Code of Administrative Procedures of Bulgaria.

130 § 119 of the Law on Constitutional Court of Czech Republic.

131 § 7(1), (21) of the Estonian Law on Liability of the State.

compensation by damages is not available.[132] Also, in Spain, reopening is available in theory, 'provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review, without this prejudicing the *bona fide* rights acquired by third parties'.[133] According to the jurisprudence of the Spanish Tribunal Supremo, even if a retrial is not possible, a liability claim may be lodged.[134] Although state liability for judicial decisions in Europe has its roots in the perception of the state as a single entity, the liability of the state for damages caused by a miscarriage of justice requires a sufficiently serious violation to be proved.[135] Procedural law in Switzerland[136] demonstrates a similar inclination towards compensation being a predominant remedy. Also, in the Slovak Republic, procedural law allows reopening unless substantial consequences arising from the ECHR violation have been duly remedied by awarding a just satisfaction. The right to have a case reopened is subject to further conditions in Norway. The competent court might refuse to reopen if the violation of the convention can be redressed in another way, for example, by means of just satisfaction.[137] Moreover, in Norway, 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.[138]

This overview of various approaches throughout Europe shows that they differ in one significant aspect: in one group of legal systems that, in principle, allow the reopening of domestic civil proceedings, there is a clear requirement that this measure is available only if the consequences of the violation of the ECHR were not redressed by way of just satisfaction (e.g., Czech Republic, Slovak Republic, Norway), whereas, in other countries, state liability claims are considered an effective primary remedy, although this does not mean that reopening is not allowed in principle (Estonia, Spain, Switzerland).

Ukrainian jurisprudence tends to adopt the first of the approaches summarised above. Formally, there is no requirement for the compensation to be proved ineffective as a formal precondition for allowing the reopening. However, the case-law developed strict criteria of availability of the reopening, which are in line with the CoE CM Recommendation, namely that a competent court needs to come to a conclusion that the reopening might provide effective redress.

Thus, although clearly there is no consensus among European countries on whether to allow the reopening of domestic civil and administrative proceedings following an ECtHR judgment, the tendency has appeared according to which those countries that made the reopening available in law are further developing their case-law in order to narrow the access so that it remains open in those rare cases when it is the most effective, if not the only, measure of *restitutio in integrum*. Those countries that historically did not provide access to reopening and still do not tend to develop paths for liability claims as an effective compensation measure.

132 Riigikohtu halduskolleegiumi, 22 February 2010, no 3-3-2-1-10; and Riigikohtu üldkogu, 10 March 2008, no 3-3-2-1-07 according to Z Varga (n 111) 97.

133 Art. 510 of the Code of Civil Procedure. See Spain country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

134 Z Varga (n 111) 97.

135 A Davies, 'State Liability for Judicial Decisions in European Union and International Law' (2012) 61(3) The International and Comparative Law Quarterly 585.

136 According to Art. 122(b) of the Federal Law of 17 June 2005 on the Federal Supreme Court compensation being not such as to remedy the effects of the violation of the ECHR is one of the conditions for reopening the proceedings (both criminal and civil).

137 Norway country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

138 Section 31-5 § 3 of the Norwegian Dispute Act.

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4.2. Competent court

Although there is a number of similarities in the principles applicable to the reopening of criminal and civil proceedings in general, we might notice that the member states do not always tend to apply the same approaches. By that, we mean that although member states establish in their procedural laws, criminal and civil, various approaches to the reopening procedure (in particular, in the aspect of what courts should be vested with the power to grant reopening – highest courts instances or courts that issued a final judgment that triggered the proceedings before the ECtHR), it is not mandatory that the reopening of both types of proceedings follow the same path. Again, applicable approaches are split into the following options:

a) an extraordinary revision appeal before the court that issued a final judgment that is *res judicata* (reviewed the judgment) in Moldova,[139] Russia,[140] Serbia, the Slovak Republic (also the Constitutional Court, if an unsuccessful petition of a person to this court for a constitutional remedy was followed by the respective ECtHR proceeding),

b) reopening procedure before the Supreme Court or other highest court (in Switzerland, Finland,[141] Lithuania,[142] Ukraine[143]) or the Constitutional Court (in the Czech Republic).[144] In Portugal and Estonia, the Supreme Court must first authorise the reopening of the case, which then can be retried by the respective court that issued the final decision. In Bosnia and Herzegovina, it is the court that had ruled in the first instance in the proceedings resulting in a decision that violated the relevant fundamental human right so as to have the impugned decision amended.[145] However, it is the Constitutional Court if the reopening of proceedings upon the constitutional appeal is sought due to the ECtHR finding that the violation of the ECHR took place during that proceeding.[146]

Norwegian procedural law aiming at removing decisions on reopening from the sphere of the courts that had originally ruled on these cases established that final and enforceable judgments of the district court and the court of appeal may be reopened upon a request to a court of the same level in a judicial district that borders onto the court that made the original ruling. However, rulings of the Supreme Court, including the Appeals Committee of the Supreme Court, may be reopened upon a request to the Supreme Court (it is for the Appeals Committee of the Supreme Court to rule upon such requests).[147]

Thus, the detectable pattern similar to one in criminal proceedings emerges, that member states tend to pay significant attention to the reopening procedures, probably in view of their

139 L Apostol, 'The Moldovan experience' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

140 Art. 393 of the CCP of the Russian Federation.

141 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

142 Art. 367 of the Lithuanian CCP of 2003. Supreme Administrative Court of Lithuania in case of reopen of administrative proceedings (Art. 156 § 1 of the Law on Administrative Proceedings).

143 The Grand Chamber of the Supreme Court (Art. 425, para. 3 of the CCP of Ukraine, Art. 365, para. 3 of the Code of Administrative Procedures (n 110)).

144 I Pospíšil, 'Comments on Reopening Trials in the Civil Matters after the ECtHR Judgments: Experience from the Czech Republic' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

145 Art. 231a of the Non-contentious Proceedings Act of BiH

146 Rules of the Constitutional Court of BH as amended in May 2014.

147 Section 31-1 §§ 3 and 4 of the Norwegian Dispute Act.

impact on the development of the domestic law and entrusting the highest court instances with the task of deciding upon reopening.

4.3. Who can seek reopening?

Generally, the reopening of the domestic court proceeding where the final judgment was rendered on the ground of violation of the ECHR is possible upon the condition that the violation was found by the ECtHR in the subsequent proceeding and the reopening concerns only the main proceedings at hand.[148]

In the member states where there is access to reopening, the right to lodge a request is granted to an applicant being a party to the original domestic case and, in some jurisdictions, to a governmental agent (the Chancellor of Justice as one of the Supreme Guardians of law in Finland,[149] the Governmental Agent in Moldova[150]).

Thus, in those countries where the reopening of civil and administrative proceedings following judgments by the ECtHR is available by law, it is, generally, only possible in the original domestic case concerned by the final judgment: the parties in the case before the ECtHR and before the national court need to be identical.

4.4. Unilateral declaration and friendly settlement as a ground for reopening

Only a small number of member states allow the reopening of civil or administrative proceedings following unilateral declarations admitting violation of the ECHR and friendly settlements (the Czech Republic, Georgia (only in relation to civil proceedings),[151] Turkey,[152] Moldova,[153] and the Czech Republic (only in relation to friendly settlements).[154] Due to the lack of detailed regulation of this matter in the procedural laws and because not many countries have faced this problem up until now, access to reopening following friendly settlement or unilateral declarations remains a 'grey' area in many countries.

148 E.g., in Ukraine, according to the well-established case-law of the Grand Chamber of the Supreme Court which shows its adherence to literal interpretation of the corresponding provisions of the procedural codes, only a party to the respective domestic procedure followed by an ECtHR judgment in their favour can initiate reopening of that domestic procedure (see § 13 in case No 202/2315/18 [2021] Supreme Court <https://reyestr.court.gov.ua/Review/99482734> accessed 4 July 2022).

149 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

150 L Apostol, 'The Moldovan experience' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

151 Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision in the domestic legal order for the re-examination or reopening of cases following judgments of the Court. Steering Committee for Human Rights (CDDH), Committee of Experts on the Reform of the Court (Strasbourg 12 February 2016, DH-GDR (2015)008 Rev.) 11 <https://rm.coe.int/1680654d5a> accessed 20 February 2022.

152 Art. 375 §1 of the CCP of Turkey (Law no. 6100), as amended by Law no 7145 of 31 July 2018, now constitutes a ground for the reopening of civil proceedings in cases where the ECtHR decided to strike an application out of its list of cases following a friendly settlement or a unilateral declaration.

153 L Apostol, 'The Moldovan experience' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

154 According to the opinion of the Constitutional Court and despite the explicit wording in the domestic law that explicitly refers to a decision of an international tribunal. See I Pospíšil, 'Comments on Reopening Trials in the Civil Matters after the ECtHR Judgments: Experience from the Czech Republic' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

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This might be because, according to the approach supported in many countries (e.g., Austria, Estonia, and Switzerland), the very definition of a friendly settlement is the final resolution of the case of the ECtHR and ending the applicant's status of a victim is a serious legal obstacle for reopening.[155] Also, in some states (e.g., Spain and Ukraine), the legislation provides only for reopening following the respective *judgments*. Restrictive or extensive interpretation and application of respective procedural provisions are in the hands of the judiciary. Current jurisprudence demonstrates rather restrictive tendencies.

4.5. Time limits

Similar to the diversity of approaches to the time-limits for requests for reopening of criminal proceedings, there is no prevailing option of time-limits applied to reopening of civil proceedings, as well as with regard to the event which should be taken as a starting point:

(i) one year after the ECtHR judgment becomes *final* in Spain,[156] 90 days in Bosnia and Herzegovina (six months in case of reopening of proceedings upon the constitutional appeals before the Constitutional Court).[157] In Finland, a motion for the annulment on the grounds of a serious procedural error must be filed to the Supreme Court or, in some cases, to a Court of Appeal, within a six-month time limit starting from the day when a law enforcement or supervisory body competent in the supervision of international human rights obligations (the ECtHR is considered as one of these bodies) gives its final decision. A request for the reversal on substantive grounds shall usually be made within one year of the date on which the judgment became final. However, this rule is applied flexibly;[158]

(ii) the six-month time limit since the judgment was *delivered* in Moldova (no requirement for the judgment to become final);[159]

(iii) three months from the day the ground for reopening is revealed in Lithuania,[160] the Russian Federation,[161] the Slovak Republic,[162] six months in Estonia and Norway,[163] and one month in Germany.[164]

It seems clear that there is not much room for debate on the fundamental benefits or disadvantages of any of these options over the others. Where the procedural law does not distinguish the ECtHR judgment among other grounds for an extraordinary review of a

155 DH-GDR Overview (n 152) 11.

156 Section 1 of Art. 512 of the CCP of Spain.

157 Art. 231a of the Non-contentious Proceedings Act of BiH for civil proceedings and the Rules of the Constitutional Court of BH as amended in May 2014.

158 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

159 Art. 450(f) of the CCP of Moldova.

160 Art. 367 of the Lithuanian CCP. However, no later than within five years from the date when the judgment of the domestic court came into effect (Art. 368 § 2). Art. 156 § 1 of the Law on Administrative Proceedings (period of limitation for the reopening of cases on the ground of the judgment of the ECtHR).

161 Art. 394 § 1 of the CCP of Russian Federation.

162 Section 230 § 1of the CCP of Slovak Republic, as reported in Slovakia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

163 Section 31-6 § 1 of the Norwegian Dispute Act. However, according to Section 31-6 § 2 a case cannot be reopened after more than ten years.

164 §586(1) of the CCP of Germany.

final judgment in terms of procedure, it may avoid establishing a specific term or tie it to the moment respective ground for the reopening revealed. It is left for the judiciary to establish what moment needs to be taken as a starting point with respect to the review following an ECtHR judgment, and usually, it is the moment when the judgment becomes final.

5 CONCLUDING REMARKS

Procedural laws, case-law, and many known legislative and scholarly debates on the subject of whether reopening domestic court procedures in light of ECtHR findings of a violation of the Convention is justified demonstrate that European countries are struggling to find a fair balance between *res judicata*, legal certainty in general, and a duty to restore violated fundamental rights.

The ECtHR does not push countries in either direction. It carefully reiterates that it has no power to order the reopening of court proceedings, although encouraged to do so by many experts. Only in recent decades has the ECtHR started to indicate that the reopening might be an effective instrument of *restitutio in integrum*, especially if it revealed that the procedural laws of a particular state envisaged the reopening. Also, only recently and only in exceptional cases has the ECtHR specifically ordered domestic court proceedings to be reopened.

Provisions regarding reopening can be found in the criminal procedural codes of the majority of the member states and in the civil or administrative procedural legislation in many European countries, but not in the majority of the member states. States enjoy a margin of appreciation while deciding on whether to provide access to the reopening of domestic court cases. This margin of appreciation is wider in civil and administrative proceedings.

It should be pointed out that the case-law shows that domestic courts apply various criteria while deciding on whether to order a reopening. Among those criteria, the one that plays one of the most significant roles in criminal proceedings is whether the violation found by the ECtHR affected the result of the domestic criminal proceeding. Thus, normally the ECtHR findings concerning excessive length of criminal proceedings and of pre-trial detention do not serve as the reason for ordering reopening.

The case-law has pointed out two types of violations that justify the reopening following the ECtHR findings. Usually, it is either grave procedural errors that have occurred in the main course of the criminal proceeding, which could have had an impact on the content of the final judgment, or substantive defects when the ECtHR's findings of the violation of the Convention stem from the very content of the final judgment in the domestic proceedings.

Despite the fact that the CoE CM, in its Recommendation, made the distinction between situations when the impugned domestic judgment that became *res judicata* is on the merits contrary to the ECHR and when the violation found is based on serious procedural errors, in many member states, the law does not make any distinction between the two situations as the reasons for granting reopening.

Although we may agree that the access to reopening of criminal proceedings following the judgment of the ECtHR is provided in procedural laws of the majority of the member states, the domestic procedural laws do not explicitly refer to reopening of criminal proceedings for a full retrial but contains a reference to review which can take the form of a mere reassessment by the same judicial body in order to redress the situation that gave rise to the breach of the requirements of the ECHR.

It is noteworthy that in the vast majority of the member states, the access to reopening based on the violation of the ECHR is generally limited to specific cases in which the ECtHR has

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rendered its judgment. The member states remain conservative in this matter, providing access to usually reopening upon request and only to the applicant's benefit. Clearly, there is strong ground for the European consensus in that reopening of the criminal proceedings concluded by a final judgment shall be available only for the benefit of the victim of a violation of fundamental rights.

With regard to the *beneficium cohaesionis* and, broadly speaking, the *erga omnes* effect of the ECtHR judgments, the majority of European countries remain on restrictive rails, recognising that the reopening might be ordered upon the request of an applicant who succeeded in the ECtHR. However, due to the absence of detailed rules of the reopening in most countries, it remains possible to elaborate in case-law the variety of approaches towards *erga omnes* effect: (i) full recognition (normally, in countries like Finland where an adverse ECtHR judgment is not specified explicitly as a ground for reopening but is considered by domestic courts as one of the reasons for an extraordinary review on the grounds of substantive error in law); (ii) *de facto erga omnes effect* (an ECtHR judgment finding a violation in a case to which the country is a party remains a prerequisite of the access to reopening, however, it might also be granted upon requests of other persons in similar circumstances in other criminal proceedings which were not among the successful applicants to the ECtHR); (iii) application of the principle of *beneficium cohaesionis* or (iv) a traditionalist interpretation of Art. 46 of the ECHR, which is strongly based on the respect of national procedural autonomy that usually provides for reopening of the domestic criminal proceeding only with respect to the successful applicant to the ECtHR who then lodged a request for reopening.

Although reopening of a court case following an ECtHR judgment is an individual measure, the attention paid to it in procedural laws and case-law, especially the fact that many member states have vested their highest courts with the power to decide upon whether to grant the reopening, says much about the impact of the ECtHR findings on the development of the national law. Of course, one of the reasons why those countries do not automatically forward respective cases to lower courts is to avoid new trials and new stages of appeal where there is no need for that, i.e., the judgment of the highest courts might be the final one and the only one needed. However, it also becomes part of the case-law on how to deal with problems similar to those that resulted in the respective ECtHR case, and this case-law reaches lower courts long before their jurisprudence in cases where they applied respectively, the ECtHR will have the chance to be tested by the highest courts.

As to civil and administrative proceedings, it is worth noting that explicitly or according to general rules on state liability, the member states have accepted their liability for breaches of fundamental rights under the ECHR. The relationship between a liability action and other effective remedies available under the national law falls within the principle of national procedural autonomy. Therefore, whatever remedy is available under national law, it fulfils the requirements of the Convention provided that it assures *restitutio in integrum* by way of restoration of violated rights or provides adequate compensation.

Thus, although around twenty member states allow access to the reopening of civil and administrative proceedings following an individual application or the request of a public authority, many member states are inclined towards a compensation mechanism protecting *res judicata* in civil proceedings, as well as the interests of good faith third parties. In those member states that formally provide access to reopening in law, its practical availability is usually conditioned on finding out whether it is necessary due to the nature of the violation, as well as whether it is able to redress the violation effectively. Consequently, allowing reopening based on a violation of the ECHR is rare.

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