
LEGAL TRENDS

Court Decisions Entered into Force and their Revision

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On December 2-3, 2002 Tbilisi hosted the Regional Conference of Judges on the Court Decisions Entered into Force and Their Revision. The Conference was held under the initiative of the Supreme Court of Georgia, with the support of the *Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH* regional project - Support of the Judicial and Legal Reforms in the Countries of South Caucasus¹.

The Conference aimed to studying of the concerns of the courts of various countries and to seeking the ways for their overcoming. Particular attention was paid to the sharing of experience in the field of revision of decisions already entered into force. Apart from the judges of four countries (Germany, Azerbaijan, Armenia and Georgia) the Conference hosted representatives of non-governmental organisations, lawyers and officials from the Prosecutor's Office.

Below is a review of the issues raised by some of the spokesmen, as well as the recommendations, elaborated by the participants of the conference.

1. Reopening of Court Decisions and the State based upon a Rule-of-Law (Spokesman Lado Chanturia)

The Chairman of the Supreme Court of Georgia, *Lado Chanturia* regards the mechanism of reopening cases in the exercise of the supervisory power as a "Soviet vestige", which was provided for by the procedure law of the Soviet period. Moreover, this opportunity cannot be considered as an additional warranty for the protection of the rights of a citizen, inasmuch as groundless court decisions used to enter into force just after the reopening of cases in the exercise of the supervisory power. The clear evidence to the above is the court practice for the respective years. For the time being the rights of a Georgian citizen are safeguarded by the judicial system that provides the opportunity for appeal and cassation of court decisions. Hence, "the mentioned system is fully compatible with the requirements of the European Convention on Human Rights".

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¹ The project was founded in 2001 and is the realisation of the idea of *Heidemarie Wiczorek-Zeul*, the Minister for the Economic Co-operation and Development (BMZ) of Germany.

The main argument supporting the necessity to reopen cases in the exercise of the supervisory power is that it allows for the correction of the errors made in the decisions already entered into force.

Furthermore, the arguments of the supporters of reopening cases are backed up by the fact that in practice there are cases when an unlawful court decision entered into force, because the injured party failed to enjoy his right to apply to a higher instance. In this case the court and the state are powerless, as the right of appeal is the prerogative of the parties to the proceedings and its transfer to another person or a state authority is not admissible.

However, if we assume that judges also are the human beings, there should be some opportunity to correct their mistakes. However, the question arises as to who should reopen the case. Should it be a judge who might well make more mistakes? This is definitely an argument against the reopening of cases.

The practice of reopening of cases in the exercise of the supervisory power resulted in the groundless deferment of court proceedings, "that could be considered as the violation of Article 6 of the European Convention on Human Rights". Consequently, "The institute of reopening of a court decision might even question the existence of a state based upon the rule of law".

2. Impartiality of Judges (Spokesman Hein Bölling)

The presentation of the Chairman of Bremen Land court panel, *Hein Bölling* concerned the impartiality of judges. In his opinion a court decision entered into force is the logical end to every court proceeding. "This is an important value in the society based upon a rule-of-law". A dispute settlement should be followed by "legal peace" between the parties.

Any court decision will always have an unsatisfied party. The main thing is that the litigating parties respect and trust in the judges and respectively, in the court. The party who is not satisfied with a specific decision agrees to the given decision if he acknowledges and trusts the judicial system of the country. Reinforcement of the impartiality of judges is the indispensable precondition for the normal operation of the judicial system in a state based upon a rule-of-law. This principle (the impartiality of judges), underlies the trust of the parties in court proceedings.

Impartiality is a great responsibility for a judge. He is well aware that a decision delivered by him is of a mandatory nature and often final. This situation intensifies the sense of responsibility of a judge and makes him deliver a correct and lawful decision. The institute of impartiality becomes efficient only when it is supported and secured by the Constitution and a respective law.

The prime guarantee to avoid groundless allegations against judges should be the domestic legislation of a state. Legislation should provide a precise and exhaustive list of

possibilities for the reopening of court decisions. German legislation provides such exhaustive list that gives the opportunity to correct mistakes and at the same time safeguards the court against groundless allegations and infinite proceedings.

3. German Experience in Reopening Court Decisions (Spokesman Wolfgang Golasowski)

As a general rule a decision that has entered into force cannot be changed whether it is right or wrong. This is the opinion of *Wolfgang Golasowski*, the Chairman of Bremen Land Court. However, German legislation provides an exhaustive list of circumstances when a court decision may be reopened.

First of all, this is the case when the party enjoying the right of appeal without fault let lapse the time to appeal.

The revision of a decision that has entered into force shall also be admissible in the case of a modification of circumstances upon which the decision was based (for example a change in alimony payments if the income of the person changes significantly), so called suit for modification (*Abänderungsklage*).

Also, German legislation allows to renew case proceedings and thus to revoke a decision entered into force on the basis of a nullity suit (*Nichtigkeitsklage*) and suit for restitution (*Restitutionsklage*).

The grounds for a nullity suit shall be, for example, the existence of such circumstances as the composition of the court made up through the violation of the established order (e.g. insufficient amount of judges in the panel considering the case); participation of a judge in a case consideration who was not duly authorised or was debarred from the case due to his impartiality; deficient representation (the party was not represented in the case proceeding according to the statutory requirements).

The right to demand the revision of a court decision may also arise when there are grounds for the proceedings for restitution. These are cases, when a decision was based on fake documents in the case records, on a false testimony of a participant of the proceedings (including a witness), as well as when during the case there was deceit, coercion or the deprivation of liberty, a punishable action of a judge. Restitution may also be forthcoming in the case of revocation of the decision, the decision concerned is based on; there is (was found) another court decision on the same case or some new documents pertaining to the case are discovered.

The limitation period for a nullity suit or the proceedings for restitution is one month after the disclosure of a circumstance necessitating the renewal of a case. However the renewal of a case is inadmissible if five years has elapsed after delivering a decision.

In exceptional cases a decision entered into force may be subject to revision when the decision is against ethics. The court practice considered this admissible to protect consumer rights (this could be the case when a credit agreement provides a disproportional high interest rate and the creditor acquired the payment order through a simplified court procedure).

Finally, a decision may be reopened through appeal to the constitutional court if it violated the constitutional rights of the participants of the proceedings.

A party shall enjoy the right to demand the revision of the decision entered into force only within narrow frames established by the law and consequently the court shall only consider it, if those explicitly defined preconditions exist.

4. Judge-Made-Law (Spokesman Karlmann Geiss)

The presentation of the Ex-Chairman of the Supreme Court of Germany *Karlmann Geiss* concerned the judge-made-law that is less developed in Georgia.

The shortcomings of the law, as well as a number of unregulated legal relations can force a judge to get involved in legislative activities. The judge-made-law acquired particular significance over the past fifty years and as a result it became one of the most important and new sources for the law, together with the parliamentary laws.

A judge is not entitled to refuse the adoption of a decision only because the particular relations are not regulated. Subsequently, rather often the upgrading and filling up of the law with an interpretation becomes a duty and not a right of a judge.

Consequently, the urgency of the judge-made-law has been doubtless in the legal environment of both Germany and France since the second half of the nineteenth century. Furthermore, for the time being, the judge-made-law is the classic topic of the training methodology. The only subject matter of the dispute is the how and to what extent can a judge-made-law be admissible.

In its narrow meaning the judge-made-law is vitally necessary in cases when the law is silent. Therefore the classic means of interpretation (literal, grammatical, systemic, teleological, etc.) are useless for the settlement of a specific issue, as the law does not allow for it.

As a result court methodology gave rise to the "legislative" judge-made-law on the grounds of analogy. In this case we have to deal with the type of judge-made-law that exceeds the framework of the law. The opponents to the existence of the judge-made-law within a wide framework base their opinion on the assertion that its admission violates the principle of democracy. Namely it contradicts the principle of the division of powers and challenges the precise division. However, it should be mentioned that the principle of division of powers does not exclude the existence of the judge-made-law if the decision of a judge falls within the general principles granted upon him and acknowledged by the law.

The development of the judge-made-law is definitely a positive phenomenon and should be considered as a step forward for the contemporary legal system.

Colleagues from Armenia and Azerbaijan also participated in the conference. The conference stressed the similarity of the problems of the neighbouring countries.

5. Recommendations Elaborated by the Conference Participants

On December 2-3, 2002 the judges from Armenia, Azerbaijan, Germany and Georgia deliberated on the issue "The court decisions entered into force and their revision" and elaborated the following recommendations:

1. The final decision at the court proceedings should be delivered in not more than three instances. There should be no more judicial review over the court decisions than the above mentioned, as was the case in Soviet law.
2. The case revision in the last court instance should be based on the principle of competition, but it should be limited to the assessment of the legal aspects. If during these proceedings it is disclosed that the facts of the case were established at the first instance in a single interpretation, the court should have the right and the duty to make a decision itself. The return of the case to the courts of lower instance contradicts the principle of economy of the court proceedings and thus the courts of lower instance should as well make efforts to avoid the above.
3. The inherent and significant task of a judge is the interpretation of a law. Such an interpretation should occur during the case proceedings. The difference between the official and unofficial interpretations that was accepted in the Soviet system, as well as the delegation of the interpretation competence to the authorities outside the proceedings, contradicts to the principles of the state based upon the rule of law and should be rejected.
4. The obligation, provided for by Article 6 of the European Convention on Human Rights, by virtue of which everyone is entitled to a final decision within a reasonable time, makes it possible to conduct efficient proceedings and at the same time results in unimpeded completion, is acknowledged as the considerable commitment for the establishment of legal peace.
5. The state should not allow the poor to refrain from applying to the court due to financial reasons (availability of justice).