Res Iudicata in Breach of the ECHR: The Italian Constitutional Court's Point of View

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Abstract

In the judgment no 123 of 2017 the Italian Constitutional Court declared inadmissible the question of constitutionality stemming from a Code of Administrative Procedure provision (Art 106) in the part in which it does not provide for the possibility to review a ruling in cases of conflict between domestic judgments and judgments of the Court of Strasbourg. The paper firstly introduces the obligation of the Contracting States to conform their legal systems to judgments of the Court of Strasbourg (according to Arts 46, para 1, and 41 of the ECHR). Secondly, it focuses on the case-law and the systematic evolution that has recently led to overcome national *res iudicata*, especially in case of conflict between criminal judgments. Thirdly, the paper proceeds to analyse the arguments of decision no 123 of 2017, which will lastly be the subject of some final considerations. The author, similarly to the ruling of the Constitutional Court, duly considers the jurisprudence of the European Court of Human Rights and the legal systems of the main continental systems referred.

I. Introduction

In the judgment no 123 of 2017,[1] for the first time the Italian Constitutional Court dealt with the delicate issue of the revocability of the administrative judgments that violates the rules of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the ECHR).

The issue addressed by the Court is particularly complex because it affects the principle of intangibility of the final judgment, which is one of essential principle in a legal system. Indeed, this principle guarantees the legal certainty through the definitiveness of the decision contained in a decision, both under the aspect of procedural law and under that of substantive law.

In the Code of Administrative Procedure (decreto legislativo 2 July 2010 no 104) the definition of 'final judgment' in administrative matters is absent. Therefore, it is necessary to apply the provisions of the Code of Civil Procedure (Art 39 of the Code of Administrative Procedure refers to the rules of the civil

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[1] Corte costituzionale 26 May 2017 no 123, available in English at www.cortecostituzionale.it. The judgment was decided on 7 March 2017 and published on 26 May 2017.

trial, if compatible, in case of lack of specific discipline). At the systematic level, there are two reference provisions in Italian law. On the one hand, Art 324 of the Code of Civil Procedure sets the notion of 'formal *res iudicata*' (the decision is unappealable for the exhaustion of the ordinary appeals). On the other hand, from the Art 2909 of the Civil Code, the notion of 'substantial *res iudicata*' is inferred, in terms of incontrovertibility of the assessment in the final judgment.

Concerning the judgment in no 123 of 2017, it should be pointed out that the Constitutional Court declared the issue inadmissible about Arts 24 (right of defence) and 111 (right to a fair trial) of the Italian Constitution. In the opinion of the Court, the question is also unfounded about Art 117, para 1, Italian Constitution, that allows the Convention to be assessed as a parameter 'interposed' between the Constitution and the Italian ordinary law.

This judgment must be taken into account first of all for the delicate and current subject matter, and for well-argued arguments that consider the case law of the Court of Strasbourg and the evolution of several legal systems in Europe.

Additionally, the judgment sets out some of the issues that the Constitutional Court had already dealt with regarding criminal *res iudicata* in the decisions nos 129 of 2008[2] and 113 of 2011[3] (regarding the so-called *Dorigo* case)[4], and no 210 of 2013[5] (connected to the *Scoppola* case).[6]

In order to understand the reasons of the ruling, first of all, it is appropriate to proceed with a concise exposition of the protracted judicial proceedings before the Italian Administrative Courts, the Court of Strasbourg and finally the Constitutional Court. Then it examines the principles drawn up by the Constitutional Court in criminal matters whenever there is a contrast between domestic and European judgments, and finally to analyse the arguments of judgment no 123 of 2017.

II. The ECtHR Decisions *Mottola* and *Staibano* v *Italy* and the Italian Case Law

The trial case that led to the judgment commented here is particularly complex but its exact understanding is necessary to grasp the arguments of the Constitutional Court in judgment no 123 of 2017.

[2] Corte costituzionale 30 April 2008 no 129, *Giurisprudenza italiana*, 2142 (2009), available at www.cortecostituzionale.it.

[3] Corte costituzionale 7 April 2011 no 113, *Giurisprudenza italiana*, 2646 (2011), and furthermore available in English at www.cortecostituzionale.it.

[4] Eur. Commission H.R., *Dorigo* v *Italy*, Judgment of 20 May 1998, available at www.hudoc.echr.coe.int.

[5] Corte costituzionale 18 July 2013 no 210, *Giurisprudenza italiana*, 392 (2014), and furthermore available in English at www.cortecostituzionale.it.

[6] Eur. Court H.R., *Scoppola* v *Italy*, Judgment of 17 September 2009, available at www.hudoc.echr.coe.int.

The complicated judicial case of the judgment no 123 of 2017 starts with a claim brought to the Reginal Administrative Court. The facts concerned the legal qualification of the relationship between the Hospital of the University of Naples 'Federico II' and some practitioners who, between 1983 and 1997, had carried out professional activity paid with the 'job on call' system. Subsequently, these practitioners were hired for a fixed term.

Following an assessment by the Italian Social Security Agency, some of these practitioners filed claims to the Regional Administrative Court (*Tribunale Amministrativo Regionale* or *TAR*) of Campania in order to have their employment relationship accepted and acknowledged by the University and, therefore, to obtain the right to the payment of social security contributions. These lawsuits by a first group of applicants were successful both before the *TAR* and in the appeal before the Council of State. Consequently, the University of Naples implemented these judgments by acknowledging the employment relationship.

However, in 2004, a second group of practitioners paid by the University of Naples 'Federico II' with the 'job on call' system, brought another claim to the Regional Administrative Court of Campania, demanding the same issues of the first group of claimants.

In the decision no 2527 of 24 March 2005,[7] the Regional Administrative Court accepted the claim partially, assimilating the activity carried out by the practitioners to that of university researchers. This assimilation allowed to state that the administrative judge was competent to decide. In the opinion of the judges at first instance, even if formally defined as a free collaboration without any subordination link, the contractual relationship between the University and its temporary physicians presented all the characteristics of employment in the public sector.

Differently, the Council of State, in plenary session (*Adunanza Plenaria*), in the judgment no 4 of 2007[8] accepted the appeal of the University and considered applicable Art 45, para 17, of decreto legislativo 31 March 1998 no 90 (New provisions on the organisation and employment relationships in public administrations, jurisdiction in labour disputes and administrative jurisdiction, issued for implementing Art 11, para 4, of Law 15 March 1997 no 59), then merged into the current Art 69, para 5, of decreto legislativo 30 March 2001 no 165 (General rules on the regulation of employment by public administrations).

This provision is particularly important in the division of jurisdiction between ordinary judges and administrative judges. Specifically, the aforementioned

[7] Tribunale amministrativo regionale Campania-Napoli 24 March 2005 no 2527, available at www.giustizia-amministrativa.it.

[8] Consiglio di Stato-Adunanza Plenaria 21 February 2007 no 4, *Corriere del merito*, 536 (2007).

article provides that for disputes relating to 'privatised' civil service, cases, concerning employment contracts stipulated before 30 June 1998, remain assigned to the exclusive jurisdiction of the administrative judge if submitted by 15 September 2000, under penalty of expiration.

This provision was subject to an interpretative contrast.

Indeed, a first unusual permissive orientation held that the second part of Art 69, para 7, of decreto legislativo 30 March 2001 no 165, was to be understood as meaning that appeals incorrectly submitted to the administrative court after 15 September 2000, could be resubmitted to ordinary courts (acting as labour courts).

However, a different and more rigid orientation prevailed in the jurisprudence of the Court of Cassation and the Council of State. Appeals submitted belatedly, radically lost the right to assert, in any forum, their claims. The purpose of this orientation (also endorsed by the Constitutional Court)[9] was to avoid ordinary courts having to rule on disputes concerning employment relationships established at a time when they were not yet competent for dealing with them.

The *Adunanza Plenaria* adhered to the second and more rigorous orientation: consequently, the lawsuit of the appellant parties, brought before the administrative judge in 2004 and, thus, after 15 September 2000, was declared inadmissible by the Council of State due to delay.

Adhering to the most rigorous interpretation, the Council of State prevented the *translatio* of the trial to the ordinary judge with jurisdiction, due to the statute of limitations set by the legislator in the aforementioned Art 69, para 7 of decreto legislativo 30 March 2001 no 165.[10]

Some of the unsuccessful appellants, therefore, lodged an appeal to the European Court of Human Rights (hereinafter ECtHR). The Court held two decisions of 4 February 2014 (*Staibano and others* v *Italy*[11] and *Mottola and others* v *Italy*),[12] which became final on 4 May 2014, ascertained the violation by Italy of Art 6, para 1 of the ECHR, and of Art 1 of the first Additional Protocol.

Specifically, the Court of Strasbourg clarified the scope of the right of access to justice and the conditions under which it may be limited. The limitations must not lead to the total compromise of the individual's right and, moreover, they must pursue a legitimate purpose, respecting a reasonable proportionality

[9] Corte costituzionale ordinanza 6 July 2004 no 214, *Critica del diritto*, 543 (2004); Corte costituzionale ordinanza 26 May 2005 no 213, *Corriere del merito*, 983 (2005); Corte costituzionale 11 May 2006 no 197, available at www.cortecostituzionale.it.

[10] The same *Consiglio di Stato*, with a ruling of 13 November 2006, decided on a case of a doctor in the same conditions who acted before 15 September 2000, and, in this case, confirmed the assessment of the *TAR* which considered the working relationship between the doctor and the University as a public employment relationship.

[11] Eur. Court H.R., *Staibano and others* v *Italy*, Judgment of 4 February 2014, available at www.hudoc.echr.coe.int.

[12] Eur. Court H.R., *Mottola and others* v *Italy*, Judgment of 4 February 2014, available at www.hudoc.echr.coe.int.

between means and purposes.

With these premises, the Court ascertained the violation of Art 6, para 1 of the Convention regarding the right of access to a court since in this case that right had been unjustly harmed, due to the jurisprudential change of the aforementioned Art 69, para 7 of decreto legislativo 30 March 2001 no 165.

Furthermore, the Court held that Italy had also infringed Art 1 of the first Additional Protocol to the same Convention. The appellants were holders of an 'possession' within the meaning of the aforementioned conventional parameter since their pension credit right had a sufficient basis in domestic law in light of the jurisprudence that was prevailing at that time.

The decision of the Council of State had, therefore, deprived the appellants of their legitimate expectation of achieving this 'asset'.

As concerns the question of just satisfaction under Art 41 ECHR, the Court had made reservations on this point, urging the Italian Government to reach a settlement agreement before the judgment became final under Art 44, para 2, ECHR.

III. The Constitutional Issues by the Council of State Sitting in Plenary Session

In light of the *Staibano* and *Mottola* judgments, the unsuccessful parties of the aforementioned judgment no 4 of 2007 of the *Adunanza Plenaria* (some of which were parties to the trial in Strasbourg), started proceedings to obtain the revocation of that judgment, asking the Council of State to proceed with the constitutionally oriented interpretation or, in the alternative, to raise the issue of constitutional legitimacy of Art 106 of decreto legislativo 2 July 2010 no 104 (the Code of Administrative Procedure),[13] as well as of Arts 395 and 396 of the Code of Civil Procedure referred to by it.[14]

The Council of State in plenary session, therefore, was unable to give the law an extensive interpretation, or one conforming to the ECHR as compulsory. Since it could not set aside the domestic laws in contrast with the conventional text (not being the law of the European Union),[15] it raised an issue of constitutional legitimacy. Precisely, it asked the Constitutional Court if these provisions do not provide for a different case of revocation when this becomes necessary to implement final rulings of the European Court of Human Rights.

According to the most recent jurisprudence of the Constitutional Court, the

[13] Art 106 of the Code of Administrative Procedure provides that the of the Regional Administrative Tribunals and the State Council judgments are revocable, in the cases and under the conditions provided by the Arts 395 and 396 of the Code of Civil Procedure.

[14] Arts 395 and 396 of the Code of Civil Procedure do not provide for the revocation when the decision is contrary to the ECHR.

[15] Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal S.p.A.*, [1978] ECR -00629; Corte costituzionale 8 June 1984 no 170, *Foro italiano*, 2062 (1984).

Convention, interpreted by the Court of Strasbourg, assumes importance as intermediate rules between the law and the Constitution in Italian legal system. It integrates the parameter of Art 117, para 1, of the Italian Constitution, that binds the legislators (national, state and regional) to comply with the international obligations assumed by the Italian State, which includes the ECHR.[16]

On the other hand, as the Council of State pointed out correctly, the position of the Convention in the Italian system of legal sources did not change even after the entry into force of Art 6 of the Lisbon Treaty, which provides for the European Union to join the ECHR and which has still not been implemented.[17] Consequently, any court, when it has to decide on a contrast between the ECHR and a rule of domestic law, will be required to try to interpret the provision in accordance with the Convention before raising the issue of constitutional legitimacy.[18]

On the basis of these premises, the Council of State detected a tension between the internal rules governing the revocation of a final administrative judgment and Art 46 ECHR which requires Member States to comply with the decisions of the Court of Strasbourg by taking all general and/or necessary measures to remedy the alleged infringement.

Considering that in the present case, as mentioned above,[19] the Court of Strasbourg ascertained the violation of the right of access to a Court (Art 6 ECHR) and the right to property (Art 1 Additional Protocol no 1), the impossibility of revoking judgment no 4 of 2004 of the Plenary Session would have meant for the appellants the definitive loss of the possibility of access to a Court, and the

[16] See Corte costituzionale 24 October 2007 nos 348 and 349, *Danno e responsabilità*, 973 (2008).

[17] Corte costituzionale 11 March 2011 no 80, *Diritto penale e processo*, 404 (2011).

[18] Please, pay attention to Corte costituzionale 26 March 2015 no 49, *Foro italiano*, 1623 (2016), also available in English at www.cortecostituzionale.it, para 7: 'The Italian courts will only be obliged to implement the provision identified at Strasbourg in cases involving 'consolidated law' or a 'pilot judgment' by adjusting their criteria for assessment in line with it in order to resolve any contrast with national law, primarily using 'any interpretative instrument available' or, if this is not possible, by referring an interlocutory question of constitutionality (see Judgment no 80 of 2011). Consequently, and as a general matter, this consolidated law, as an interposed rule, will take on the meaning already established within European case law, which this Court has in fact repeatedly asserted it cannot 'set aside' (see *inter alia* Judgment no 303 of 2011) save in the exceptional eventuality that it, and thus also the implementing law, is found to violate the Constitution (see *inter alia* Judgment no 264 of 2012), which is strictly a matter for this Court.

On the other hand, in the event that the ordinary court questions the compatibility of an ECHR provision with the Constitution, it goes without saying that, absent any 'consolidated law', this doubt alone will be sufficient to exclude that rule from the potential content which can be assigned through interpretation to the ECHR provision, thereby avoiding the need to refer a question of constitutionality by interpreting the provision in a manner compatible with the Constitution'.

See also, A. Terrasi, 'The Relationship between the Italian Constitution and the European Convention on Human Rights' *Italian Yearbook of International Law*, 536 (2016).

[19] See para II above.

opportunity to assert the pension rights they would have been entitled to.

Finally, the Council of State raised the issue of constitutional legitimacy of Arts 106, 395 and 396 of the Code of Administrative Procedure, citing as constitutional parameters the following provisions. Firstly, Art 117, para 1, of the Italian Constitution which, in this case, points out the commitment undertaken by the Italian State – with the ratification and execution of legge 5 August 1955 no 848 – to comply with the judgments of the Court of Strasbourg, with specific reference to Art 46 ECHR. Secondly, Art 111 of the Italian Constitution (a rule that guarantees the so-called 'fair trial') and Art 24 (right of defence).[20]

IV. ECHR Violations and *Res Iudicata*

1. The Article 46 ECHR and *Res Iudicata* in the Convention's System

Before analysing the content of the ruling of the Constitutional Court, it is necessary to set out the structure outlined by the Convention concerning the possible conflict between judgments and the evolution of the Court of Strasbourg and Italian jurisprudence in criminal matters, with particular reference to that of the Constitutional Court.

The matter being examined by the Constitutional Court falls among what doctrine has defined as 'erosion of the *res iudicata* myth'.[21] This phenomenon has affected many State systems that, starting after the Second World War, opened up to international and supranational experiences of protection of fundamental rights. Primarily, the value of *res iudicata* as a crucial element of legal certainty, is questioned in the face of the ever-increasing weight within national legal systems of the ECHR and the jurisprudence of the Court of Strasbourg.

As is well known, unlike European Union Law, which uses the preventive instrument of reference for a preliminary ruling,[22] Art 35 ECHR imposes the

[20] Consiglio di Stato-Adunanza Plenaria ordinanza 4 March 2015 no 2, para 17 '*Ritiene, dunque, il Collegio di dover sollevare questione di legittimità costituzionale degli artt. 106 c.p.a. e 395 e 396 c.p.c. in relazione agli artt. 117 co.1, 111 e 24 Cost nella parte in cui non prevedono un diverso caso di revocazione della sentenza quando ciò sia necessario, ai sensi dell'art. 46 par. 1, della Convenzione europea dei diritti dell'uomo e delle libertà fondamentali, per conformarsi ad una sentenza definitiva della Corte europea dei diritti dell'uomo*' ('The Court believes that it should raise a question of constitutional legitimacy of the Arts 106 of the Italian Civil Code and 395 and 396 in relation to the Arts 117, para 1, 111 and 24 of the Constitution in the part in which they do not provide for a different case of revocation of the sentence if necessary, pursuant to Art 46, para 1, of the European Convention on Human Rights and Fundamental Freedoms, to comply with a final ruling by the European Court of Human Rights').

[21] R. Caponi, 'Corti europee e giudicati nazionali' *Corti europee e giudici nazionali. Atti del 27° Convegno nazionale (Verona, 25-26 settembre 2009)* (Bologna: Bononia University Press, 2011), 239.

[22] As is well known, the project of reform of the conventional system to introduce the instrument of the preliminary reference for interpretation is currently stopped because Art 5 of

exhaustion by the appellant of all internal remedies, as a general condition of admissibility of the appeal[23] (with some exceptions[24]). This mechanism entails an inevitable tension between domestic judgments and the subsequent judgment of the Court of Strasbourg which (if any) has ascertained the violation of the Convention by the State.

Therefore, the problem is how to identify the right remedy to implement the ruling of the European Court of Human Rights in favour of the successful appellants.

The Convention, in the first paragraph of Art 46 (*Binding force and execution of judgments*), provides that 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'. This provision follows that previously contained in Art 53, para 2, amended and transfused by the Eleventh Protocol which radically changed the control procedure on compliance with the Convention.[25]

The Constitutional Court itself emphasised in judgment no 113 of 2011 that the present regulation has a central importance in the European system of protection of fundamental rights, based on the Court of Strasbourg, being one of the primary obligations that derive from the adhesion to the Convention by the Contracting States.[26]

The first paragraph of Art 46 ECHR imposes a variable obligation on the States depending on the content of the judgment that has established a conventional violation.

Furthermore, we must remember that a judgment of the European Court of Human Rights carries out its binding effect under international law and is compulsory for the State as it is the subject of this treaty-based legal system. Therefore, the ruling has no binding effect in the domestic legal systems since it does not place any national law obligations. Indeed, the mandatory effectiveness, recognised to the Convention within the State legal system, does not automatically

the XVI Additional Protocol of the ECHR (which foresees this instrument) is not yet in force due to the lack of the minimum number of ratifications.

[23] B. Randazzo, 'Il giudizio dinanzi alla Corte europea dei diritti: un nuovo processo costituzionale' *Rivista AIC*, 29 November 2011, 16.

[24] In the European Court's opinion, the rule can be derogated when the national law does not offer any remedy or when the exhaustion of possible internal remedies would be solved for the victim in a useless activity due to an unfavorable consolidated case law. See Eur. Court H.R., *Scordino and others* v *Italy*, Judgment of 27 March 2003, available at www.hudoc.echr.coe.int.

[25] G. Raimondi, 'Il protocollo n. 11 alla Convenzione europea dei diritti dell'uomo: una Corte unica per la protezione dei diritti dell'uomo in Europa' *Rivista internazionale dei diritti dell'uomo*, 61-63 (1994); J.F. Flauss, 'La pratique du Comité des Ministres du Conseil de l'Europe au titre de l'Art 54 de la Convention Européenne des Droits de l'Homme' *Annuaire Français de Droit International*, 408 (1998); F. Sundberg, 'Le contrôle de l'exécution des arrêts de la Cour européenne des droits de l'homme' *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan* (Bruxelles: Bruylant, 2004), II, 1515.

[26] Corte costituzionale 7 April 2011 no 113 n 3 above.

imply recognition of similar validity to judgments issued by the European Court of Human Rights.[27]

Art 46, para 1, ECHR was interpreted, historically, in conjunction with Art 41 ECHR, pursuant to which

> 'if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'.

The interpretation of these combined provisions has changed over time, as will be explained further on.

2. The Evolutionary Interpretation of Arts 46, Para 1, and 41 ECHR

Initially, it was considered that the combined provisions of the two articles attributed to the Court of Strasbourg only the power to declare the violation of the conventional obligations. The Contracting States could choose at their discretion how to fulfil the obligation to comply with such rulings. Furthermore, it was considered that the impossibility of achieving the reintegration in a specific form, mentioned in Art 41 ECHR, should be understood as not only a material but also a legal impossibility ('if the internal law of the High Contracting Party'), thus giving the States the choice whether or not to provide for or limit the scope of the specific reparation.

According to this original approach, therefore, the impossibility to surpass the judgment, constituting a 'legal impossibility' of domestic law, would have prevented in any case *restitutio in integrum*, the Court having to opt for a pecuniary conviction.

The original interpretation of Arts 41 and 46, para 1, ECHR was surpassed by an evolutionary interpretation of the provisions aimed at broadening the mandatory scope of the Court's judgments.

In particular, taking into consideration the textual wording of Art 46, accurate doctrine emphasises that the rule is not limited to sanctioning the binding effectiveness of the judgments of the European Court of Human Rights. However, it contains a *quid pluris*, placing the burden of a real additional obligation (whether to do or not) on the Contracting Parties about the ruling of the Court. This correct interpretation involves the obligation of the State responsible for adopting specific measures to implement the decisions issued against it.[28]

Since the late 1990s, under pressure from the Committee of Ministers, the

[27] P. Pirrone, *L'obbligo di conformarsi alle sentenze della Corte europea dei diritti dell'uomo* (Milano: Giuffrè, 2004), 80-82.

[28] ibid 3.

Court's judgments have been enriched with content, fuelling the idea that *restitutio in integrum* represents the primary instrument for fulfilling the conventional conformation obligation.

The position taken by the jurisprudence of the Court at the end of this evolutionary path is represented by the judgment of the Grand Chamber *Scozzari and Giunta* v *Italy*[29] of 13 July 2000. In this case, the Court (para 249) 'points out that by Art 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects'.

The interpretative turn was also portrayed by the Italian Constitutional Court in the judgment no 113 of 2011,[30] where it was found that 'It is now a well-established position in this regard within the most recent case law of the Strasbourg Court that,

> 'a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction (...) but also to choose the general and/or, if appropriate, individual measures to be adopted' (see *inter alia*, *Scoppola* v *Italy*, Grand Chamber, Judgment of 17 September 2009, para 147; Grand Chamber, Judgment of 1 March 2006, *Sejdovic* v *Italy*, para 119; Grand Chamber, Judgment of 8 April 2004; and *Assanidzé* v *Georgia*, para 198).

This is because, in the light of Art 41 ECHR, the purpose of awarding sums by way of just satisfaction is

> 'to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied' (*Scozzari and Giunta* v *Italy,* Judgment 13 July 2000, para 250).

The objective of the individual measures which the respondent State is required to carry out is identified more specifically by the European Court as *restitutio in integrum*, or full redress, in favour of the interested party.

[29] Eur. Court H.R. (GC), *Scozzari and Giunta* v *Italy*, Judgment of 7 July 2000, available at www.hudoc.echr.coe.int.

[30] Corte costituzionale 7 April 2011 no 113 n 3 above.

Accordingly, these measures must put

> 'the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded' (see *inter alia*, Grand Chamber, *Scoppola* v *Italy*, Judgment of 17 September 2009, para 151; *Sejdovic* v *Italy*, Judgment of 10 November 2004, para 55; and *Somogyi* v *Italy*, Judgment of 18 May 2004, para 86)'.

The European Court of Human Rights, moreover, has continuously reiterated, even in the presence of this evolution, that in principle it is not up to it to indicate the measures aimed at achieving *restitutio in integrum* and/or the general measures necessary to put an end to the conventional violation, leaving the States free to choose the means for the fulfilment of this obligation, provided they are compatible with the conclusions contained in its judgments.[31]

However, in some exceptional cases, it considers it useful to indicate to the defendant State the type of measures to be taken to put an end to the infringement.[32]

Finally, in case of violation of the fair trial rules (Art 6 ECHR), the reopening of the trial or the re-examination of the case are, in principle, the most appropriate, if not the only, means of operating *restitutio in integrum* of the victim.[33]

[31] Eur. Court H.R. (GC), *Bochan* v *Ukraine (no 2)*, Judgment of 5 February 2015, para 57; Eur. Court H.R. (GC), *Centre for Legal Resources on behalf of Valentin Câmpeanu* v *Romania*, Judgment of 17 July 2014, para 158; Eur. Court H.R. (GC), *Kuric and others* v *Slovenia*, Judgment of 26 June 2012, para 79; Eur. Court H.R. (GC), *Davydov* v *Russia*, Judgment of 30 October 2014, para 25; Eur. Court H.R., *Biblical Centre of the Chuvash Republic* v *Russia*, Judgment of 12 June 2014, para 66; Eur. Court H.R., *Oleksandr Volkov* v *Ukraine*, Judgment of 9 January 2013, para 194; Eur. Court H.R., *Jehovah's Witnesses of Moscow and others* v *Russia*, Judgment of 22 November 2010, para 206; Eur. Court H.R. (GC), *Scoppola* v *Italy*, Judgment of 17 September 2008, para 147; Eur. Court H.R., *Kollcaku* v *Italy*, Judgment of 8 February 2007, para 82; Eur. Court H.R., *Zunic* v *Italy*, Judgment of 21 December 2006, para 75; Eur. Court H.R. (GC), *Sejdovic* v *Italy*, Judgment of 1 March 2006, paras 119 e 127; Eur. Court H.R. (GC), *Öcalan* v *Turkey*, Judgment of 12 May 2005, para 210; Eur. Court H.R., *Bocellari and Rizza* v *Italy*, Judgment of 13 November 2007, para 44; Eur. Court H.R., *Scozzari and Giunta* v *Italy*, Judgment of 7 July 2000, para 249. All these judgments are available at www.hudoc.echr.coe.int.

[32] Eur. Court H.R. (GC), *Davydov* v *Russia*, Judgment of 30 October 2014, para 26; Eur. Court H.R., *Oleksandr Volkov* v *Ukraine*, Judgment of 9 January 2013, para 195; Eur. Court H.R. (GC), *Verein Tierfabriken Schweiz (VgT)* v *Switzerland*, Judgment of 30 June 2009, para 88; Eur. Court H.R. (GC), *Öcalan* v *Turkey*, Judgment of 12 May 2005, para 210; Eur. Court H.R., *Popov* v *Russia*, Judgment of 13 July 2006, para 263. All these judgments are available at www.hudoc.echr.coe.int.

According to the ECtHR, in some cases the nature of the violation would leave no real choice regarding the measures: Eur. Court H.R., *Oleksandr Volkov* v *Ukraine*, Judgment of 9 January 2013, para 195; Eur. Court H.R., *Aleksanyan* v *Russia*, Judgment of 22 December 2008, para 240; Eur. Court H.R., *Fatullayev* v *Azerbaijan*, Judgment of 22 April 2010, paras 176-177; Eur. Court H.R. (GC), *Assanidze* v *Georgia*, Judgment of 8 April 2004, para 202. All these judgments are available at www.hudoc.echr.coe.int.

[33] *Inter alia*, Eur. Court H.R., *Karelin* v *Russia*, Judgment of 20 September 2016, para 97;

Recommendation no R (2000)2 to the Member States of 19th January 2000 by the Council of Ministers on 'the re-examination or reopening of certain cases at the European Court of Human Rights' and its Explanatory *Memorandum* are particularly crucial in the evolution of the topic we are dealing with here.

Indeed, although it is technically a soft law act, the Recommendation appears to be a particularly important act for determining the obligations of the Contracting States of the Convention for various reasons. First of all, because it comes from the Council of Ministers that is the body responsible for overseeing the execution of condemnation rulings of the Court of Strasbourg. Secondly, because the Recommendation affects the relevant application practice regarding the interpretation of the ECHR under Art 31, para 3, of the Vienna Convention on the Law of Treaties. Finally, since the Court often quotes the Recommendation within the justification of the judgments, integrating the precepts of the Convention with these contents.

Referring to the contents of the Recommendation, it is worth to highlight

> 'that the practice of the Committee of Ministers in supervising the execution of the Court's judgements shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*'.

The Committee of Ministers itself

> 'invites (...) the Contracting Parties to ensure that there exists at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*',

and while acknowledging wide discretion on the point to the individual States,

> 'encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention'.

The Recommendation also indicates two situations in which the re-examination of the case is the most appropriate. For example, when

Eur. Court H.R. (GC), *Bochan* v *Ucraina*, 5 February 2015, para 57; Eur. Court H.R. (GC), *Davydov* v *Russia*, Judgment of 30 October 2014, para 27; Eur. Court H.R. (GC), *Sakhnovskiy* v. *Russia*, Judgment of 2 November 2010, para 112; Eur. Court H.R. (GC), *Verein Tierfabriken Schweiz (VgT)* v *Switzerland*, Judgment of 30 June 2009, para 89; Eur. Court H.R., *Cat Berro* v *Italy*, Judgment of 11 December 2007, para 46; Eur. Court H.R., *Kollcaku* v *Italy*, Judgment of 8 February 2007; Eur. Court H.R., *Zunic* v *Italy*, Judgment of 21 December 2006, para 74; Eur. Court H.R. (GC), *Öcalan* v *Turkey*, Judgment of 12 May 2005, para 210. All these judgments are available at www.hudoc.echr.coe.int.

> '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';
>
> or when
>
> 'the judgement of the Court leads to the conclusion that:
>
> a. the impugned domestic decision is on the merits contrary to the Convention, or
>
> b. the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of'.

The Explanatory *Memorandum*, moreover, clarifies that these hypotheses are aimed at identifying exceptional cases in which the purpose of ensuring the protection of individual rights and the effective application of the Court's judgments, prevail over the principles underlying the *res iudicata* doctrine, and in particular the legal certainty, despite their undoubted importance.

V. The Conflict Between Judgments in Criminal Proceedings in the Constitutional Court's Case Law

The described regulatory development of the Convention system had an immediate effect on Italian criminal case law. Since the mid-2000s, it has faced the problem of how to incorporate the indications of the Court of Strasbourg concerning the *restitutio in integrum* following the ascertainment of the violation of the right to the fair trial protected by Art 6 ECHR.

In an attempt to find a remedy in the Italian legal system, the Court of Cassation has identified several possible remedies: the exclusive procedure for relief from the time limitations for lodging the appeal (Art 175, para 2, Italian Code of Criminal Procedure);[34] or the application for an enforcement review (Art 670 of the Italian Code of Criminal Procedure), by which the enforcement court would have to declare the unenforceability of the national ruling contrary to the Convention;[35] finally, through an analogical interpretation, the procedure for extraordinary appeal owing to material or factual errors contained in the measures issued by the Court of Cassation (Art 625-*bis* of the Italian Code of

[34] Corte di Cassazione penale 12 February 2008 no 8784, available at www.dejure.it; Corte di Cassazione penale 15 November 2006 no 4395, *Corriere giuridico*, 688 (2007).

[35] Corte di Cassazione penale 1 December 2006 no 2800, *Giurisprudenza italiana*, 2281 (2007).

Criminal Procedure).[36]

However, the prevailing opinion was that these were partial solutions that were incapable of sufficiently achieving the objective.[37]

The Constitutional Court was the principal architect of the development of the Italian legal system in matters of *restitutio in integrum* on criminal issues thanks to several significant judgments.

The Court dealt with the problem for the first time in the judgment no 129 of 2008.[38] In this decision, it declared the non-substantiation of the question of the constitutionality of Art 630, para 1, sub *a*), of the Italian Code of Criminal Procedure about the parameters referred to Arts 3, 10 and 27 of the Italian Constitution. In this judgment, however, after underlining the complexity and delicacy of the subject of revocation remedies, the Court addressed the legislator with a 'pressing invitation' to adopt the most appropriate measures to allow the Italian legal system to comply with the rulings of the Court of Strasbourg which has ascertained a violation of Art 6 ECHR.

In the absence of an expected intervention of the legislator, the Constitutional Court was faced with the question of the constitutional legitimacy of Art 630 of the Italian Code of Criminal Procedure for the violation of Art 117, para 1, of the Italian Constitution in relation to Art 46, para 1, ECHR, for the second time adopting the judgment no 113 of 2011.[39]

In this ground-breaking decision, the Court took several factors into account.

First of all, the evolutionary interpretation of the case law of the Court of Strasbourg on the scope of Art 46 ECHR. Secondly, of the continuing absence within the Italian legal system of an adequate instrument to ensure *restitutio in integrum*. In addition, the repeated complaints against Italy by the Committee of Ministers and the Parliamentary Assembly on the occasion of the *Dorigo* case. Finally, the adoption by the many Member States of the Council of Europe of appropriate instruments to allow the reopening of a criminal trial found unfair by the Court of Strasbourg. From a comparative point of view, based on data updated to 2016, it turns out that thirty-three[40] Member States of the

[36] Corte di Cassazione penale 12 November 2008 no 45807, *Giurisprudenza italiana*, 2292 (2009); Corte di Cassazione penale 11 February 2010 no 16507, *Giurisprudenza italiana*, 2643 (2010).

[37] Corte costituzionale 7 April 2011 no 113 n 3 above.

[38] Corte costituzionale 30 April 2008 no 129 n 2 above.

[39] Corte costituzionale 7 April 2011 no 113 n 3 above.

[40] Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and Turkey. The data is the same as resulting from the *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*, 12 May 2006, available at https://www.coe.int.

Council of Europe allow the reopening of criminal trials.[41]

Based on these considerations, the Constitutional Court declared that Art 630 of the Code of Criminal Procedure was unconstitutional insofar as it did not provide for a different ground for the review of a judgment or conviction in order to enable a trial to be reopened when this is necessary, pursuant to Art 46, para 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and to comply with a final judgment of the European Court of Human Rights.

Another fundamental issue for the reconstruction of the relations between the rulings of the Court of Strasbourg and a criminal judgment is that which led to judgment no 210 of 2013.[42]

In this ruling, the Constitutional Court dealt with the position of the subjects convicted with a final judgment who did not lodge an appeal to Strasbourg but who are in the same situation as those who successfully applied to the Court of Strasbourg.

While denying the nature of a pilot ruling to the Grand Chamber's ruling *Scoppola* v *Italy*,[43] the Constitutional Court shared the observation of the Joint Divisions of the Court of Cassation referring to the presence of the Court of Strasbourg's determination to adopt not only general measures, but also individual actions, having imposed itself on Italy to resolve the violation on a legislative level and to remove its effects in respect of all convicted persons whose circumstances are the same as those of Scoppola. According to the Constitutional Court

> 'it falls first and foremost to the legislator to acknowledge the conflict that has arisen between national law and the Convention system and to remove the provisions that gave rise to it, ensuring that they have no further effect; however, if the legislator does not take action, the problem arises as to how to eliminate effects that have already definitively arisen in cases identical to those in which the Convention was found to have been breached, but which were not appealed to the ECtHR, and have thus become ineligible for appeal. Indeed, there is a fundamental difference between persons who have appealed to the ECtHR after exhausting internal remedies, and those who by contrast have not exercised that right, with the result that their convictions, which have now become final, are no longer eligible for relief under the Convention'.

Moreover, it is stated:

[41] *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*, 12 February 2016, DH-GDR(2015)008, available at https://www.coe.int.

[42] Corte costituzionale 10 July 2013 no 210 n 5 above.

[43] Eur. Court H.R. (GC), *Scoppola* v *Italy* n 6 above.

> 'The value of a final judgment through which compelling requirements of legal certainty and stability within legal relations are expressed is not moreover extraneous to the Convention system, so much so that the Scoppola judgment itself identified it as a limit on the extension of the lex mitior principle, as this Court has already stressed (judgment no 236 of 2011). It must therefore be concluded that, as a matter of principle, the obligation to comply with Convention requirements, in the meaning stipulated by the Strasbourg Court, does not apply to cases – different from that to which this judgment relates – in which the judgment has become final for the purposes of internal law, and that any exceptions to that limit must be inferred not from the ECHR (which does not require it) but from national law'.[44]

The Court, therefore, acknowledged that Italian law does allow situations in which the intangible status of a final judgment may be set aside where the law provides that opposing values – with equal Constitutional standing, but to which the legislator has intended to afford priority status – may be deemed to prevail over the Constitutional value inherent within that principle.

One of these cases is that in which personal freedom has been restricted by an incriminating rule subsequently repealed or modified in favour of the offender (Arts 673 of the Italian Code of Criminal Procedure, and 2, para 3, of the Italian Criminal Code).

However, in relation to the instrument to be used in these cases, according to the Court, the review procedure provided for under Art 630 of the Code of Criminal Procedure, as resulting from the declaration of unconstitutionality in Judgment no 113 of 2011, was not adequate for that case in which it was not necessary to 'reopen the trial' on the merits, but was somewhat necessary merely to alter the enforcement of the decision in such a manner as to replace the sentence imposed with one that was compatible with the ECHR, and which was already determined in a precise manner by law.[45]

VI. The Constitutional Court's Assessment

After having traced the system outlined by the ECHR (with particular reference to Arts 41 and 46, para 1) and examined the evolution of the case law of the Italian Constitutional Court in case of conflict between judges in criminal matters, it is possible to thoroughly analyse judgment no 123 of 2017 which decided the issue of the constitutionality of Art 106 of the Code of Administrative Procedure raised by the Council of State sitting in plenary session.

[44] Corte costituzionale 10 July 2013 no 210 n 5 above, *Conclusions on points of law*, para 7.2.

[45] ibid para 8.

After a broad description of the fact, the Court proceeded with the examination of the complaints, declaring inadmissible owing to lack of justification on the non-manifest unfoundedness, those relating to Arts 24 and 111 of the Italian Constitution. According to constant jurisprudence, the referring judge (in our case the Council of State sitting in plenary session) should have explained the reasons for the alleged contrast of the rules censured with the evoked constitutional values.[46]

The Court, therefore, deals with the analysis of the alleged breach of Art 117, para 1, of the Italian Constitution in relation to the parameter laid down by Art 46, para 1, ECHR, starting from the findings of *Mottola* and *Staibano*.

Once the relevance of the issue was ascertained, the Court began with the analysis of the merits, declaring the question unfounded.

Firstly, the issue that is dealt with is the one concerning the persons who, despite being in the same substantial situation as the appellants of *Mottola* and *Staibano*, decided not to appeal to the Court of Strasbourg.

With regard to these subjects, the Constitutional Court already decided in a negative sense in the past, since the obligation to reopen the proceedings, pursuant to Art 46 ECHR,

> 'in the meaning stipulated by the Strasbourg Court, does not apply to cases – different from that to which this judgment relates – in which the judgment has become final for the purposes of internal law'.[47]

According to the Court, there is

> 'a fundamental difference between persons who have appealed to the ECtHR after exhausting internal remedies, and those who by contrast have not exercised that right, with the result that the proceedings relating to them, which have now been resolved by a final judgment, are no longer eligible for relief under the Convention'.[48]

Moving on to the analysis of the position of the subjects who successfully applied to the Court of Strasbourg and recalling their own jurisprudence on the re-opening of the criminal trial which was previously mentioned,[49] the Court raises the question whether it is possible to reach the same conclusions for trials

[46] Corte costituzionale 10 June 2016 no 133, available at www.cortecostituzionale.it; Corte costituzionale 16 December 2016 no 276, *Giurisprudenza italiana*, 449 (2017). See also Corte costituzionale ordinanza 11 April 2011 no 126; Corte costituzionale ordinanza 22 July 2011 no 236; Corte costituzionale ordinanza 6 July 2012 no 174; Corte costituzionale ordinanza 11 July 2012 no 181; Corte costituzionale ordinanza 22 November 2012 no 261; Corte costituzionale ordinanza 22 April 2016 no 93; all available at www.cortecostituzionale.it.

[47] Corte costituzionale 10 July 2013 no 210 n 5 above, *Conclusions on points of law*, para 7.3.

[48] ibid.

[49] para V above.

other than criminal proceedings, and, in particular, administrative ones.

From an argumentative point of view, the reason of the decision in question is valuable because it achieves the desired dialogue between the Constitutional Court and the European Court of Human Rights, whose jurisprudence is widely considered and referred.

The Constitutional Court first outlines the scope of application of ECHR Arts 41 and 46, in their interpretation provided by the Court of Strasbourg. From the combined provisions of the aforementioned articles, the obligation to comply with the conviction may imply for the condemned State: the payment of fair satisfaction (if ordered by the Court pursuant to Art 41); the adoption, where appropriate, of individual measures aimed at ending the violation; the introduction of general measures to stop the violation deriving from an administrative act or administrative or jurisprudential practice, thus avoiding future violations.[50]

However – as the Italian Court correctly points out in what is probably the essential part of the decision –

> 'the ECtHR has been settled in asserting that, as a matter of principle, it does not fall to it to state suitable measures to give tangible expression to *restitutio in integrum* or the general measures necessary in order to put an end to a breach of the ECHR, as the States are free to choose the manner in which that obligation is complied with, provided that this is compatible with the conclusions contained in its judgments (*inter alia*, *Bochan* v *Ukraine,* Grand Chamber, Judgment of 5 February 2015, para 57; *Centre for legal resources on behalf of Valentin Campeanu* v *Romania*, Grand Chamber, Judgment of 17 July 2014, para 158; *Kuric and others* v *Slovenia,* Grand Chamber, Judgment of 12 March 2014, para 80), and has only considered it appropriate to indicate the type of measure to be adopted in a few exceptional cases (amongst the most recent judgments, *Davydov* v *Russia*, Judgment of 30 October 2014, para 27; *Oleksandr Volkov* v *Ukraine*, Judgment of 9 January 2013, para 195).
>
> In addition, in cases involving a violation of the provisions on a fair trial (Art 6 ECHR), it has also asserted that the reopening of the trial or the review of the case are in principle the most appropriate ways of providing *restitutio in integrum* (*inter alia*, *Karelin* v *Russia,* Judgment of 20 September 2016, para 97; *Bochan* v *Ukraine,* Grand Chamber, Judgmente of 5 February 2015, para 58)'.[51]

[50] Eur. Court H.R., *S.K.* v *Russia*, Judgment of 14 February 2017, para 132; Eur. Court H.R., *Ignatov* v *Ukraine*, Judgment of 15 December 2016, para 49; Eur. Court H.R., *Karelin* v *Russia*, Judgment of 20 September 2016, para 92; Eur. Court H.R. (GC), *Centre for legal resources on behalf of Valentin Campeanu* v *Romania*, Judgment of 17 July 2014, para 158. All these judgments are available at www.hudoc.echr.coe.int.

[51] Corte costituzionale 26 May 2017 no 123 n 1 above, para 10.

From the ECtHR case law and the Recommendation R (2000)2,[52] it is therefore possible to find that the obligation to conform the Court's judgments has variable content, and that individual reinstatement measures are only reasonable and must be adopted just where they are necessary to implement the decisions, especially in the case of violation of the rules on a fair trial.

On the other hand, this principle would also be confirmed by the case law of the ECtHR concerning civil and administrative trials.

The Court finds, however,

> 'that the assertion that the trial must be reopened as a measure capable of guaranteeing *restitutio in integrum* is only contained in judgments given against states the internal legal systems of which already provide for the review of judgments that have become final in the event that the Convention has been violated (see *inter alia Artemenko* v *Russia,* Judgment of 22 November 2016, para 34; *Kardoš* v *Croatia,* Judgment of 26 April 2016, para 67; *T.Ç. and H.Ç* v *Turkey* Judgment of 26 July 2011, paras 94 and 95; *Iosif and others* v *Romania, Judgment of* 20 December 2007, para 99; *Paykar Yev Haghtanak LTD* v *Armenia*, Judgment of 20 December 2007, para 58; *Yanakiev* v *Bulgaria,* Judgment of 10 August 2006, para 90; *Gurov* v *Moldavia,* Judgment of 11 July 2006, para 43)'.[53]

It is clear from the case law of the Court of Strasbourg referred to in the judgment, that the Member States have broad discretion in this regard in order to find a proper balance between the formal obligation to comply with the Court's judgments, on the one hand, and the principles of *res iudicata* and legal certainty, on the other, especially when the dispute concerns third parties, bearers of an independent interest.[54]

The constitutionality issue is decided on the basis of this last argument.

As the Constitutional Court correctly observes, the obligation pursuant to Art 46, para 1, ECHR behaves differently in the case of civil and – in relation to the concrete case – administrative proceedings in which protection must also be ensured to parties other than the State who took part in the 'internal' judgment, such as administrations other than the State or private defendants, entrusted with a *public munus* and nominal opponents.

The protection of these 'third parties', together with respect towards them of the legal certainty guaranteed by the *res iudicata*, justifies the more cautious attitude of the ECtHR outside the criminal field, where the principles just stated can give way to the deprivation of the personal freedom of the condemned subject in violation of conventional parameters.

This is reflected by the position of various State Parties that have expressed

[52] para IV.2. above.

[53] Corte costituzionale 26 May 2017 no 123 n 1 above, para 12.

[54] Eur. Court H.R. (GC), *Bochan* v *Ucraina*, 5 February 2015, para 57.

similar caution in this regard, as was noted – as mentioned above – in Bochan and as is apparent from the *Explanatory Memorandum to Recommendation R(2000)2*, the *Review of the implementation of Recommendation* of 12 May of 2006[55] and finally the *Overview of the Committee of Experts* dated 12 February 2016.[56]

On the basis of these arguments and after outlining a broad overview of the relevant legislation in various European legal systems such as Germany, Spain and France, the Constitutional Court correctly attributes to the legislator the decision, in the light of Art 24 of the Italian Constitution, between the right of action of the interested parties and the right of defence of third parties. According to the Court

> 'also under Italian law the reopening of non-criminal trials, resulting in the reversal of a final judgment, require that a delicate balance be struck, in the light of Art 24 of the Constitution, between the right of action of interested parties and third parties' right to a defence, and that balancing of interests falls primarily to the legislator'.[57]

In this regard, the Court emphasises, however, that third parties are currently not adequately involved in the proceedings before the ECtHR.

In the trials outlined by the Convention, in fact, the necessary parties are the appellant and the State that committed the violation, while the intervention of other parties to the internal appeal – to which, moreover, the appeal does not have to be notified – is subjected to the discretionary assessment of the President, who 'may (...) invite (...) any person interested who is not the appellant to submit written comments or take part in hearings' (Art 36, para 2, ECHR). A systematic opening of conventional proceedings to third parties, concludes the Court, would certainly make the work of the domestic legislator easier.[58]

VII. Concluding Remarks

1. The Constitutional Relevance of *Res Iudicata*

In the opinion of the author, the decision of the Constitutional Court in question is acceptable.

In a delicate matter involving several important interests in the national legal system and of constitutional relevance (legal and judgment certainty, right

[55] *Review of the implementation of Recommendation (2000)2 of the Committee of Ministers to the Member States* n 40 above.

[56] *Overview of the exchange of views held at the 8th meeting of DH-GDR* n 41 above.

[57] Corte costituzionale 26 May 2017 no 123 n 1 above, para 17.

[58] For a critical position on the point, A. Randazzo, 'A proposito della sorte del giudicato amministrativo contrario a pronunzie della Corte di Strasburgo (note minime alla sent. n. 123 del 2017 della Corte costituzionale)' *Osservatorio costituzionale*, III, 8 (2017).

of defence, interests of third party nominal opponents, right to a fair trial, etc) and in the absence of the damage to a value such as personal freedom in criminal decisions, it should be the legislator to identify the correct balance by law.

Apart from the necessary protection of the constitutional right of persons other than the State who could not participate in the proceedings before the European Court of Human rights (as will be commented further on), the constitutional value of *res iudicata* must undoubtedly be taken into consideration during the balancing procedure. In Italy, despite the failure of a project to include an article on judgments in the Constitution,[59] the case law of the Court has continuously affirmed its constitutional value.[60]

Thus, the judgment is assigned 'inescapable (...) constitutional function',[61] since it is designed to protect legal certainty and the stability of legal situations,[62] and this certainty responds to the logical (more than juridical) need that the trial to be concluded with a final solution, that is to say in a definitive ascertainment which constitutes the very purpose of the judicial activity[63] and which represents a constitutionally protected value, as it can be linked to the right to judicial protection (Art 24 of the Constitution),[64] whose effectiveness would be severely compromised if it were always possible to call into question a judicial case.[65] Furthermore, the principle of a reasonable duration of a trial, enshrined in Art 111,

[59] F. Modugno, 'Giudicato e funzione legislativa, introduzione' *Giurisprudenza italiana*, 2815-2818 (2009); G. Serges 'Il 'valore' del giudicato nell'ordinamento costituzionale' *Giurisprudenza italiana*, 2819-2827 (2009).

[60] Corte costituzionale 10 July 2013, no 210 n 5 above.

[61] Corte costituzionale 30 April 2008, no 129 n 2 above.

[62] Corte costituzionale 10 April 2014 no 90, available at www.cortecostituzionale.it; Corte costituzionale 10 July 2013, no 210, n 5 above; Corte costituzionale ordinanza 20 June 2013 no 149, available at www.cortecostituzionale.it; Corte costituzionale 5 July 1995, no 294, *Corriere giuridico*, 1100 (1995); Corte costituzionale 12 July 1972 no 136, available at www.dejure.it; Corte costituzionale ordinanza 29 October 1999 no 413, *Il Consiglio di Stato*, 1482 (1999).

[63] Corte costituzionale 4 February 1982 no 21, *Giurisprudenza italiana*, 582 (1982).

[64] In the sentence no 364 of 2007, the Constitutional Court traces the need to protect the judged (from the retroactive law), on the one hand to the need to preserve the constitutional prerogatives of judicial authority and, on the other hand, to protect the legitimate expectation of private individuals in the definitive outcome of the process. According to R. Caponi, 'Giudicato civile e diritto costituzionale: incontri e scontri' *Giurisprudenza italiana*, 2827 (2009), '*le due giustificazioni – apparentemente parallele – si risolvono in una sola: il giudicato come strumento di tutela giurisdizionale dei diritti è costituzionalmente protetto in vista della garanzia della certezza e della stabilità del risultato del processo, nell'interesse delle parti*' ('the two justifications – apparently parallel – are resolved into one: *res iudicata* as a tool for judicial protection of rights is constitutionally protected in view of the guarantee of certainty and stability of the outcome of the process, in the interests of the parties').

See also, Corte costituzionale ordinanza 20 June 2013 no 149 n 62 above; Corte costituzionale 3 July 1996 no 224, *Giustizia civile*, 2468 (1996); Corte costituzionale ordinanza 17 November 2000 no 501, *Giurisprudenza costituzionale*, book 7 (2000).

[65] Corte costituzionale 10 April 2014 no 90 n 62 above; Corte costituzionale ordinanza 20 June 2013 no 149, n 62 above; Corte costituzionale 5 July 1995 no 294 n 62 above; Corte costituzionale ordinanza 17 November 2000 no 501, *Cassazione penale*, 796 (2001).

para 2, of the Italian Constitution would be compromised.[66]

In matters of balancing, if in criminal matters the decrease in criminal proceedings is justified by the possible compromise of personal freedom (fundamental right of the person protected at constitutional level), the same requirement does not exist in civil and administrative matters. Therefore, the conventional obligation to reopen proceedings would succumb to the constitutional rules laid at the basis of the judgment (Arts 24, 102, 111, para 2, and 113 of the Italian Constitution), thus making, in our opinion, the decision of the Court correct.

In this sense, the Art 30, para 4 of legge 11 March 1953 no 87 (Rules on the constitution and functioning of the Constitutional Court) could also be reinstated and enhanced, which – excluding, outside the criminal sphere, the impact of declarations of constitutional illegitimacy on concluded relationships (including the judgment) – would bear witness to a balance existing in the legal system in favour of the finality of the judicial ascertainment and to the detriment of fundamental rights (even those protected by the Constitution).

It must, however, be stressed that the need to protect civil and administrative judgments is not unconditional and even legge 11 March 1953 no 87, while regulating the operation of the Constitutional Court does not have the status of constitutional rules. Therefore, it does not limit the legislator who, for example, has considered the different values at stake in the event of an extraordinary revocation (Art 395, nos 1, 2, 3 and 6, of the Italian Code of Civil Procedure).

On the other hand, it should be emphasised that the Conventional system in itself, does not seem to oblige the Member States to reopen internal trials to implement the decisions of the Court of Strasbourg. In other words, at present, the interposed parameter mentioned (Art 46, para 1, ECHR) does not require the Italian State to overcome civil and administrative judgments.

The analysis of case law that has dealt with the issue under examination shows, in fact, that the Court of Strasbourg considers the *restitutio in integrum* obligation only in cases where the national laws provide for this hypothesis.[67] In the case of civil and administrative proceedings (where the personal freedom of an individual is not in danger), Member States have shown greater resistance to questioning some critical internal principles (sometimes of constitutional relevance) such as the legal certainty of *res iudicata* for the protection of third parties.[68]

[66] Corte costituzionale 7 June 2013 no 132, *Foro italiano*, 2073 (2013); Corte costituzionale ordinanza 17 November 2000 no 501, n 65 above.

[67] Eur. Court H.R. (GC), *Bochan* v *Ucraina*, 5 February 2015; Eur. Court H.R., *Steck-Risch and others* v *Liechtenstein*, Judgment of 11 May 2010; Eur. Court H.R. (GC), *Verein Tierfabriken Schweiz (VgT)* v *Switzerland*, Judgment of 30 June 2009, para 89. All available at www.hudoc.echr.coe.int.

[68] The Court of Strasbourg recognizes, in fact, the importance of the judged, as a principle of a rule of law, as can be seen from the Grand Chamber's judgment of 28 October 1999 *Brumărescu* v *Romania*, which states (para 61) that 'the right to a fair hearing before a tribunal as guaranteed by Art 6 § 1 of the Convention must be interpreted in the light of the Preamble to

The particularly prudent attitude of the Court of Strasbourg towards the principles enunciated in criminal matters emerges from the Grand Chamber's ruling of 5 February 2015 *Bochan* v *Ukraine* (referred to by the same Constitutional Court in judgment no 123 of 2017). It states that

> '(...) it is for the Contracting States to decide how best to implement the Court's judgments without unduly upsetting the principles of *res iudicata* or legal certainty in civil litigation, in particular where such litigation concerns third parties with their own legitimate interests to be protected. Furthermore, even where a Contracting State provides for the possibility of requesting a reopening of terminated judicial proceedings on the basis of a judgment of the Court, it is for the domestic authorities to provide for a procedure to deal with such requests and to set out criteria for determining whether the requested reopening is called for in a particular case. There is no uniform approach among the Contracting States as to the possibility of seeking reopening of terminated civil proceedings following a finding of a violation by this Court or as to the modalities of implementation of existing reopening mechanisms (see paras 26-27 above)'.[69]

the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question'. This judgment is available at www.hudoc.echr.coe.int.

[69] References to these passages of the Bochan ruling are present in the subsequent sentences: Eur. Court H.R., *Goryachkin* v *Russia*, Judgment of 15 November 2016, para 84; Eur. Court H.R., *Barkov and others* v *Russia*, Judgment of 19 July 2016, para 28; Eur. Court H.R., *Popov* v *Russia*, Judgment of 13 July 2006, para 44; Eur. Court H.R., *Gankin and others* v *Russia*, Judgment of 31 May 2016, para 50; Eur. Court H.R., *Yevdokimov and others* v *Russia*, Judgment of 16 February 2016, para 59. All judgments available at www.hudoc.echr.coe.int.

The same argumentative setting shines through in Eur. Court H.R., *Ryabkin and Volokitin* v *Russia*, Judgment of 28 June 2016, para 47: 'However, it is only exceptionally that a violation, by its very nature, does not leave any real choice as to the measures required to remedy it (see *Assanidze* v *Georgia* [GC], no 71503/01, para 202, ECHR 2004-II). This is particularly true in civil cases where the Contracting States dispose of a variety of means to ensure redress to an aggrieved party (see *Kudeshkina* (no 2) v *Russia (*dec.), no 28727/11, para 77, 17 February 2014). Moreover, such means would frequently be preferable to the reopening of proceedings in view of other equally important considerations, such as the principle of legal certainty, respect of *res iudicata* or the interests of bona fide third parties (see Eur. Court H.R., *Almeida Santos* v *Portugal*, Judgment of 27 July 2010, para 12; and *Bochan* v *Ukraine* (no 2) [GC], no 22251/08, para 57, ECHR 2015). Those considerations would in particular prevail over an applicant's interest in having proceedings reopened when the violation of the Convention results from a general problem generating repetitive applications rather than from the specific circumstances of an individual case (see *Davydov* v *Russia*, n 31 above, para 29; *Henryk Urban and Ryszard Urban* v *Poland*, Judgment of 30 November 2010, no 23614/08, para 64; *Golubowski* v *Poland*, Judgment of 5 July 2011, no 21506/08; and, by contrast and compare with *Miroslaw Garlicki* v *Poland*, Judgment of 14 June 2011, no 36921/07, para 154).

In any event, if the internal law allows only partial reparation to be made, Art 41 of the Convention gives the Court the power to award compensation to the party injured by the act or

However, it has been reported[70] that sometimes the ECtHR has invited the reopening of trials to countries whose legal systems do not yet have a specific remedy, as in the two recent cases against Slovenia *Perak*[71] and *Tence*.[72]

Therefore, examination of the ECtHR case law currently shows a significant tendency to exclude civil and administrative proceedings from the formal obligation to conform in a specific way, where internal regulations have not yet provided for particular re-examination or revision instruments.

The introduction of such instruments would seem, at present, only strongly advocated.

2. The Third Parties' Right to a Defence

Another element that justifies the particularly cautious attitude on the matter by the European Court of Strasbourg is the protection of the right of defence of those third parties, other than the State, who could not take part in the trial in Strasbourg and who, legitimately, relied on the domestic judgment. As pointed out by the Constitutional Court in the final part of the judgment in question, the participation of these third parties (in respect of which there is no obligation to notify the appeal) is possible and left to the discretion of the President of the Court (Art 36, para 2, ECHR).

The European Court of Human Rights is fully aware of the delicate balance between the protection of the right to a fair trial of both the appellant and third

omission that has led to the finding of a violation of the Convention (see *Papamichalopoulos and Others* v *Greece* (Art 50), Judgment of 31 October 1995, Series A no 330-B, 58-59, para 34, and *Brumarescu* v *Romania* (just satisfaction) [GC], no 28342/95, para 20, ECHR 2001-I).

Again, in Eur. Court H.R., *Kudeshkina* v *Russia* (2), Judgment of 17 February 2015: 'With regard in particular to the reopening of proceedings, the Court clearly does not have jurisdiction to order such measures. However, where an individual has been convicted following proceedings that have entailed breaches of the requirements of Art 6 of the Convention, the Court may indicate that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation'. The judgment is available at www.hudoc.echr.coe.int.

These arguments were already present in the judgments Eur. Court H.R., *Steck-Risch and others* v *Liechtenstein*, Judgment of 11 May 2010; Eur. Court H.R. (GC), *Verein Tierfabriken Schweiz (VgT)* v *Switzerland*, Judgment of 30 June 2009 available at www.hudoc.echr.coe.it.

[70] R.G. Conti, 'L'esecuzione delle sentenze della Corte EDU nei processi non penali dopo Corte cost. n. 123 del 2017' *Consulta online*, 333 (2017).

[71] Eur. Court H.R., *Perak* v *Slovenia*, Judgment of 1 March 2016, para 50, available at www.hudoc.echr.coe.int.

[72] Eur. Court H.R., *Tence* v *Slovenia*, Judgment of 31 May 2016, para 43: 'Moreover, while the Slovenian legislation does not explicitly provide for reopening of civil proceedings following a judgment by the Court finding a violation of the Convention (see *Bochan* v *Ukraine* (no 2) [GC], no 22251/08, para 27, ECHR 2015), the Court has already stated that the most appropriate form of redress in cases where it finds that an applicant has not had access to court in breach of Art 6 ,para 1, of the Convention would be for the legislature to provide for the possibility of reopening the proceedings and re-examining the case in keeping with all the requirements of a fair hearing (see, *mutatis mutandis*, *Kardoš* v *Croatia*, no 25782/11, Judgment of 26 April 2016, para 67; and *Perak* v *Slovenia*, Judgment of 1 March 2016, no 37903/09, para 50)'. The judgment is available at www.hudoc.echr.coe.int.

parties who were unable to participate in the judgments in Strasbourg.

In this respect, as noted above, in the *Bochan* ruling, the Grand Chamber urged States to find the most appropriate system to execute judgments of the Court by weighing up the principles of *res iudicata* and legal certainty with the legitimate expectations of the third parties involved in the trial.[73]

Not surprisingly in *Review*[74] of 12 May 2016 and in *Overview*[75] of 12 February 2016, it should be noted that for some States the interest of third parties, in civil and administrative proceedings, is a significant concern and a reason to refuse the reopening of trials. Additionally, according to some Member States, it should be provided that the ECtHR, where the possible reopening is in the interest of third-parties, invites the latter to participate in the trial under Art 36 of the ECHR.

The position of third parties is relevant at the level of internal balancing as their right of defence is constitutional (Art 24 of the Italian Constitution). Considering the position of the ECHR in the system of legal sources in the Italian legal system as a parameter interposed under the Constitution, the obligation to reopen the trial would be in sharp tension with Art 24 of the Italian Constitution whenever a person other than the appellant or the State has been involved in the civil or administrative proceedings. In these situations, it would not be possible for the conventional revocation obligation to set in.

To further confirm these arguments, the *Mottola and others* v *Italy* and *Staibano and others* v *Italy* rulings, despite having ascertained the double conventional violation (both substantive and procedural) by the Italian State, did not indicate the re-examination or reopening of the trial as a necessary, or

[73] In the same meaning the judgments: Eur. Court H.R., *Goryachkin* v *Russia*, Judgment of 15 November 2016, para 84; Eur. Court H.R., *Barkov and others* v *Russia*, Judgment, 19 July 2016, para 28; Eur. Court H.R., *Popov* v *Russia*, Judgment of 31 May 2016, para 44; Eur. Court H.R., *Gankin and others* v *Russia*, Judgment of 31 May 2016, para 50; Eur. Court H.R., *Yevdokimov and others* v *Russia*, Judgment of 16 February 2016, para 59.

At last in Eur. Court H.R., *Almeida Santos* v *Portugal*, Judgment of 27 July 2010, para 12 : '*La Cour estime d'emblée que la situation litigieuse, qui concernait une succession impliquant une tierce personne, ne se prête pas à une réouverture de la procédure d'inventaire incriminée*'. The judgment is available at www.hudoc.echr.coe.int.

[74] *Review of the implementation of Recommendation (2000) 2 of the Committee of Ministers to the Member States* n 40 above, para 17: 'It was underlined, in the first phase of the review, that when States have not given effect to the recommendation to allow for reopening of proceedings in the fields of civil and administrative law; major concerns expressed in this connection relate to the need for legal certainty and the need to protect the interests of good faith third parties'.

[75] *Overview of the exchange of views held at the 8th meeting of DH-GDR* n 41 above, 7: 'For a few States third-part interest was a real concern and could be ground for the refusal to reopen proceedings. The wish was expressed that information be gathered regarding the impact that the reopening of proceedings may have on third parties who have not had the opportunity to submit observations to the European Court. It was also suggested that it should really be envisaged that the European Court of Human Rights, in cases where a possible reopening may affect third parties, invite the parties to the proceedings in accordance with Art 36 of the Convention'.

even just adequate measure for the specific remedy.

The non-existence of a conventional obligation of *restitutio in integrum* which involves the overturning of *res iudicata* in civil and administrative matters, confirmed by the Constitutional Court itself,[76] has correctly determined the groundlessness of the question, since there is no conflict of the rules censored with the interposed parameter of Art 46, para 1, ECHR and, therefore, of Art 117, para 1, of the Italian Constitution.

3. Some Considerations of Comparative Law

The interpretative and systematic difficulties related to the topic under examination are demonstrated by the fragmentary nature of the regulations of other European States on the subject and by the consequent lack of consensus among the Council of Europe.

A quick analysis from a comparative perspective,[77] indeed shows that many States currently do not allow the revocation of civil and administrative judgments issued in violation of the Convention. The datum, moreover, has been duly taken into account by the Constitutional Court which in the judgment in question refers to the French, German and Spanish legal systems.

From the *Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision of domestic legal order for the re-examination or reopening of cases following judgments of the Court*[78] it appears that, as of 12 February 2016, twenty-three States[79] (out of a total of forty-seven) allowed the reopening of civil trials, and in one of them (Italy) the issue was taken into consideration (following the issue of constitutionality raised by the Council of State, negatively resolved by the judgment in question).

The *Overview* also notes that among the States where reopening is permitted,

[76] Corte costituzionale 10 July 2013 no 210, n 5 above.

[77] P. Passaglia, 'Gli effetti delle sentenze di condanna della Corte europea dei diritti dell'uomo sulle sentenze dei giudici nazionali passati in giudicato', available at https://tinyurl.com/yc3jrz7t (last visited 30 June 2018); P. Patrito, 'Revocazione – se sia ammissibile l'impugnativa per revocazione della sentenza del Consiglio di Stato per contrasto con decisione sopravvenuta della Corte EDU' *Giurisprudenza italiana*, 2710 (2015); J. Gerards- J. Fleuren, *Implementation of the European Convention on Human Rights and of the Judgments of the EctHR in National Case Law. A Comparative Analysis* (Cambridge: Intersentia, 2014); *Committee of experts on the reform of the Court (DH-GDR), Compilation of written contributions on the provision in the domestic legal order for re- examination or reopening of cases following judgments of the Court*, DH-GDR(2015)002, 21 May 2015, in *www.echr.coe.int*.

[78] *Overview of the exchange of views held at the 8th meeting of DH-GDR* n 41 above.

[79] Albania, Armenia, Bosnia and Herzegovina, Croatia, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Latvia, Lithuania, the Republic of Moldova, Norway, Portugal, Romania, Russian Federation, San Marino, Serbia, the Slovak Republic, Spain, Switzerland and Turkey. In Eur. Court H.R. (GC), *Bochan* v *Ukraine (no 2)*, Judgment of 5 February 2015, the Court noted that the number of States providing the remedy was twenty-two. The judgment is available at www.hudoc.echr.coe.int.

there are some who take a very cautious approach and consider the remedy to be rather exceptional.

Even the Grand Chamber, in the aforementioned judgment *Bochan* v *Ukraine*,[80] having to take due account of the eventual *consensus* in this regard, acknowledges that out of thirty-eight States surveyed, (as of 5 February 2015) the following sixteen Countries did not provide for the institute in question: Austria, Belgium, France, Greece, Hungary, Italy, Ireland, Liechtenstein, Luxembourg, Monaco, the Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom (England and Wales).

France, however, provided for re-examination in the civil field a year later.

While the *révision* of criminal trials was introduced with Law no 2000-516, which admitted *réexamen* of *décision pénale definitive,* if a breach of the Convention was ascertained by the Court of Strasbourg,[81] the re-examination of civil trials was introduced by Art 42 of *Loi no 2016 - 1547 du 18 November 2016 de modernisation de la justice du XXI siècle.*

Specifically, Art 42 in question provides for

> 'the right to seek the cancellation of civil judgments that affect the status of individuals in the event of a ruling against the State by the ECtHR

[80] Eur. Court H.R. (GC), *Bochan* v *Ukraine (no 2)*, Judgment of 5 February 2015. The judgment is available at www.hudoc.echr.coe.int.

[81] The Arti 622-1 of the *code de procédure pénale* states that '*le réexamen d'une décision pénale définitive peut être demandé au bénéfice de toute personne reconnue coupable d'une infraction lorsqu'il résulte d'un arrêt rendu par la Cour européenne des droits de l'homme que la condamnation a été prononcée en violation de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ou de ses protocoles additionnels, dès lors que, par sa nature et sa gravité, la violation constatée entraîne, pour le condamné, des conséquences dommageables auxquelles la satisfaction équitable accordée en application de l'article 41 de la convention précitée ne pourrait mettre un terme. Le réexamen peut être demandé dans un délai d'un an à compter de la décision de la Cour européenne des droits de l'homme. Le réexamen d'un pourvoi en cassation peut être demandé dans les mêmes conditions*' ('the re-examination of a final penal decision may be requested for the benefit of any person found guilty of an offense when it results from a judgment of the European Court of Human Rights that the sentence has been pronounced in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or its Additional Protocols, since, by its nature and gravity, the violation found causes, for the convicted person, damaging consequences to which the just satisfaction granted in application of Art 41 of the above-mentioned Convention could not put an end to. The review may be requested within one year of the decision of the European Court of Human Rights. The review of an appeal on points of law may be requested under the same conditions').

On this topic, see C. Pettiti, 'Le rèexamen d'une décision penale française après un arrêt de la Cour européenne des Droits de l'Homme : la loi française du 15 juin 2000' *Revue trimestrielle des droits de l'homme*, 3 (2001). Likewise, in Belgium, the *loi 1er avril 2007* introduced, to the arts 442-*bis* et seq of the *Code d'instruction criminelle*, the instrument of the *réouverture de la procédure penale* in the event of a supervised sentence by the ECtHR; A. Verheylesonne and O. Klees,'La loi Belge du 1er avril 2007 relative à la réouverture de la procédure penale à la suite d'un arrêt de condamnation de la Cour européenne des Droits de l'Homme' *Revue trimestrielle des droits de l'homme*, 773 (2008).

where, due to its nature and seriousness, the violation of the Convention has given rise to a loss that cannot be made good by just satisfaction'.[82]

At present, however, there is no legal provision that allows the administrative judgment to be overcome. The *Conseil d'Etat* denies the possibility of *reopening* administrative proceedings that have violated the Convention.[83] However, recently the *Conseil d'Etat* has admitted the possibility of reconsidering the legitimacy of a final administrative penalty when the European Court of Human Rights finds a violation of the Convention,[84] on the basis of a clear distinction between the administrative procedure and the administrative trial.[85]

In Germany,[86] instead, after a first solution provided by way of interpretation by the *Bundesverfassungsgericht*,[87] with the *Zweites Gesetz zur Modernisierung der Justiz - 2 Justizmodernisierungsgesetz* of 22 December 2016, the legislator added to classic cases of revocation of civil and administrative judgments, the one in which if the Court of Strasbourg has ruled that the ECHR or its protocols have been violated, the national decision should be based on this violation (§ 580, 8th para, *Zivilprozessordnung*).[88]

In Spain,[89] with the *Ley Orgánica* 7/2015 of 21 July 2015, following several attempts by the jurisprudence to use the special appeal procedures already

[82] Corte costituzionale 26 May 2017 no 123 n 1 above, para 16.

[83] Conseil d'Etat, 11 February 2004, *Chevrol*, no 257682: '*il ne résulte d'aucune stipulation de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et notamment de son article 46, non plus que d'aucune disposition de droit interne, que la décision du 13 février 2003 par laquelle la cour européenne des droits de l'homme a condamné la France puisse avoir pour effet de réouvrir la procédure juridictionnelle qui a été close par la décision du Conseil d'Etat du 9 avril 1999 et à l'issue de laquelle Mme X a saisi la cour européenne des droits de l'homme*' ('there is no stipulation in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in particular Art 46 thereof, nor any provision of domestic law that the decision of 13 February 2003 by which the European Court of Human Rights condemned France could have the effect of reopening the jurisdictional procedure which was closed by the decision of the Council of State of 9 April 1999 and after which Ms. X has seized the European court of human rights'); Conseil d'Etat, 4 October 2012, *Baumet*, no 328502.

[84] Conseil d'Etat, 30 July 2014, *Vernes*, no 358564.

[85] P. Patrito, 'Revocazione' n 77 above, 2710.

[86] E. Klein, 'Germany', in J. Gerards and J. Fleuren eds, *Implementation of the European Convention on Human Rights* n 77 above, 183 and 202.

[87] 2 BvR 1481/04, 14 October 2004, avalaible in English at http://www.bundesverfassungsgericht.de.

[88] Zivilprozessordnung para 580 Restitutionsklage '*Die Restitutionsklage findet statt: (...) 8. wenn der Europäische Gerichtshof für Menschenrechte eine Verletzung der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten oder ihrer Protokolle festgestellt hat und das Urteil auf dieser Verletzung beruht*' ('The restitution claim takes place: (...) 8. if the European Court of Human Rights has found a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or its Protocols and the judgment is based on this violation').

[89] C. Montesinos-Padilla, 'El recurso de revisión como cauce de ejecución de las sentencias del Tribunal de Estrasburgo: pasado, presente y futuro' *Eunomía. Revista en Cultura de la Legalidad*, X, 98-113 (2016).

present in the legal system extensively,[90] a revocation measure concerning all judgments in contrast with a final judgment of the Court of Strasbourg was introduced by legislative means.[91]

At present, however, only slightly more than half of the Member States of the Council of Europe have provided themselves with appropriate means to overcome judgments in civil or administrative matters, thus determining the lack of consensus on the issue. Therefore, it is likely that if shortly an increasing number of Countries adopt the re-examination procedure for civil or administrative matters, the ECtHR could re-interpret the Convention considering the introduction of re-examination an indefectible and necessary tool to implement its rulings in fields other than the criminal one.

The comparison between different European legal systems and the multiple solutions adopted show that the subject of the revocation of national judgments results particularly complex and it is, therefore, the task of the legislator to intervene by balancing the various interests involved. As a result, the decision of the Italian Constitutional Court appears to be correct. In a democratic society inspired by the principle of division of powers, it should be the legislator to intervene in such a delicate matter, establishing procedures, conditions and timing of a new possibility of re-examination of domestic judgments on civil or administrative issues for ascertained breach of the Convention, thus balancing the different values of constitutional importance at stake, including the right of defence of third parties.

It is possible, however, that the Constitutional Court, if it is again involved in the matter, may consider this form of re-examination with an interpretative approach, as was done in criminal cases[92] with judgment no 129 of 2008.[93] As explained above, with this last judgment the Constitutional Court, while declaring the non-substantiation of the issue of the constitutionality of Art 630, para 1,

[90] *Inter alia*, in criminal matter, Tribunal Constitucional, *Barberà, Messegué y Jabardo (or Bultò)*, Judgment of 16 December 1991 no 245.

[91] Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, Art 5-*bis*: '*Se podrá interponer recurso de revisión ante el Tribunal Supremo contra una resolución judicial firme, con arreglo a las normas procesales de cada orden jurisdiccional, cuando el Tribunal Europeo de Derechos Humanos haya declarado que dicha resolución ha sido dictada en violación de alguno de los derechos reconocidos en el Convenio Europeo para la Protección de los Derechos Humanos y Libertades Fundamentales y sus Protocolos, siempre que la violación, por su naturaleza y gravedad, entrañe efectos que persistan y no puedan cesar de ningún otro modo que no sea mediante esta revisión*' ('An appeal for review before the Supreme Court may be lodged against a final judicial decision, in accordance with the procedural rules of each jurisdictional order, when the European Court of Human Rights has declared that said decision has been issued in violation of any of the recognized rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, by its nature and seriousness, entails effects that persist and cannot cease in any way other than through this revision').

[92] Para 5 above.

[93] Corte costituzionale 30 April 2008 no 129, n 2 above.

sub *a*) of the Italian Code of Criminal Procedure, addressed an invitation to the legislator to adapt the Italian system to the canons of the Convention. Only when there was no follow-up to this invitation did the Court decide to intervene with judgment no 113 of 2011,[94] finally declaring the constitutional illegitimacy of Art 630 of the Italian Code of Criminal Procedure for breach of Art 117, para 1, of the Italian Constitution about Art 46, para 1, ECHR.

Moreover, legislative intervention seems necessary due to the increasing overlapping of the legal systems of national States with those of the Council of Europe and the European Union and the consequent multiplication of different legal levels in the supranational sphere.

This new constitutionalism and the consequent and constant debating between these legal systems inevitably require a rethinking of the categories of national legal systems not only under the aspect of substantive law but also under the point of the procedural law.

From the European Union Law, perspective, the Court of Justice has generally affirmed that the national final judgment in contrast with the EU Law must be preserved, in accordance with the autonomy reserved to the Member States in procedural and jurisdictional matters.[95] However, the 2007 ruling of the Grand Chamber *Lucchini* privileges the *primauté* of European Law concerning the certainty of national law, should the national judgment compromise a matter falling within the material scope of application of EU Law.[96]

In relation to the European Convention system aimed at the full protection of the human person, today the legislator is called upon to carry out a proper modification of the national system in order to guarantee the execution of the

[94] Corte costituzionale 7 April 2011 no 113, n 3 above.

[95] Case C-213/13 *Impresa Pizzarotti & C. SpA* v *Comune di Bari and Others*, [2014], available at http://curia.europa.eu, paras 54 et seq; Case C-2/*08 Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate* v *Fallimento Olimpiclub Srl*, [2009] ECR I-07501, para 24; Case C-126/97 *Eco Swiss China Time Ltd* v *Benetton International NV*, [1999] ECR I-03055; Case C-453/00 *Kühne & Heitz NV* v *Produktschap voor Pluimvee en Eieren*, [2004] ECR I-00837; Case C-2/06 *Willy Kempter KG* v *Hauptzollamt Hamburg-Jonas*, [2008] ECR I-00411. See, also, Case C-224/01, *Gerhard Köbler* v *Republik Österreich*, [2003] ECR I-10239; Case C-173/03, *Traghetti del Mediterraneo SpA* v *Repubblica italiana*, [2006] ECR I-05177. These last two judgments aimed at compensation for damages deriving from the national final judgment in contrast with the EU law, necessarily presupposed the formal maintenance of the prejudicial national sentence.

[96] Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato* v *Lucchini SpA*, [2007] ECR I-06199, where the Court concludes that: 'The answer to the questions referred must therefore be that Community law precludes the application of a provision of national law, such as Art 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final'. See, also, Case C-2/*08 Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate* v *Fallimento Olimpiclub Srl*, n 95 above; Case C-40/08 *Asturcom Telecomunicaciones SL* v *Cristina Rodríguez Nogueira*, [2009] ECR I-09579.

judgments of the Court of Strasbourg, a precious instrument to ensure the effectiveness of the so-called multilevel protection.[97] The ruling of the Constitutional Court, indeed, currently paralyses the internal effects of the ECtHR rulings in civil and administrative matters, actually reducing the content of Art 46, para 1, ECtHR. If, as underlined, it is true that at present the Convention does not require the Member State to reconsider *res iudicata*, it is also true that this represents an indefectible necessity, as proven by the recent proposal for a European review of subjects other than the criminal law in the main European legal systems.

Moreover, unless the legislator intervenes in the Italian legal system there will be a protection vacuum: the judges who will have to resolve a new contrast between the administrative judges and the European judges, being without any specific indications from the Court, will again have to raise the question of constitutional legitimacy.

We, therefore, hope that the Italian Constitutional Court ruling no 123 of 2017 is an invitation that the Italian legislator should seize as soon as possible in order to ensure citizens the effective protection guaranteed by the European Convention and, more generally, by the new multilevel constitutionalism.

[97] P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale*, (Napoli: Edizioni Scientifiche Italiane, 2008), 11; M. Cartabia, 'The Multilevel Protection of Fundamental Rights in Europe: The European Pluralism and the Need for a Judicial Dialogue', in C. Casonato ed, *The Protection of Fundamental Rights in Europe: Lessons from Canada* (Trento: Quaderni dipartimenti scienze giuridiche, 2004); Id, 'La tutela multilivello dei diritti fondamentali – il cammino della giurisprudenza costituzionale italiana dopo l'entrata in vigore del Trattato di Lisbona', available at https://tinyurl.com/yangc6wg (last visited 30 June 2018); A. Barbera, 'Le tra Corti e la tutela multilivello dei diritti', in P. Bilancia and E. De Marco eds, *La tutela multilivello dei diritti. Punti di crisi, problemi aperti, momenti di stabilizzazione* (Milano: Giuffrè, 2004), 89; I. Pernice, 'Multilevel Costituzionalism in the European Union' 27 *European Law Review*, 511 (2002); S.P. Panunzio, *I diritti fondamentali e le Corti in Europa* (Napoli: Jovene, 2005), 5; F. Sorrentino, 'La tutela multilivello dei diritti' *Rivista Italiana di Diritto Pubblico Comunitario*, 79 (2005).