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Case Notes



A (Not Always) Difficult Balance between Legal Certainty and Legality: The Effects of CJEU and ECtHR Case Law on National *Res Judicata*

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Abstract

This note examines a recent judgment of the *Corte di Cassazione*, in which the Court rejected an opposition against the enforcement of a final judgment that was purportedly irreconcilable with later rulings of the Court of Justice of the European Union (“CJEU”) and the European Court of Human Rights (“ECtHR”) on very similar cases. The impact of judgments rendered by international tribunals on domestic procedural rules concerning *res judicata* often raises complex issues. This is mainly due to the difficult balance between the principle of legal certainty on one hand, and the principles of legality and effectiveness of European Union (“EU”) law and the human rights protection system, on the other. Nonetheless, in the case under review, the rules and principles developed through the years by the CJEU and the Italian *Corte Costituzionale*, that will be analysed in this note, provided clear guidance to the *Corte di Cassazione*.

Keywords

res judicata – *res interpretata* – legal certainty – legality – effectiveness of EU law – CJEU preliminary rulings – ECHR

Abstract of the Decision

In its judgment no. 15102/2022, the *Corte di Cassazione* was called upon to consider the effects of the case law of the CJEU and the ECtHR on national *res judicata*.

The facts of the case leading to the decision may be summarized as follows. The claimant was an administrative, technical and auxiliary (“ATA”) employee of the Province of Milan, working in a state school in Italy. Following the enactment of Law No. 124/1999, all ATA employees who were working in state schools and employed by regional or local authorities came under the direction of the Ministry of Education. Accordingly, the claimant was transferred to the list of state ATA employees. As a result of that transfer, the ATA employee claimed that his full length of service had not been recognized and that he had suffered a substantial loss of salary. He therefore sought damages from the Ministry of Education. The claim was successful at the first two levels of judgment, but in a final appeal before the *Corte di Cassazione*, the appellate court decision was quashed on the basis of Law No. 266/2005, adopted in the meantime, that included a provision of “authentic interpretation” of Law No. 124/1999. Law No. 266/2005 stated that ATA employees who had been transferred to the Ministry of Education were not entitled to any compensation for non-recognition of their seniority. The *Corte di Cassazione* could only reject the claim and order restitution of the amounts that the Ministry of Education had already paid in execution of the judgments rendered by the lower courts.

The claimant opposed enforcement of the decision of the *Corte di Cassazione*, arguing that it had been superseded by subsequent case law on analogous cases decided by the CJEU and the ECtHR: case law that reflected legal principles in conflict with those underlying the judgment at hand. Specifically, in the *Scattolon* case, the CJEU held that the takeover by the Ministry of Education of ATA workers employed by local authorities constituted a transfer within the meaning of Council Directive No. 77/187/EEC, Article 3 of which precluded any loss of salary of transferred employees arising from failure to recognize a length of service equivalent to that completed with their former employer.¹

¹ Case C-108/10, *Scattolon*, 2011, paras. 66 and 83.

In a different fashion, in the case *Agrati et al. v. Italy*, the ECtHR found that the provision of “authentic interpretation” of Law no. 124/1999, on which the decision of the *Corte di Cassazione* was based, constituted undue interference of the legislative power, aimed at influencing the judicial outcome of pending disputes, and that it amounted to a violation of the rule of law and the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights (“ECHR”).² The Strasbourg Court also found that by preventing recognition of the full seniority of service of the applicants in calculating their remuneration, the retroactive effect of that provision amounted to a violation of their right to property under Article 1 of Additional Protocol no. 1 to the ECHR.

The court of first instance allowed the ATA employee’s opposition to the enforcement proceedings, but the judgment was later overturned by the court of appeal. In the decision under review, the *Corte di Cassazione* eventually reaffirmed the appellate court’s judgment. The court held that its first decision, which denied the claim against the Ministry of Education, was *res judicata*. As such, the decision could not be affected by subsequent case law of the CJEU and ECtHR. Besides the fact that in the view of the *Corte di Cassazione*, the relevance of the decisions of these supranational courts was far from being proved in the case under scrutiny, the procedural rules concerning *res judicata* could not be disapplied in order to conform to the interpretation of any relevant provisions of EU law provided by the CJEU, nor in order to comply with the judgments of the ECtHR.

Key Passages from the Ruling

(Paragraph 8). The relationship between national procedural rules on *res judicata* and EU law has already been examined by this Court, on the basis of the principles affirmed by the CJEU.

(Paragraph 9). In several decisions, the CJEU has pointed out that:

- where the applicable domestic procedural rules provide the possibility, under certain conditions, for a national court to go back on a judgment with *res judicata* authority in order to make the situation compatible with domestic law, that possibility must be exercised – in accordance with the principles of equivalence and effectiveness and provided that those conditions are met – in order to remedy a domestic situation which is incompatible with EU law;

² *Agrati et al. v. Italy*, Application Nos. 43549/08, 6107/09 and 5087/09, Judgment of 28 November 2011, paras. 58–66 and 73–85.

- otherwise, EU law does not require a national court to go back on its own judgments that have become final, in order to take into account the interpretation of a relevant provision of EU law adopted by the CJEU.

(Paragraph 10). In this regard, the CJEU has stressed the importance of the principle of *res judicata* in both the legal order of the European Union and in national legal systems. In order to ensure the stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions, which have become final after all rights of appeal have been exercised or after expiry of the time-limits for appeal, can no longer be called into question. EU law therefore does not require a national court to disapply domestic procedural rules that make a judgment final, even if to do so would make it possible to remedy an infringement of a provision of EU law, regardless of its nature.

(Paragraph 17). [...] in case of conflict between domestic law and the ECHR which cannot be solved by interpretation, [Italian] national courts cannot simply disapply domestic law; rather, they must refer the question of compatibility of the domestic provision at issue with Article 117 of the Italian Constitution in relation to the ECHR provision to the Constitutional Court. Moreover, even if the Constitutional Court declares the domestic provision unconstitutional, this does not affect judgments that are already final, by virtue of the principle that a declaration of unconstitutionality, albeit retroactive, does not affect legal relationships that have already been settled.

(Paragraph 18). On the other hand, the extraordinary legal remedies against court decisions envisaged by the [Italian] code of civil procedure do not contemplate the possibility that a decision of the European Court of Human Rights affect the authority of *res judicata* of domestic judgments.

Comment

Preliminary Remarks

The judgment under review concerns the impact of CJEU and ECtHR decisions on national *res judicata*. The issue is not new to Italian case law. Italian courts have often been called upon to assess the effects of judgments rendered by international or supranational tribunals on the domestic legal system and specifically on domestic provisions that make national judgments final and binding.

The principle of *res judicata* is of paramount importance in every legal system based on the rule of law. By ensuring the finality of court decisions, it

serves the public and private interest in procedural efficiency and legal certainty.³ The effects of *res judicata* are two-fold: the principle prevents re-litigation of disputes already decided (preclusive/negative effects of *res judicata*), and the parties must abide by the decision and can rely on it if the same claims or issues arise as incidental arguments in subsequent proceedings (conclusive/positive effects of *res judicata*). In the Italian legal system, the rules on *res judicata* are enshrined in Article 2909 of the Civil Code ("*giudicato sostanziale*") and Article 324 of the Code of Civil Procedure ("*giudicato formale*"). Under these provisions, a decision that is no longer subject to ordinary appeal is final and binding on the parties.

However, complications may arise if an international or supranational court issues a decision that is in some way irreconcilable with a national judgment that has already acquired the authority of *res judicata*. While pertaining to a different legal order, judgments rendered by international or supranational courts can have effects on the internal legal order.⁴ The question is whether and to what extent such effects can limit the operation of domestic procedural rules that make judgments issued by national courts final.

The Effects of CJEU Preliminary Rulings on National Res Judicata in Italy

In the case dealt with by the *Corte di Cassazione*, the claimant opposed enforcement of a national judgment that had already acquired the authority of *res judicata*, arguing that the reasoning on which the latter was based had been superseded by a later CJEU preliminary ruling on a very similar case. The issue therefore touches on the effects of preliminary rulings of the CJEU on national procedural rules on *res judicata*. Put differently, it revolves around the balance between the principles of supremacy and legality of EU law on one hand and the principles of procedural autonomy of Member States and legal certainty on the other.⁵

3 For a comparative overview of the different approaches to *res judicata*, see ZEUNER and KOCH, "Effects of Judgments", in CAPPELLETTI (ed.), *International Encyclopedia of Comparative Law – Vol. XVI (Civil Procedure)*, Leiden, 2012, p. 23 ff.; CHAINAIS, "L'autorité de la chose jugée en procédure civile: perspectives de droit comparé", *Revue de l'Arbitrage*, 2016, p. 3 ff.

4 See, on the topic, PALOMBINO, *Gli effetti della sentenza internazionale nei giudizi interni*, Napoli, 2008; CATALDI, "La mise en œuvre des décisions des tribunaux internationaux dans l'ordre interne", *RCADI*, Vol. 386, 2017-V, p. 371 ff.

5 See, GROUSSOT and MINNSEN, "Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?", *European Constitutional Law Review*, 2007, p. 385 ff.; TURMO, "National *Res Judicata* in the European Union: Revisiting the Tension Between the Temptation of Effectiveness and the Acknowledgment of Domestic Procedural Law", *Common Market Law Review*, 2021, p. 361 ff.

Although not expressly envisaged by the Treaties, it is generally acknowledged that preliminary rulings are final and binding. They are final in the sense that they determine the content of EU law with no room for appeal by the referring court, and they are binding on that court for the purposes of the decision to be given in the main proceedings.⁶ Failure to abide by CJEU rulings is a breach of EU law, and if the domestic decision is not reversed by a higher court, it may trigger State liability⁷ as well as infringement action under Article 258 of the Treaty on the Functioning of the European Union (“TFEU”).⁸ Preliminary rulings are also applicable in proceedings other than those that gave rise to the corresponding referral to the CJEU. Indeed, with regard to their declaratory nature, aimed at determining the content of EU law and at ensuring its uniform interpretation, such rulings are in a sense binding on all courts of EU Member States. When confronted with a legal issue analogous to one already determined by an earlier preliminary ruling, national judges must base their decision on the answer provided by the CJEU, unless they consider appropriate to make a new preliminary reference, requesting the CJEU to reconsider its previous ruling.⁹ Also in this case, failure to comply with CJEU case law constitutes an infringement of EU law and may result in State liability.¹⁰

It is quite uncommon for CJEU preliminary rulings to come into direct conflict with domestic rules on *res judicata* applicable to the main proceedings. Indeed, national proceedings must be suspended until the CJEU has rendered

6 According to well-established case law, albeit the referring court is not precluded from making a new referral to the CJEU when it encounters difficulties in understanding or applying the preliminary ruling, or if it considers appropriate to submit a fresh question of law to the Court, it cannot challenge the validity of an earlier decision. See Case C-466/00, *Kaba*, 2003, para. 39; Case C-14/86, *Pretore di Salò*, 1987, para. 12; Case C-69/85, *Wünsche*, 1986, para. 15; Case C-29/68, *Milch-Fett- und Eierkontor*, 1969, para. 3. It should be noted, however, that CJEU preliminary rulings do not have authority of *res judicata* in the proper sense, as the Court can reconsider its previous rulings if the same issue arises in different domestic proceedings (and is referred to the CJEU), see D’ALESSANDRO, *Il procedimento pregiudiziale interpretativo dinanzi alla Corte di giustizia*, Torino, 2012, pp. 245–255. See also PALOMBINO, *cit. supra* note 4, p. 31.

7 Provided, of course, that all other conditions for State liability are met, see Joined cases C-6/90 and C-9/90, *Francovich*, 1991, paras. 38–46 and, more generally on this point, FUMAGALLI, *La responsabilità degli Stati per la violazione del diritto comunitario*, Milano, 2000, pp. 243–270.

8 As it was the case when the German Federal Constitutional Court refused to abide by the CJEU ruling in Case C-493/17, *Weiss et al.* See, also, CONDINANZI and MASTROIANNI, *Il contenzioso dell’Unione europea*, Torino, 2009, p. 231.

9 See, among the others, Case C-429/09, *Günter Fuß*, 2010, para. 58.

10 Case C-34/19, *Telecom Italia*, 2020, para. 69; C-224/01, *Köbler*, 2003, para. 56; WATTEL, “Köbler, Cilfit and Wealthe Grove: we can’t go on meeting like this”, *Common Market Law Review*, 2004, p. 177 ff.

its decision. At that stage therefore, the actual case in dispute has not yet been decided, or if already decided by a lower court and referred to the CJEU by an appellate court, the decision has not yet become *res judicata*. Nonetheless, in two different scenarios, the obligation of Member States' courts to observe and apply CJEU rulings may come into tension with the national procedural rules that make domestic decisions final. First, the legal issue referred to the CJEU may specifically concern the interaction between an EU provision and national rules on *res judicata*. Second, the ruling of the CJEU may be irreconcilable with previous national judgments that were based on a different understanding of EU law, and that had already become final and binding by the time the court rendered its decision.¹¹

When confronted with such cases, the CJEU has consistently acknowledged "the importance of the principle of *res judicata* in both the legal order of the European Union and in national legal systems", observing that as a rule, "EU law does not require a national court to disapply its domestic procedural rules that confer finality on judicial decisions".¹² Nonetheless, according to the CJEU, the inviolability of national *res judicata* is subject to the principles of effectiveness and equivalence. With reference to the principle of effectiveness, the CJEU has held that national procedural rules on *res judicata* cannot make the application of EU law impossible or excessively difficult.¹³ In line with this approach, the CJEU has found that EU law precludes application of national rules on *res judicata* (or a particular interpretation of the latter) if they would: prevent the recovery of State aid granted in violation of the Treaties and that the Commission considered incompatible with the Common Market;¹⁴ prevent

11 As a matter of fact, according to a well-established case law, CJEU preliminary rulings have effect *ex tunc* – i.e. from the time of entry into force of the respective EU law provisions – and they apply also to legal relationships that have been settled before the decision of the Court. See, among the others, Case C-492/16, *Incyte Corp.*, 2017, para. 41; Case C-76/14, *Manea*, 2015, para. 53; Case C-402/03, *Skov Æg*, 2006, para. 50; Case C-453/00, *Kühne & Heintz*, 2004, para. 21; Case C-24/86, *Blaizot*, 1988, para. 27; Case C-61/79, *Amministrazione delle finanze dello Stato*, 1980, para. 16.

12 See, among the others, *Telecom Italia* case, *cit. supra* note 10, paras. 64–65; Joined cases C-154/15, C-307/15 and C-308/17, *Naranjo*, 2016, para. 68; Case C-213/13, *Impresa Pizzarotti*, 2014, para. 58; Case C-40/08, *Asturcom Telecomunicaciones*, 2009, para. 35; Case C-2/08, *Fallimento Olimpiclub*, 2009, para. 22; Case C-234/04, *Kapferer*, 2006, para. 20; *Kühne & Heintz* case, *cit. supra* note 11, para. 24; *Köbler* case, *cit. supra* note 10, para. 38; Case C-126/97, *Eco Swiss*, 1999, para. 47.

13 See, among the others, *Telecom Italia* case, *cit. supra* note 10, para. 58; Case C-676/17, *Călin*, 2019, para. 42; Case C-234/17, *xc et al.*, 2018, para. 49; *Fallimento Olimpiclub* case, *cit. supra* note 12, para. 24.

14 See Case C-119/05, *Lucchini*, 2007, paras. 59–62. The case led to many comments and debates in legal scholarship, see among the others, BŘÍZA, "Lucchini SpA – is there anything left of *res judicata* principle?", *Civil Justice Quarterly*, 2008, p. 40 ff.; TIZZANO

a national court from calling into question a finding on a fundamental issue, contained in the judicial decision of a different albeit related case, in order to correct an erroneous interpretation of EU law;¹⁵ or deprive a consumer of effective judicial protection, precluding any action against unfair contractual terms.¹⁶ With respect to the principle of equivalence, the CJEU has instead observed that as a rule, the temporal effect of preliminary rulings does not prevent the application of national procedural provisions on *res judicata* to judgments that have already become final and binding by the time the court renders its decision.¹⁷ If the infringement of EU law only becomes apparent *a posteriori*, the CJEU considers that review of such a decision is only required if permitted by the relevant procedural rules, in case of infringements of national law. Indeed, under the principle of equivalence, “procedural rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions”.¹⁸

It is therefore important to draw a clear distinction between two scenarios: on one hand, cases in which the CJEU is asked specifically to interpret an EU provision and to assess whether its application is made impossible or excessively difficult by national procedural rules on *res judicata*; on the other hand, cases in which the interpretation of such provisions in a preliminary ruling might also have been relevant for the decision of earlier disputes, that have nonetheless come to an end. In the first scenario, albeit adopting a cautious approach, the CJEU has not refrained from ruling out the applicability of procedural rules on *res judicata* when the effects would have greatly limited the effectiveness of EU law. In the second scenario, in line with the principle of equivalence, the CJEU has clearly indicated that mistakes in the application of EU law can only be remedied if the relevant procedural rules so permit in the analogous case of infringements of national law; otherwise, the principle of legal certainty and stability of the law prevents final decisions from being called into question, even if the result reached by the national court is incompatible with EU law.

and GENCARELLI, “Union Law and Final Decisions of National Courts in the Recent Case Law of the Court of Justice”, in ARNULL et al. (eds.), *A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood*, Oxford, 2011, p. 267 ff.

15 See *Fallimento Olimpiclub* case, *cit. supra* note 12, paras. 29–32.

16 See Case C-600/19, *Ibercaja Banco*, 2022; Joined cases C-639/19 and C-831/19, *SPV Project 1503*, 2022; Case C-725/19, *Impuls Leasing România*, 2022; Case C-869/19, *Unicaja Banco*, 2022.

17 See *Impresa Pizzarotti* case, *cit. supra* note 12, para. 60.

18 See *Călin* case, *cit. supra* note 13, paras. 30 and 34–35; *XC et al.* case, *cit. supra* note 13, para. 25.

The case dealt with by the *Corte di Cassazione* in the decision considered here aligns squarely with this second scenario. In the absence of a judicial remedy that would allow the review of final judgments based on an erroneous understanding of the law (be it domestic or EU law), rendered by the court of last resort, the *Corte di Cassazione* was therefore right in denying the case of the claimant.

The Effects of ECtHR Case Law on National Res Judicata in Italy

In the present case, the claimant also contended that the Ministry of Education should have refrained from enforcing the final judgment of the *Corte di Cassazione*, as it was based on application of a law that had been found to violate the ECHR in a different, albeit analogous, case. This second argument therefore concerns the effects of decisions rendered by the Strasbourg Court on national legal systems – a topic that has been thoroughly investigated by Italian legal scholars¹⁹ – and their impact on the procedural rules that make domestic judgments final.

In that regard, it is necessary to distinguish between the effects of *res judicata* and the effects of *res interpretata* of such decisions.²⁰ As regards the former, it is undisputed that judgments issued by the ECtHR are binding on the parties, i.e. the applicant(s) and the State that took part in the proceedings. In particular, under Article 46 ECHR, States shall “abide by the final judgment of the Court in any case to which they are parties”. If the ECtHR decides on the

19 See, among the others, LUZZATTO, “La Corte europea dei diritti dell’uomo e la riparazione delle violazioni della Convenzione”, in *Studi in onore di Manlio Udina*, Milano, 1975, p. 423 ff.; PIRRONE, *L’obbligo di conformarsi alle sentenze della Corte europea dei diritti dell’uomo*, Milano, 2004; PALOMBINO, *cit. supra* note 4; CANNIZZARO, “Tutela dei diritti dell’uomo e rapporti fra fonti internazionali e ordinamento interno”, *Rivista italiana per le scienze giuridiche*, 2010, p. 183 ff.; CATALDI, “La natura self-executing delle norme della Convenzione europea dei diritti umani e l’applicazione delle sentenze della Corte europea negli ordinamenti nazionali”, in CALIGIURI, NAPOLETANO and CATALDI (eds.), *La tutela dei diritti umani in Europa*, Padova, 2010, p. 565 ff.; ID., “La mise en œuvre des décisions des tribunaux internationaux dans l’ordre interne”, *cit. supra* note 4, p. 371–415; CALIGIURI and NAPOLETANO, “The application of the ECHR in the domestic systems”, *Italian Yearbook of International Law*, 2010, p. 125 ff.; DONATI, “Il rilievo delle sentenze della Corte europea dei diritti dell’uomo nell’ordinamento interno: problemi e possibili soluzioni”, *Osservatorio sulle fonti*, 2018/1, p. 1 ff.; ROSSI, “L’interpretazione conforme alla giurisprudenza della Corte EDU: quale vincolo per il giudice italiano”, *Osservatorio sulle fonti*, 2018/1, p. 1 ff.; PADELLETTI, “L’efficacia delle sentenze della Corte europea dei diritti dell’uomo tra valori e formalismi”, in ANNONI, FORLATI and FRANZINA, *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno*, Napoli, 2021, p. 411 ff.

20 See CATALDI, *cit. supra* note 4, pp. 377–385.

merits of the application and determines that there has been a violation of the ECHR, the State responsible shall cease the conduct judged incompatible with Convention rights, remove all consequences of that violation, and take all appropriate measures to ensure that the same violation will not occur again in the future. With respect to the obligation to redress the effects of the violation, Article 41 ECHR specifically provides that where the internal law of the State “allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”.²¹

As regards the effects of *res interpretata*, decisions rendered by the ECtHR play an important role in determining the content and scope of the ECHR. In particular, the Italian *Corte Costituzionale* has recognized the binding interpretative value of established ECtHR case law and of principles enshrined in the so-called “pilot judgments”.²² Domestic courts called to apply these rules shall therefore consider (and are bound by) the interpretation of the relevant provisions provided by the ECtHR. Should a domestic provision be in apparent contrast with the ECHR – i.e. it cannot be reconciled with the interpretation of the relevant Convention rights provided by the ECtHR – the national judge shall raise a question of constitutional legitimacy, leaving the task of determining whether and to what extent the relevant national provision shall be set aside to the *Corte Costituzionale*. On the contrary, common judges cannot directly disapply national laws that they deem to be in contrast with the ECHR or with the relevant interpretation of the same provided by the ECtHR.

21 The payment of the sums awarded under Art. 41 ECHR, however, does not exclude the obligation to put an end to the violation and to remove, as far as possible, its negative effects, see *Sejdovic v. Italy*, Application No. 56581/00, Judgment of 1 March 2006, para. 119.

22 The current approach of Italian courts to the effects of ECtHR case law in the internal legal order is set out in *Corte Costituzionale*, Judgment of 26 March 2015, No. 49, that stands at the end (so far) of a complex evolution of the constitutional case law on the topic, started in 2007 with the so-called “twin judgments” (*Corte Costituzionale*, Judgment of 24 October 2007, No. 348 and *Corte Costituzionale*, Judgment of 24 October 2007, No. 349). As known, in the Italian legal system, international treaties (including the ECHR) have an intermediate position in the hierarchy of legal sources. Art. 117 para. 1 of the Italian Constitution provides that the State and the Regions shall respect the obligations arising from international law in the exercise of their legislative powers. Consequently, albeit not vested with constitutional rank, domestic laws that implement international treaties have a particular force of resistance against subsequent ordinary laws. In particular, international treaties represent the standard of review to assess the constitutionality of the ordinary law provisions, pursuant to Art. 117 para. 1 of the Italian Constitution, see CATALDI and IOVANE, “International Law in Italian Courts 1999–2009: an Overview of Major Methodological and Substantive Issues”, *The Italian Yearbook of International Law Online*, 2009, p. 3 ff., pp. 19–20. With regard to the ECHR, the *Corte Costituzionale* has indicated that such standard of review is not just the rule of the Convention in itself, but rather the respective provision as construed by the ECtHR in its (established) case law.

ECtHR decisions may easily come into (direct) conflict with national procedural rules that make domestic judgments final. Indeed, Article 35 ECHR limits admissibility of applications to the ECtHR to cases for which no further internal remedies are available: this implies that the violation of the Convention is generally “enshrined” in a national judgement that is final and binding for the parties (otherwise, lacking the finality of the domestic decision, the application to the ECtHR shall be ruled inadmissible). The obligation to abide by the decisions of the Strasbourg Court may therefore theoretically involve setting aside procedural rules on *res judicata* and allowing reopening of national proceedings. However, in 2017 the Italian *Corte Costituzionale* declared groundless the question of constitutional legitimacy of the domestic procedural rules (Articles 395 and 396 of the Code of Civil Procedure) that prevent review of civil and administrative judgments that violate the ECHR,²³ observing that there is no provision in the Convention that expressly requires States to reopen proceedings in order to comply with the decisions of the ECtHR.²⁴ If the reopening of proceedings is not available in case of civil decisions expressly declared in contrast with the ECHR, it is even truer for similar cases never

23 *Corte Costituzionale*, Judgment of 26 May 2017, No. 123. The principles set out in this ruling have been reaffirmed by the same Court in its decision of 27 April 2018, No. 93.

24 Nor does such an obligation seem to derive, according to the *Corte Costituzionale*, from the established case law of the Strasbourg Court, since “the assertion that proceedings must be reopened, in order to ensure the *restitutio in integrum*, is only present in judgments rendered against States whose internal legal systems already provide for a mechanism of revision of judgments that have become final and binding, in the event of a violation of the Convention rights”. Notably, a mechanism of review of civil decisions that have been declared in contrast with the ECHR has been recently introduced by Legislative Decree no. 149/2022 at Art. 391-*quater* of the code of civil procedure, see GRASSI, “Revocazione della sentenza civile per contrasto con la Convenzione europea per la salvaguardia dei diritti dell’uomo e delle libertà fondamentali”, *Rivista di diritto internazionale privato e processuale*, 2022, p. 919 ff. The *Corte Costituzionale* also emphasized the structural differences, for the purpose of the enforcement of ECtHR’s judgments, between civil proceedings and criminal proceedings (as a matter of fact, in 2011 the Court had declared that Art. 630 of the Code of Criminal Procedure was unconstitutional in so far as it did not allow the review of a judgment of conviction, when that was necessary to comply with a decision of the ECtHR). While, as a rule, the latter involve exclusively the same parties to the proceedings before the ECtHR (i.e. the State and the individual/applicant to the Strasbourg Court), civil proceedings normally involve also third parties, who have not necessarily taken part in the proceedings before the ECtHR. The re-opening of non-criminal proceedings, would, therefore require a delicate balance of the right of action of the interested parties and the right to a defence of third parties. For a critical analysis of the approach of the *Corte Costituzionale*, see MAURI, “Il «mito» del giudicato civile e amministrativo alla prova degli obblighi internazionali di *restitutio in integrum*”, *Diritti umani e diritto internazionale*, 2019, p. 487 ff.

brought before the ECtHR. Indeed, the *Corte Costituzionale* observed that there is a fundamental difference between parties who submit an application to the ECtHR after exhausting all possibilities of internal redress, and those who fail to exercise this right. As already mentioned, in proceedings other than those from which the application to the ECtHR originated, the rulings of the latter do not have a binding (*res judicata*) effect, but may at most be relevant insofar as they amount to *res interpretata*. Nonetheless, the hermeneutical constraint of established ECtHR case law only applies at the stage of application of the relevant provisions, i.e. in the phase preceding formulation of the judgment. This implies that subsequent changes (or clarifications) in the case law regarding the scope and content of Convention rights do not call into question domestic decisions that are already considered final under Italian law.

This was exactly the case in the judgment under review. The claimant did not participate in the proceedings before the ECtHR, and by the time the Strasbourg Court rendered its decision, the judgment handed down at the end of the proceedings to which he was party had already acquired the authority of *res judicata*. As such, there was no possibility of reopening the proceedings, and even if there had been, the judge could have not disappplied the domestic provision that was declared in breach of the Convention, but they could have only raised a question of constitutional legitimacy with the *Corte Costituzionale*.

Concluding Remarks

Although the impact of judgments by international or supranational courts on domestic procedural rules concerning *res judicata* often raises complex issues, this is not always the case, and the ruling considered here is a good example of this. In its decision, the *Corte di Cassazione* correctly applied the rules and principles developed over the years by the CJEU and the Italian *Corte Costituzionale*. The importance of the present judgment mainly lies in the fact that the Court was confronted with the effects of both CJEU and ECtHR case law on the same judgment. Although the rulings of these Courts may also have an impact on other proceedings besides those that gave rise to the corresponding referrals or applications, their effects are mainly limited to the persuasive (or binding) authority on the correct interpretation of the relevant provisions. As such, in the absence of a procedural mechanism allowing the review of final judgments to correct any mistakes in the application of EU law or ECHR provisions, they cannot affect the authority of *res judicata* of domestic decisions.