Res Judicata Principle in the Case Law of International and Lithuanian Courts

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Abstract: *Res judicata* is a general principle of law recognized in all legal systems and based on legal certainty. However, recognition of universal character of this legal principle does not resolve the problem of finality of a judgment rendered on national level when this judgment contradicts the European Convention on Human Rights (ECHR) or EU law. A similar problem arises in situations where final national judicial decisions contradict posterior judgments of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). In public international law, the authority of *res judicata* of a judgment of national court does not prevent international courts from holding that this judgment contradicts international obligations of a State and thus entails international liability. The case law of the ECtHR and the CJEU shows that grounds for reopening of national proceedings is a matter of domestic law. There is also no general rule which would require reopening of national proceedings in order to put judicial decisions in line with the judgments of the ECtHR and the CJEU. Nevertheless, the *res judicata* principle is not absolute and cannot serve as an excuse for non-respect of human rights. Higher courts' powers to quash or alter binding and enforceable judicial decisions should be exercised for the purpose of correcting violation of human rights. In EU law, the principles of sincere cooperation, equivalence and effectiveness may require to review a final decision of national court incompatible with the Charter of Fundamental Rights or, in general, with the directly applicable EU rules. In conformity with supremacy of EU law, the authority of *res judicata* of national judicial decisions must be reviewed on the basis of principle of legality and rule of law. This should prevail over traditional recourse to legal certainty of a final judgment.

Keywords: *Res judicata – General principles of law – Sources of international law – International Court of Justice – European Convention on Human Rights – European Court of Human Rights – Exhaustion of local remedies – EU law – Principle of legal certainty – Principle of legality – Lis pendens – Court of Justice of the European Union – Supreme Administrative Court of Lithuania – Supreme Court of Lithuania*

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DOI: https://doi.org/10.15388/EULLAJ.2023.6

Introduction

Res judicata principle is inherent in the concept of the rule of law and has constitutional meaning. Article 6 of the Constitution declares that everyone may defend his rights by invoking the Constitution. According to Article 30 of the Constitution, the person whose constitutional rights or freedoms are violated shall have the right to apply to court. This right is not absolute and its scope may be regulated by laws of the country respecting the rule of law. It must be emphasized that only a legal court decision can be final and have the *res judicata* effect (the force of a final decision). Therefore, the legality of the court decision and the *res judicata* legal effect of the decision should be assessed on the basis of whether the decision is in line with the peremptory constitutional, international rules, and EU rules of law.

Res judicata is a general principle of law, source of law, widely applied by Lithuanian courts. In its decision of 30 October 2020, the Constitutional Court noted that "The Supreme Court of Lithuania, interpreting the institution of reopening of the proceedings, *inter alia*, with regard to the case law of the European Court of Human Rights, has indicated that, following the principle of legal certainty, requests for reopening of the proceedings must be limited in time, and an enforced court decision with a *res judicata* effect may be reviewed only if there are grounds for reopening of the proceedings and if these grounds are applied more than merely formally; legal regulation, where a process carries the risk of multiple reviews of an effective decision, is incompatible with the principle of legal certainty, therefore, law does not entitle parties to the proceedings to reopen the proceedings simply with the aim of repeated adjudication of the case; according to the principle of legal certainty, after the court renders a final judgment in a dispute, its decision should not be called into question, in this manner ensuring the stability of the relationship; deviation from this principle is only possible in the event of major errors to be corrected, in the presence of important and compelling circumstances (see the ruling of 8 June 2012 in civil case No. 3K-3-276/2012)."

Article 62 of the Law on the Constitutional Court establishes that a ruling, conclusion, and decision of the Constitutional Court can be reviewed on the initiative of the Constitutional Court itself if new material circumstances arose, which, if the Constitutional Court had been aware of them at the time the ruling, conclusion or decision was given, would have given a ground for a different content of the ruling, conclusion or decision. The Constitutional Court has powers to review its rulings, conclusions, decisions where they were given the Constitutional Court being unaware of such material circumstances, which, if had been known, would have been able to result in a different content of the rulings, conclusions or decisions given (ruling of 28 March 2006, decisions of 8 August 2006, 20 November 2009).

1. *Res judicata* as a general principle of law

Res judicata principle is a general principle of law recognised by almost all national legal systems, international law, and the European Union law. *Res judicata* (*res iudicata*) rule is said to originate from the Roman civil law. *Expedit rei publicae ut sit finis litium* – it is for the public good that there be an end of litigation. A prohibition of annulment of a taken court decision is a rule entered in the Code of Hammurabi, the king of Babylon, in about 1750 BC: "a judge, having annulled his decision, if requested, will have to refuse to adjudicate again for twelve times and will be expelled from the office of the judge." The main elements of *res judicata* are also found in the First Statute of Lithuania:

> "We or our lord councillors have to open those books of written law and see: if a case was settled as prescribed by that law, then that court should still follow the decision of that public officer of ours; meanwhile, if the case was settled by that court differently than prescribed by books of written law, then we or our lord councillors must open the books and take a decision according to that written law that we have established for the whole land. And if it happened that a judge took a decision not according to written law and damage is caused for this reason, then the one who took a decision not according to law, must compensate the damages and expenses, and that court decision is to be rendered invalid."[2]

A court decision with a *res judicata* effect prevents making the same claims in another court, using the same legal basis and facts, upon which an effective court decision between the same parties is already rendered. This is required by the principle of legal certainty. As a general rule, the rule of finality applies to decisions taken on the merits of the case. It is also admitted that a court decision on the admissibility of a claim (application) is final, though this may not prevent a court of another jurisdiction to admit a new claim for adjudication if that were permissible and justifiable in another jurisdiction.

Unlike the continental legal system, the common law system does not have origins in the Roman law, such as *res judicata*, though in English and Welsh law an effective court decision is also deemed final. In the common law system, an *estoppel* rule is applied, according to which a new position of a party in the proceedings is not to be deemed lawful if it is contrary to its position in a previous stage of the proceedings. The continental law system and EU law do not recognise this rule, though it is close to the *res judicata* principle. The purpose of *estoppel* is to protect the integrity of the proceedings, preventing a party from gaining an unfair advantage.

2 Lietuvos statutas. The Statute of Lithuania. Statuta Lituaniae. 1529. Vilnius, 2002, p. 167.

In criminal law, *res judicata* principle is close to another principle of this branch of law, namely, *non bis in idem*: no one can be tried or punished twice for the same act.

The application of *res judicata* principle in private international law is the most complicated when a final decision needs to be determined while the parties litigate in different national jurisdictions, where contradictory court decisions can be taken. In private international law, this problem is solved by introducing uniformity for conflict of law rules in different national systems according to requirements of international agreements and the European Union regulations. Regulation (EU) 1215/2012, for example, seeks to facilitate access to justice, first of all, setting forth rules on courts' jurisdiction and rules for the fast and simple recognition and enforcement of judgments in civil and commercial matters handed down in the Member States, whereas Regulation (EU) 2019/1111 sets forth rules on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on intra-EU child abduction. When comparing private international law and public international law, it can be observed that the latter has created basically the same doctrine and practice of *res judicata* based on international jurisprudence, whereas in private international law, the unification was taking place in the form of individual international agreements and EU regulations. In the context of globalization, the situation of *lis pendens*[3] is no longer rare when the same parties in the same dispute apply to courts of different national jurisdictions in order to benefit from laws most favourable for the claimant or applicant. Abuse of conflict of law rules of the governing law is also possible. The court which, without infringing the rules of jurisdiction, is the first to start adjudication of a case, will have a priority to do it. In private international law, determination of jurisdictional priority also allows to answer the question the court of which State will adopt a final decision.

The principle of *res judicata* is based on legal certainty and security. However, like the principle of legal certainty, the principle of *res judicata* is not absolute and must therefore be applied assessing not only whether the decision has come into force but also its legality.

The European Court of Human Rights recognizes the principle of *res judicata* to be a part of the principle of legal certainty. Failure to comply with the principle of *res judicata* may violate the right to a fair trial in accordance with Article 6(1) of the European Convention on Human Rights.

Failure to comply with the EU legal rules in a national court can mean that an effective judgment will be illegal in terms of EU law, as it will be contrary to the

3 This term comes from the Medieval (Vulgar) Latin term *litispendentia*, consisting of *lis, litis*, meaning "dispute, litigation", and *pendere*, meaning "pending, uncertain".

obligations of the State under the Treaty on European Union and the Treaty on the Functioning of the European Union.

2. *Res judicata* in case law of the International Court of Justice

Public international law has taken over the principle of *res judicata* in its traditional civil expression. This is explained by the characteristics of the public international law system, the specifics of creation of its rules. The principles of domestic law of the States, especially of civil law, have been transferred to the international law and order by international courts and arbitral tribunals. The States have recognised this case law, accepting the decisions taken, which often relied on principles of national law. The applicable law is explicitly mentioned in the treaties and agreements establishing international courts or in arbitration clauses, and the "general principles of law" have been cited in the judgments of these courts or in arbitral awards, which were enforced by the States. All this has also given the power of the general principles of law, as sources of law in international law, to the principle of *res judicata*, as well. Prof. Cherif Bassiouni, the most prominent authority in international criminal law, said:

> "It can be argued that "General Principles" create obligations which have the implicit consent of States. This argument can be construed from the fact that "General Principles" are an accepted source of international law and that they are derived from the States' own principles, as ascertained through the inductive approach. Even if express consent were required, it would be satisfied by empirical evidence that principles existing in the national legal system are applicable in international law."[4]

The general principles of law form a constituent part of law applied by the United Nations International Court of Justice according to Article 38(1) of the Statute of the Court:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;

4 Cherif Bassiouni. A Functional Approach to "General Principles of International Law". *Michigan Journal of International Law. 1990, vol. 11, issue 3*, pp. 768–818, at p. 786.

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

In 1920, when the general principles of law were included in the list of sources of international law of the Permanent Court of International Justice attached to the League of Nations (predecessor of the International Court of Justice), the general principles of law were a more important source of law in international law due to gaps in law that still existed.

The general principles of law are not codified in international law (and not in international law only). International courts and arbitral tribunals apply such general principles of law as the principles of legal certainty, good will, prohibition of unjust enrichment, also the principles of *ex injuria jus non oritur, pacta sunt servanda, rebus sic stantibus*, *exceptio non adimpleti contractus*, *lex specialis derogat legi generali, lex posterior derogat legi priori*, *nullum crimen sine lege*, *iura novit curia*, *compétence-compétence, res judicata,* etc. In 2018, the United Nations International Law Commission, which was drafting the codification of international law, included the topic "General principles of law" in its program, and in 2019 its Special Rapporteur, Ambassador Marcelo Vázquez-Bermúdez, presented his first report, in which he, *inter alia*, emphasized that the existence of general principles of law requires evidence that it is recognised by States. In his second report to the International Law Commission in 2021, he indicated that in the jurisprudence of the International Court of Justice, the principle of *res judicata*, "as reflected in Articles 59 and 60 of its Statute", is a general principle of law which protects the judicial function of a court or tribunal and the parties to a case which has led to a final judgment.[5]

The International Court of Justice, in its judgment of 2 February 2018 in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, defined *res judicata* as an established general principle of law:

> "68. The Court has previously had the occasion to emphasize that "the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal." <...>. However, for *res judicata* to apply in a given case, the Court "must determine whether and to what extent the first claim has already been definitively settled", for "if a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it."

5 UN International Law Commission. Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur. UN doc. A/CN.4/741, p. 33.

In this judgment, the International Court of Justice, having referred to its judgment of 2015 between the same parties, stated:

> "These passages indicate that no decision was taken by the Court in its 2015 Judgment on the question of sovereignty concerning the coast of the northern part of Isla Portillos, since this question had been expressly excluded. This means that it is not possible for the issue of sovereignty over that part of the coast to be *res judicata*."[6]

It should be stressed that *res judicata* and other general principles of law are not identical to the principles of international law enshrined in Article 2(4) of the Charter of the United Nations, for example, the principle of non-use of force in international relations, having the power of a peremptory norm (*jus cogens*) in international law.[7] *Jus cogens* principles are norms of international law with supreme power, non-compliance with which in conclusion of international agreements, renders such agreements invalid.

Article 60 of the Statute of the International Court of Justice provides that the judgment of the Court is final and without appeal and gives it *res judicata* effect both with regard to the merits of the case and admissibility of the claim. According to Article 61(1), an application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

Res judicata has the same meaning in international law as in national law: a final judicial decision, preventing adoption of a later, conflicting decision between the same parties and regarding the same matter. Prof. Cheng noted in his famous book "General Principles of Law as Applied by International Courts and Tribunals" that the obligation to carry out a judgment possessing the force of *res judicata* follows logically from the definitive and obligatory character of the judgment, and the party bound by it cannot seek to subordinate its execution to conditions not admitted in the judgment. Where a court has merely declared itself to have no jurisdiction to entertain a suit, this does not prevent the same issue from being presented before another court which may be competent.[8]

6 *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, para. 68 and 69.

7 In the codification project "Peremptory norms of general international law (*jus cogens*)", the UN International Law Commission arrived at the conclusion that the general principles of law, together with the customary international law and provisions of agreements, can be a basis for peremptory norms of general principles of law (*jus cogens*). – UN doc. A/CN.4/706.

8 Bin Cheng. *General Principles of Law as Applied by International Courts and Tribunals*. Cambridge: Cambridge University Press, 1987, p. 338.

The Iran–United States Claims Tribunal applied the rule of *estoppel* in *American Bell International* as a general principle of law:

> "It is a general principle of law that a party which at some stage of judicial or arbitral proceedings admits that certain legal conclusions can be drawn from some facts or circumstances is thereafter estopped from arguing otherwise in the same proceedings."[9]

Although the rule of *estoppel* may be applicable in the course of the proceedings, this does not, however, mean that the decision made in the course of these proceedings will necessarily be final on the merits (*ratione materiae*), therefore, the consequences of *estoppel* and *res judicata* may not coincide.

One of the peculiarities of the resolution of disputes in international law is that, as a rule, court judgments and rulings are handed down in the first instance, which is the only one. Judgements of the International Court of Justice may not be appealed. International agreements may provide for the competence of the International Court of Justice to examine an appeal against decisions of the UN specialised institutions (agencies) established by those agreements. For example, pursuant to Article 84 of the Convention on International Civil Aviation, the Court has jurisdiction to examine an appeal against the decision of the Council of the International Civil Aviation Organization (ICAO).[10] Public international law does not provide for a general right of appeal.

Under international law, authority of *res judicata* attaches not only to the dispositif but covers also elements of the reasoning, at least in so far as they have been determined "expressly or by necessary implication" in the judgment in question.[11] The Permanent Court of International Justice indicated in *Mavrommatis Concessions (Jurisdiction)*:

> "The Court sees no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound, more especially seeing that the two Parties have shown a disposition to accept the point of view adopted by the Court."[12]

The jurisdiction of international courts and arbitral tribunals is based on agreements between States and, therefore, in disputes concerning the interpreta-

9 *American Bell International Inc. v. Iran*. Award of Iran-United States Claims Tribunal (Award No. 255-48-3) of 19 Sept 1986, para. 16.

10 See *Appeal Relating to the Jurisdiction of the ICAO Council (Bahrain, Egypt, Saudi Arabia and the United Arab Emirates v Qatar*, Judgment, I.C.J. Reports 2020, p. 1.

11 Jörg Polakiewicz. *Between ‚Res Judicata' and ‚Orientierungswirkung' – ECHR Judgments Before National Courts*. Brno, Seminar of 19–21 June 2017. Statement by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law, Council of Europe. https://www.coe.int/en/web/dlapil/-/between-res-judicata-and-orientierungswirkung

12 P.C.I.J., Series A, No.11, p. 18.

tion and application of international agreements, their jurisdiction usually limits the scope of examining the disputes, allowing for solving only the issues of interpretation and application of the agreement, the dispute concerning which has been referred to these courts or arbitral tribunals. If a dispute is referred on the basis of a special agreement, pursuant to which the dispute is referred to court or arbitral tribunal, this can put a limit on reasoning the parties are allowed to give. In such cases, the *res judicata* effect of a rendered judgment does not in any way imply that new disputes between the parties may be brought, based on other possible jurisdictional grounds on those matters that have not been resolved by the previous jurisdiction.

The *res judicata* force of the judgments of the International Court of Justice is defined in Article 59 of its Statute, which declares:

> "The decision of the Court has no binding force except between the parties and in respect of that particular case."

The decision does not change rights and obligations of parties that are third parties in the case. A decision of an international court or arbitral award, by which a territorial dispute has been settled, cannot create a territorial sovereignty or borders of a third State. Although the judicial interpretation of a multilateral convention could affect the interests of all States that are parties to the convention and set a precedent, a decision on territorial issues cannot change the rights and obligations of third States which are not parties to the dispute even if they were joined to the case as the States concerned. A distinction should be made between procedural rights according to the Statute of the International Court of Justice and substantive rights under international law. States must not infringe the territorial rights of other States under international law, they must respect the rights and obligations of third States as defined by the International Court of Justice in its decision. As regards the territorial rights of third States and *res judicata* consequences for such rights, the International Court of Justice emphasized in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*:

> "As was stated in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the Court's Judgment may only address the maritime boundary between the Parties, "without prejudice to any claim of a third State or any claim which either Party may have against a third State" <…>. The Judgment can refer to those claims but cannot determine whether they are well founded. Conversely, a judgment rendered by the Court between one of the Parties and a third State or between two third States cannot *per se* affect the maritime boundary between the Parties. The same applies to treaties concluded between one of the Parties and a third State or between third States."[13]

13 *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua),* I.C.J. Reports 2018, para. 123.

According to Article 65 of the Statute, the International Court of Justice may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. According to Article 38(1)(d) of the Statute, the International Court of Justice may apply advisory opinions as "subsidiary means for the determination of rules of law." The doctrine on advisory opinions of the International Court of Justice says that "although in principle advisory opinions formally do not give rise to *res judicata*, they have been put to use in subsequent contentious cases where the same point has arisen for decision."[14]

The principle of *res judicata* must not be confused with the rule of exhaustion of domestic legal remedies. Claims filed by States on behalf of their citizens and legal entities in international courts and by use of diplomatic defence procedures, as well as applications of natural persons and legal entities to the European Court of Human Rights are admissible only if the injured person has already exhausted legal remedies available to him in a State that has infringed his rights. According to Article 44 of the draft articles on Responsibility of States for Internationally Wrongful Acts prepared by the UN International Law Commission, the responsibility of the State may not be invoked if the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. In its commentary, the Commission noted that this rule applies to any cases to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection. According to international law, it is a procedural measure which differs from using the measures of "examination of the case on the merits" in international court or arbitral tribunal, the decision or award of which acquired the legal force of *res judicata*.[15]

Res judicata of a national court decision does not prevent international courts from deciding that a national decision is contrary to international obligations of the State. According to Article 3 of the Draft articles on Responsibility of States for Internationally Wrongful Acts prepared by the UN International Law Commission, the characterization of an act of a State as internationally wrongful is governed by international law. Such qualification is not affected by the characterisation of the same act as lawful by internal law. However, this does not mean that international courts are competent to annul decisions of national courts which are contrary to public international law even when national courts violate rules on human rights. In such situations, the responsibility of the State under international law arises.

14 Iain Scobbie. Res Judicata, Precedent and the International Court: A Preliminary Sketch *[1999] Australian Yearbook of International Law 16; (1999) 20. p. 4*

15 See International Law Commission. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. United Nations 2001, p. 121.

3. *Res judicata* in case law of the European Court of Human Rights

The European Convention on Human Rights (ECHR) does not guarantee the right to a review of a final decision of a national court. The European Court of Human Rights cannot be expected to review a decision of a national court of a State. It has no such competence.

The right to a fair trial in accordance with Article 6 of the ECHR usually does not apply to the request to review a decision even if new facts emerge. However, if an appeal requesting a review of a national court judgement before national courts is successful, the newly opened national court proceedings are subject to all guarantees concerning the right to a fair trial provided for in Article 6. As regards the reopening of criminal proceedings, it should be noted that the rule *non bis in idem* in Article 4(2) of Protocol No. 7 to the ECHR does not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned if there is evidence of new or newly discovered facts or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

Dr. Jörg Polakiewicz, Director of Legal Advice and Public International Law (Legal Adviser) of the Council of Europe, stressed that although the Convention does not contain a provision which would confer an immediate legal effect upon the judgments of the European Court of Human Rights (ECtHR) in domestic law, it leaves no doubt about binding force of ECtHR judgments in the domestic law of the States parties to this Convention.[16]

Article 44 of the ECHR provides that the judgment of the Grand Chamber of the Court shall be final and that the judgment of a Chamber shall become final after the parties declare that they will not request that the case be referred to the Grand Chamber or three months after the date of the judgment of a Chamber. A request for referral of the case to the Grand Chamber is granted only in exceptional cases. In all the cases referred to above, a judgment of the Court becomes final and not subject to appeal. "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties" (Article 46(1) of the ECHR). If the Committee of Ministers of the Council of Europe, which has control over enforcement of judgments of the ECtHR, decides that the State refuses to abide by a judgment in a case to which it is a party, it serves a formal notice on that party. After that, the Committee of Ministers may refer to the Court the question whether that Party has failed to fulfil its obligation. The binding nature of the final judgment of the ECtHR means not only that the State is obliged to pay the compensation awarded

16 Jörg Polakiewicz. *Between ‚Res Judicata' and ‚Orientierungswirkung' – ECHR Judgments Before National Courts*, op. cit.

by the Court. It must take all steps to eliminate the consequences of a breach of the Convention if they persist. Where a final judgement of a national court, which is not subject to appeal, is to be annulled, such a judgment must be annulled in courts of this State. However, the grounds for reopening of national proceedings are laid down by the laws of that country. For example, Article 366(1)(1) of the Code of Civil Procedure of the Republic of Lithuania provides that civil proceedings may be reopened when the ECtHR states that the judgments of the courts of the Republic of Lithuania in civil matters are in conflict with this Convention. According to Article 456 of the Code of Criminal Procedure, criminal proceedings may be reopened when the ECtHR finds that a conviction has been made in breach of the Convention or its Protocols if violations of the Convention, with regard to their nature and gravity, raise reasonable doubts as to the conviction as such and if it can be corrected only if the case of the convicted person is reopened.

When the ECtHR awards just satisfaction (pecuniary compensation) to the injured individual, it is precise and unconditional, therefore, its enforcement usually does not give rise to particular problems.[17] Practical problems may arise with regard to the declaratory part of judgments where the ECtHR finds that a certain State action (or omission) constitutes violation of the Convention. A question may arise whether a national court ruling contrary to this Convention still has the *res judicata* effect, is final and not subject to appeal. The ECHR does not offer specific provisions to address this problem. The States, High Contracting Parties to this Convention, have limited freedom to choose the means to fulfil their duty to execute a judgment of the ECtHR. The legal consequences of the ECtHR judgments, which find a violation of the ECHR, also apply to national judgments, which means that the State must stop the violation. Continuing violations of human rights must be brought to an end unconditionally and immediately, notwithstanding the fact that the States have paid a compensation and have the right to choose how they will end the violation itself and eliminate the consequences.[18] The States must ensure effective compliance with international obligations in their national law, including abiding by judgments of the ECtHR in cases against that State.[19] This general rule was also mentioned by the Constitutional Court of the Republic of Lithuania in its ruling of 5 September 2012, where it, however, noted that the discretion of the States to choose the ways and measures for the implementation of the Convention and the execution of judgments of the ECtHR is limited, *inter alia*, by the peculiarities of their constitutions, related to the established system

17 *Ibidem.*

18 *Ibidem.*

19 *See* the judgment of the Grand Chamber of the ECtHR of 13 July 2000 in *Scozzari and Giunta v. Italy*, applications nos. 39221/98 and 41963/98, para. 249.

of harmonisation of the national (domestic) and international law. In cases when the legal regulation entrenched in an international treaty ratified by the Seimas is in conflict with the one established in the Constitution, the provisions of such an international treaty do not have priority in their application (ruling of the Constitutional Court of 5 September 2012). However, the Law on the Constitutional Court should stipulate that the proceedings in the case settled by the Constitutional Court can be reopened and the taken decision can be reviewed if the ECtHR holds that the Republic of Lithuania violated the ECHR and such reopening is necessary to protect fundamental human rights and freedoms.

The principle of *res judicata* in the ECtHR case law is an integral part of the right to a fair trial. The ECtHR in its judgment of 21 January 2020 in *Şamat v. Turkey, No. 29115/07*, § 53, confirmed that the right to a fair hearing must be interpreted in the light of the principles of rule of law and legal certainty and encompasses the requirement that where the courts have finally determined an issue, their ruling should not be called into question.

According to the settled case law of the ECtHR, there is no right to reopen proceedings in this court (*Kontalexis v. Greece (No. 2)*, No. 29321/13, § 56). In this case, the ECtHR held in 2011 that Greece had violated Article 6 of the Convention in criminal proceedings against Mr. A. Kontalexis, therefore, he asked a national court to reopen the criminal proceedings. He pointed out to this court that the ECtHR had already stated that one of the judges who had been due to sit during his retrial had suddenly been replaced by a substitute without any reason being given, thereby raising doubts as to the transparency of the procedure and the real reasons for the judge's replacement. After 2011, the Greek Court of Cassation finally dismissed his appeal on points of law on the grounds that the ECtHR's finding of a violation had not concerned the accused's right to be tried by an independent and impartial tribunal. That violation of the ECHR, which had been of a purely formal nature, had been a *fait accompli* (accomplished fact), i.e. it was not continuous. The applicant again addressed the ECtHR, requesting reopening of the proceedings in this court. In its new judgment, the ECtHR reiterated the settled rule that the question of compliance by the High Contracting Parties with judgments of the ECtHR fell outside the jurisdiction of the ECtHR unless it was raised in it by the Committee of Ministers of the Council of Europe under the "infringement procedure" for failure by a State to fulfil its obligations, as provided for in paragraph 4 and 5 of Article 46 of the Convention. Accordingly, in so far Greece did not remedy the violation found by the Court in its 2011 judgment, the ECtHR does not have jurisdiction *ratione materiae*.[20]

20 In accordance with paragraph 4 of Article 46 of the ECHR, the Committee of Ministers may refer to the Court the question whether a Party has not complied with the final judgment of the Court; in accordance with paragraph 5 of Article 46, if the Court finds a violation of the obligation to comply with the final judgment, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken.

Reopening of a criminal case when a person has been finally acquitted or convicted can be in breach of the prohibition to be tried twice for the same offence (*non bis in idem*) according to Article 4 of Protocol No. 7 to the Convention, unless a case is reopened in accordance with the penal procedure of the State concerned if there is evidence of new or newly discovered facts or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. Such reopening may also infringe the right to a fair trial in accordance with Article 6 of the Convention.

An unjustified review of a final court judgment, in which it has established the civil rights and obligations of the parties, may infringe the right to a fair trial guaranteed by Article 6 of the Convention. In case *Esertas v. Lithuania*, no. 50208/06, the ECtHR examined a situation, where facts (absence of contractual relationship in dispute) material for the case were found in the final court decision, but Lithuanian courts reassessed and annulled them in the reopened proceedings by a decision with the *res judicata* effect. However, no new facts were specified in the new decisions taken during the reopened proceedings. The ECtHR held that the court, the decision of which was reviewed, had not made any material error of fact or law. The second set of the proceedings violated the principle of legal certainty. The ECtHR reaffirmed that the right to a fair trial is interpreted in accordance with the principles of the rule of law and legal certainty. It includes a requirement that, where the courts decide a case definitively, their decision must not be questioned. The ECtHR noted that in all legal systems, the *res judicata* effect of judgments does not allow for review of a settled case *ad personam* and *ratione materiae*, that is, between the same parties and regarding the same subject-matter.

In case *Şamat v. Turkey,* no. 29115/07, the ECtHR examined the issue of reopening of proceedings, where the applicants did not have a possibility to rely on *res judicata* because during the negative prescription period of ten years they did not contest an administrative act (change of the legal status of the owners' land plot)), of which they had not been notified. The legal status of the land was definitively established in the Turkish court decision in 1979 but subsequently was amended by an administrative act. The ECtHR decided that the cassation court, depriving the court decision of 1979 of the *res judicata* effect, violated the principle of legal certainty, in spite of the absence of any justified grounds for this, which are admitted in the ECtHR case law as allowing for departure from this principle. Therefore, the principle of *res judicata*, established in paragraph 1 of Article 6 of the Convention, was violated. The ECtHR reaffirmed that a departure from this principle is justified only when made necessary by circumstances of a substantial and compelling character. Higher courts' powers to quash or alter binding and enforceable judicial decisions should be exercised for the purpose of correcting fundamental defects.

4. *Res judicata* in the case law of the Court of Justice of the European Union

According to the jurisprudence of the Court of Justice of the European Union (hereinafter referred to as the "CJEU" or the "Court of Justice"), the EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties establishing the Union, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions of EU law which are applicable to their nationals and to the Member States themselves. Those fundamental characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other.[21] This conclusion of the CJEU applies to the principle of *res judicata*, too.

The judgments of the CJEU, including decisions on appeal and orders of this Court, as well as the effective judgments and orders of the General Court of the European Union are final and not subject to appeal. The preliminary rulings of the CJEU are binding on national courts in the main proceedings before national court making reference to the CJEU. According to Article 44 of the Statute of the CJEU and Article 159 of its Rules of Procedure, an application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

In the landmark *Simmenthal* case, the CJEU held that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law, is under a duty to give full effect to those provisions, if necessary, refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently. It is not necessary for this court to request or await the prior setting aside of such provision by legislative or other constitutional means.[22] In *Kempter* case, the CJEU held that while Community law does not require national courts to raise of their own motion a plea alleging infringement of Community provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as defined by the parties, they are obliged to raise of their own motion points of law based on binding Community rules where, under national law, they must or may do so in relation to a binding rule of national law.[23]

21 See, *inter alia*, case *Wightman and others*, C-621/18, ECLI:EU:C:2018:999, para. 45.

22 Judgement of the European Court of Justice of 9 March 1978 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, ECLI:EU:C:1978:49, p. 24.

23 Judgement of the European Court of Justice of 12 February 2008 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, C-2/06, ECLI:EU:C:2008:78, p. 45.

In its judgment of 16 July 2020, in case *Cabinet de avocat UR*, the CJEU drew attention to the importance, both for the EU legal order and for the national legal systems, of the principle of *res judicata*. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard, can no longer be called into question. The Court of Justice has stressed that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law. The CJEU indicated that EU law does not require a national judicial body automatically to go back on a decision having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court of Justice.[24]

EU law does not require national courts to reopen proceedings for effective judgments after the CJEU has given judgments finding that a national legal act or an effective decision is incompatible with EU law. In this case, the State has a duty to properly implement rules of EU law, and failing that, it becomes legally liable under EU and domestic law.

The rules implementing the principle of *res judicata* are a part of national law and order in accordance with the principle of procedural autonomy of the EU Member States. But, as the CJEU confirmed in its preliminary ruling in *Cabinet de avocat UR,* those rules must not be less favourable than those governing similar domestic actions (principle of equivalence), nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness). Consequently, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law.[25]

The Court of Appeal of Lithuania (hereinafter referred to as the "Court of Appeal") in *Renaissance Insignia Limited v. Ūkio bankas* (civil case No. 2-397-236/2019) referred to a provision of the Code of Civil Procedure, according to which a basis for reopening of the proceedings is newly discovered substantial facts of the case which the applicant did not know and could not know while the case was pending (subparagraph 2 of paragraph 1 of Article 366). The Court of Ap-

24 Judgement of the European Court of Justice of 16 July 2020 *Cabinet de avocat UR v Administrația Sector 3 a Finanțelor Publice prin Direcția Generală Regională a Finanțelor Publice București and Others*, C-424/19, ECLI:EU:C:2020:581, p. 22–24.

25 *Ibidem*., p. 25.

peal held that the preliminary ruling of the CJEU in *C-107/17, Aviabaltika UAB v Ūkio bankas,* cannot be admitted as a newly discovered fact as it does not have all signs of a newly discovered fact because such a ruling was not taken in the course of the litigation, adoption of the ruling by the Kaunas Regional Court, upholding the groundedness of such a ruling by the Court of Appeal of Lithuania and the Supreme Court of Lithuania. While civil case No. B2-1111-254/2014 was pending, the applicant was not aware and could not be aware about the CJEU ruling not because it was prevented by certain reasons but because such facts did not exist and could not exist while the litigation was still ongoing. However, this ruling of the Court of Appeal should not lead to an overly general conclusion that the CJEU judgments are not considered to be newly discovered facts. The principle of *res judicata* certainly does not mean that after the courts of the Republic of Lithuania settle cases definitively, their decisions may not be subsequently called into question where the Court of Justice of the European gives a different interpretation of EU law than Lithuanian courts.

The CJEU judgments may be regarded as evidence that national courts made a fundamental mistake in the application of a provision of EU law and, consequently, also of a provision of Lithuanian law, in their effective decisions. The correction of such a mistake may be necessary to ensure the formation of uniform case law, particularly in the light of the supremacy of EU law. It cannot be said that the reopening of proceedings is possible only if, in the opinion of the court, rules of EU law were incorrectly transposed to national laws that were the subject of a dispute in court. In practice, there are cases where public authorities ignore both provisions of EU law and identical provisions of national law.

According to laws of the Republic of Lithuania, cases can be reopened in administrative courts provided that the applicant presents clear evidence proving a fundamental breach of a rule of substantive law in the decision given (subparagraph 10 of paragraph 2 of Article 156 of the Law on Administrative Proceedings). An obvious breach, which had an impact on adoption of an illegal judgment, may include wrong application of a specific legal rule that has to be applied in the case (ruling of the SACL of 19 February 2011 in administrative case No. P502–19/2011) or failure to apply such a rule at all (ruling of the SACL of 24 February 2012 in administrative case No. P261-36/2012), also referring to an incorrect translation of a legal act (ruling of the SACL of 10 April 2009 in administrative case No. P822-85/2009).[26] Article 451 of the Code of Criminal Procedure provides for the grounds for reopening of criminal proceedings due to the clearly inappropriate application of criminal law. Subparagraph 9 of paragraph 1 of Article 366 of the Code of Civil

26 *See* the summary of the case law of the Supreme Administrative Court of Lithuania in application of the rules of the Law on Administrative Proceedings, p. 872.

Procedure provides that proceedings may be reopened if the judgment (ruling, order or resolution) of the court of first instance contains an obvious error in the application of a rule of law, which may have affected the adoption of an illegal judgment (ruling, order or resolution) and the judgment (ruling, order or resolution) has not been reviewed on appeal. All these grounds for reopening must be applied in cases where an obvious fundamental breach of a rule of EU law is found. The fact that these provisions do not refer to judgments of the CJEU that would require reopening of proceedings and review of effective decisions is not an obstacle for reopening of proceedings in cases where a breach of EU law is subsequently found. It should be borne in mind that the administrative courts of Lithuania and the courts of other EU Member States used to, quite rightly, reopen proceedings in cases of obvious infringements of EU law in decisions that had acquired the *res judicata* effect.[27]

Res judicata is not an absolute principle either in national or EU law. A final decision of a court of higher instance, which is incompatible with EU law, does not constitute a precedent and does not prevent other national courts from taking decisions on the same subject, which would be compliant with EU law.

Lucchini case settled by the CJEU in 2007 was one of the first and most important cases, in which the Court provided for a possibility of reversal of national *res judicata* judgments. The Court of Justice ruled that Community law precludes the application of a provision of national law, 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 which has been found to be incompatible with the common market in a decision of the European Commission. The assessment of the compatibility of the aid with the common market falls within the exclusive competence of the Commission, subject to review by the Community courts only. That rule applies within the national legal order as a result of the principle of the primacy of Community law.[28]

In case *Cabinet de avocat UR*, the CJEU arrived at the conclusion that if the principle of *res judicata* were to be applied in the manner incompatible with EU rules on VAT, the effect would be that, if ever the final national judicial decision that had become final were based on an incorrect interpretation of EU rules, those rules would continue to be misapplied for each new tax year, without it be-

27 *See* the judgements of the Supreme Administrative Court of Lithuania in administrative cases No. P^{444}-129/2008, No. AS^{502}-363/2009, No. P^{444}-129/2008, etc., overviewed, *inter alia*, in Zsófia Varga. *Retrial in the Member States on the Ground of Violation of EU Law*. ELTE Law Journal, 2017 (1). https://eltelawjournal.hu/retrial-in-the-member-states-on-the-ground-of-violation-of-eu-law/

28 See Judgement of the European Court of Justice of 18 July 2007 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, C-119/05, ECLI:EU:C:2007:434, p. 62 and 63.

ing possible to rectify that incorrect national interpretation. Therefore, the CJEU held that EU law must be interpreted as meaning that a national court, in a dispute relating to the value added tax (VAT), may not apply the principle of the authority of *res judicata* where that dispute relates to a different tax period and where the application of that principle would prevent that court from taking into account EU legislation on VAT.[29]

In case *XC and others*, the Court of Justice noted that in order to assess the existence of an infringement of the EU law principle of effectiveness, it must be determined whether the impossibility in national law of requesting the rehearing of criminal proceedings closed by a decision which has the force of *res judicata* makes it impossible in practice or excessively difficult to exercise the rights conferred by the EU legal order. European Union law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, "even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law". But the principle of *res judicata* does not preclude recognition of State liability for the decision of a court adjudicating at last instance (judgment in *Köbler* of 30 September 2003, C-224/01, EU:C:2003:513, paragraph 40). When an infringement of rights conferred by Community law by such a decision of such a court cannot be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights (judgment in *Köbler* of 30 September 2003, C-224/01, EU:C:2003:513, paragraph 34, and judgment in *Târşia* of 6 October 2015, C-69/14, EU:C:2015:662, paragraph 40).[30]

Doc. Dr. Skirgailė Žaltauskaitė-Žalimienė, having analysed the application of the *res judica* principle in the CJEU case law, noted that "it seems from the case law of this court, where adherence to the principle of *res judicata* between the parties plays a key role, that derogation from this principle is possible, however, exceptions are possible only in special cases when major legal interests are to be defended. Member States, therefore, must exhaust all internal procedures available in their national law relating to the review of final decisions in order to be able to correct this breach (judgment in *Kühne & Heitz*)".[31]

Fundamental provisions of the Treaty on European Union and the Treaty on the Functioning of the EU may take precedence over constitutional provisions. This is confirmed by the Constitutional Act "On Membership of the Republic of Lithuania in the European Union". Conflicts of the constitutional nature between

29 *Cabinet de avocat UR,* p. 32 and 34.

30 Judgement of the European Court of Justice of 24 October *2018 XC and Others v Generalprokuratur*, C-234/17, ECLI:EU:C:2018:853, p. 56–59.

31 Skirgailė Žaltauskaitė-Žalimienė. *Teisinio saugumo principas ir Lietuvos Respublikos Konstitucija. Lietuvos Respublikos Konstitucijos dvidešimtmetis: patirtis ir iššūkiai*. Vilnius. Lithuanian Chamber of Notaries, 2012, 146.

previous judgments of national courts and subsequent judgments of the CJEU and the ECtHR should be resolved by changing the Constitution and/or the laws governing the competence of courts. Most rules of the EU Charter of Fundamental Rights are in line with the ECHR rules. According to Article 51 of the Charter, when courts of a Member State of the EU must apply rules of EU law in their cases, they must also apply the rules of the EU Charter of Fundamental Rights.

It looks like that, in the future, the CJEU will directly and definitively recognise the duty of the EU Member States to make sure that *res judicata* judgments of national courts, which are contrary to rules of the EU substantive law and constitute an obstacle to their effective implementation in the EU Member State, are reversed. It seems that the CJEU judgment in C-69/14, *Târșia*, can be a sign of such a trend:

> "30. Nevertheless, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law (see, to that effect, judgment in *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 62)."[32]

The supremacy of EU law requires that decisions of national courts having the force of *res judicata* under national law must be assessed in accordance with the principles of legality and the rule of law enshrined in the case law of the CJEU.

32 Judgement of the European Court of Justice of 6 October *2015 Dragoș Constantin Târșia v Statul român and Serviciul Public Comunitar Regim Permise de Conducere si Inmatriculare a Autovehiculelor*, C-69/14, ECLI:EU:C:2015:662, p. 30.