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Res Judicata in Criminal Matters and the European Courts – A Comparison Between Germany and Italy (Part II)

In the first part of the article, it has been analysed to what extent judgements by the European Court of Human Rights and the European Court of Justice oblige Member States to go back on final judgements in national criminal proceedings. The results of this analysis have then been used for examining the German law on reopening criminal proceedings. The second part of the article focuses on the Italian law on reopening criminal proceedings. It starts with an overview of the Italian legal rules and goes on to explain how judgements by the European Court of Human Rights and the European Court of Justice are taken into consideration in the Italian legal system. The article concludes that both the German and the Italian legal system require changes of law.

IV. Italian Law

The Italian Code of Criminal Procedure (“Codice di Procedura Penale”, in the following “C.p.p.”) provides a specific procedure for reopening criminal proceedings in Art. 629 et seq. C.p.p., the so-called revision (“revisione”). This procedure aims at eliminating a conflict between procedural truth and historical truth.¹ It applies to certain judgements that have become final (Art. 629 C.p.p.): judgements of conviction, judgements issued under Art. 444 para. 2 C.p.p. (that is punishment upon request) and criminal decrees of conviction². The revision can also address single counts of judgements that deal with several counts.³

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1 *Corte Costituzionale* (Italian Constitutional Court), judgement of 4.4.2011, no. 113/2011, part 5, available at <http://www.cortecostituzionale.it/> (last access on 24 October 2015). See also, in detail, *F. Callari*, *La Revisione*, 2nd edition, 2012, pp. 1.

2 Criminal decrees of conviction (“decreto penale di condanna”) are special procedures that allow a sentence to a financial penalty without trial, Art. 459 et seq. C.p.p..

3 *E. Ranieri*, in: A. Gaito (ed.), *Codice di Procedura Penale, Commentato*, 4th edition, 2012, Art. 629, margin no 2.

As the wording shows, judgements of acquittal are excluded from revision. This is because the Italian revision procedure can only be applied in favour of the defendant (Art. 629 C.p.p.). The defendant cannot gain anything from a revision of a judgement that has acquitted him or her. Accordingly, these judgements are rightly excluded. The reason for restricting the revision procedure to convictions is that allowing the revision only for the benefit of the defendant avoids problems with the *ne bis in idem* principle.⁴ *Res judicata* is aimed at preventing repetitive criminal prosecution.⁵ However, a revision procedure that is aimed at the improvement of the defendant's position does not present a risk of repetitive prosecution.⁶ Moreover, Art. 24 para. 4 of the Italian Constitution, which states that the law must state the conditions under which a reparation of judicial faults is possible and thus forms the basis of revision, is understood to apply solely for the benefit of the defendant.⁷ This is why Italian law in principle does not allow a revision to the detriment of the defendant.

Nonetheless, there are cases in which Italian law grants a revision *in peius*, i.e. to the detriment of the defendant. These are included in special laws that have been adopted to deal with serious crimes, such as terrorism and organized crime, especially by mafia.⁸ They allow the revision of the sentence, among other situations, if the defendant has benefitted from extenuating circumstances or impunity provided by the same law and this benefit derived from false declarations.⁹ As these special reasons for reopening criminal proceedings do not apply to ECtHR and ECJ decisions anyway, they will not be discussed further in this paper.

Revision may be requested by the convicted person (or his next of kin or his heir) or the General Public Prosecutor at the Court of Appeal (Art. 632 C.p.p.). In case of revision *in peius*, only the General Public Prosecutor can ask for revision.¹⁰ The revision is an extraordinary judicial remedy and, as thus, only admissible in a limited number of cases. The paper will proceed by first explaining in which cases revision of criminal judgements is possible (I.) and then by discussing the question of how decisions by the ECtHR and the ECJ can be taken into consideration (II.).

4 See G. Lozzi, *Lezioni di Procedura Penale*, 8th edition, 2012, p. 766. From a comparative point of view S. Swoboda, *Das Recht der Wiederaufnahme in Europa*, Onlinezeitschrift für Höchstgerichtliche Rechtsprechung zum Strafrecht (HRRS) 2009, p. 188 et seq. (190).

5 Lozzi (fn. 4), p. 766.

6 Lozzi (fn. 4), p. 766. Chiavario points out that the ECHR does not forbid a revision to the detriment of the defendant, M. Chiavario, *Diritto Processuale Penale*, 5th edition, 2012, p. 668.

7 M. Scaparone, *Procedura Penale*, Vol. 2, 3rd edition, Torino 2013, p. 384.

8 Art. 10 Law of March 29 1982, no. 304; Art. 16 septies Legislative Decree of January 15, no. 8. See also E. Aprile, *Appello, Ricorso per Cassazione e Revisione*, Milano 2013, pp. 378; Chiavario (fn. 6), p. 668.

9 Ranieri (fn. 3), Art. 629, margin no. 4.

10 Chiavario (fn. 6), p. 670.

1. Cases of revision

The cases in which revision may be requested are listed in Art. 630 C.p.p. In general, it is necessary that the arguments presented in the request are able to prove that the convicted person must be dismissed under Art. 529, 530 and 531 C.p.p. (see Art. 631 C.p.p.). Judgements of dismissal (“sentenze di proscioglimento”) are the judgement of non-prosecution (“sentenza di non doversi procedere”, Art. 529 C.p.p.), the judgement of acquittal (“sentenza di assoluzione”, Art. 530 C.p.p.) and the declaration of extinguishment of the offence (“dichiarazione di estinzione del reato”, Art. 531 C.p.p.). This means that the revision basically must show that the person would not have been convicted under the circumstances envisioned in the cases. Excluded are requests that are directed at the recognition of diminished responsibility.¹¹

a) Incompatibility of judgements

Under letter a, revision may be requested “if the facts underlying the judgement or the criminal decree of conviction are incompatible with the facts established in another final criminal judgement issued by the ordinary judge or a special judge”¹².

Letter a addresses the situation that two criminal judgements clash in a way that is logically impossible due to a different factual interpretation.¹³ This can be clarified with an example:¹⁴ A is convicted for homicide. B is charged as his co-perpetrator and is acquitted because the court deems the death to have a natural cause. In this case, the facts of the conviction of A are incompatible with the facts on which the acquittal of B is based, so that, necessarily, one of the judgements must be wrong. Another example would be the case that two different persons are convicted for the same facts and crime, although it is clear that there was only one perpetrator.¹⁵ A logical impossibility also arises if one person is convicted twice for having committed different offences in different places at the same time (e.g., burglary in France and in Poland at 9 p.m. on the same date).¹⁶

Revision is possible if a judgement or a criminal decree of conviction is incompatible with a different final judgement. This means that incompatibility of two criminal decrees of conviction does not allow the revision of the decree.¹⁷ Moreover, letter a only applies to a conflict between final *criminal* judgements (“sentenze penali”), not civil or

¹¹ *Aprile* (fn. 8), p. 350.

¹² All translations of the Italian Code of Criminal Procedure are taken from M. Gialuz/L. Lupária/F. Scarpa (eds.), *The Italian Code of Criminal Procedure*, 2014.

¹³ *Chiavario* (fn. 6), p. 669 et seq. See, on the history of the norm, *F. Cordero*, *Procedura Penale*, 9th edition, 2012, p. 1218.

¹⁴ Example taken from *Lozzi* (fn. 4), p. 767 et seq.

¹⁵ *Ranieri* (fn. 3), Art. 630, margin no 1.

¹⁶ *Scaparone* (fn. 7), p. 385.

¹⁷ *Ranieri* (fn. 3), Art. 630, margin no 1.

administrative ones.¹⁸ Nor does it apply to judgements by the ECtHR.¹⁹ Because revision is only possible for the benefit of the defendant and needs to aim at a dismissal of the case (“proscioglimento”), the conflict is necessarily solved by giving precedence to the acquittal, even if the judgement of acquittal was faulty.²⁰ This shows that the resolution of conflicts between the two judgements is not the only reason for allowing the revision.

b) Revocation of civil and administrative judgements

Art. 630 letter b C.p.p. allows a request for revision “if the judgement or criminal decree of conviction confirm the existence of the offence committed by the convicted person following a judgement issued by the civil or administrative judge which has been subsequently revoked and whereby a decision has been taken on one of the preliminary issues provided for in Article 3 or one of the issues provided for in Article 479”.

Letter b deals with the situation that the criminal judgement was based on a decision in a different area of law that has subsequently been revoked. Revision is possible if the decision that was revoked concerns one of the preliminary issues described in Art. 3 C.p.p. or Art. 479 C.p.p. Art. 3 C.p.p. deals with questions of family status and citizenship, Art. 479 C.p.p. with particularly complex civil or administrative issues. An example under Art. 3 C.p.p. is, for instance, the validity of a marriage in case of bigamy.²¹ The criminal judgement must follow the civil or administrative judgement, meaning that it must explicitly or tacitly refer to the civil or administrative decision.²² The jurisprudence has also applied Art. 630 lett. b C.p.p. to judgements of bankruptcy.²³

Both letter a and b require the requestor to add a copy of the civil or administrative judgement and the notice of revocation to the request (Art. 633 para. 2 C.p.p.).

c) New evidence

Art. 630 letter c C.p.p. contains the case of revision that is most often used.²⁴ A request for revision is possible “if new evidence is found or discovered after conviction and, either independently or jointly with already assessed evidence, proves that the convicted person must be dismissed under Art. 631”.

18 But see *infra* Art. 630 letter b C.p.p.

19 *Corte Costituzionale*, judgement of 16.4.2008, No. 129/2008, available at <http://www.corte-costituzionale.it/> (last access on 24 October 2015).

20 *Lozzi* (fn. 4), p. 768 et seq.

21 *Lozzi* (fn. 4), p. 769.

22 See *Ranieri* (fn. 3), Art. 630, margin no 2.

23 *G. Santalucia*, in: G. Lattanzi/E. Lupo (eds.), *Codice di Procedura Penale, Rassegna di Giurisprudenza e di Dottrina*, Vol. 8, Milano 2013, Art. 630, margin no 2.

24 *Ranieri* (fn. 3), Art. 630, margin no 3.

The main question is when evidence can be regarded as “new”. It is generally accepted that new evidence is not only evidence that has been found after the judgement has become final, but also evidence that was in existence at the time of the judgement but has not been presented at trial.²⁵ Evidence is also new if it has been presented at trial, but has not been evaluated by the judge.²⁶ This is the case if the evidence is not considered in the judgement.²⁷ The reason for this broad interpretation might be that, at that time, an appeal to the Supreme Court was not possible if the judge had omitted to evaluate evidence that had been presented at court.²⁸ After a change of Art. 606 para. 1 letter e C.p.p. in 2006,²⁹ it is now possible to address this issue before the Supreme Court.

The broad interpretation of new evidence is especially problematic when revision of a judgement on request is applied for. A judgement on request is a consensual way of ending the criminal procedure, in other words, a negotiation between the defendant and the prosecutor on the amount of the punishment (see Art. 444 et seq. C.p.p.). If new evidence can be anything that was not taken into account in the judgement, this can effectively make it possible to revoke the consent given on a flimsy basis.³⁰

New evidence is not the same as new facts, so that a new fact in itself does not allow a revision of the judgement.³¹ In any case, the new evidence must be of such a quality as to prove (alone or in combination with the other evidence) that the convicted person ought to have been dismissed. A different evaluation of evidence that had already been presented in the first trial is not considered new evidence.³² Examples of new evidence are, for instance, results of a technical analysis that was not available at the time of conviction or DNA analysis.³³

A change of jurisprudence or law is not new evidence. A change of jurisprudence can under no circumstances provide a reason for going back on a judgement with *res judicata*.³⁴ In contrast, a change of legislation is relevant in Italian law: if a criminal law provision is abolished, the judge revokes the final judgement (Art. 673 C.p.p.).³⁵ However, as revocation is possible, revision under Art. 630 C.p.p. is not admissible.³⁶

25 *Ranieri* (fn. 3), Art. 630, margin no 3.

26 *Aprile* (fn. 8), p. 364; *Chiavario* (fn. 6), p. 669; *Lozzi* (fn. 4), p. 770; *Ranieri* (fn. 3), Art. 630, margin no 3; *Scaparone* (fn. 7), p. 386.

27 *Scaparone* (fn. 7), p. 386.

28 See *Ranieri* (fn. 3), Art. 630, margin no 3.

29 By the Law of 20 March 2006, n. 46.

30 *Ranieri* (fn. 3), Art. 630, margin no 3.

31 *Ranieri* (fn. 3), Art. 630, margin no 3.

32 *Corte Costituzionale*, judgement of 7.4.2014, no. 90/2014, available at www.cortecostituzionale.it (last access on 24 October 2015).

33 *Scaparone* (fn. 7), p. 386. See, in detail, on scientific innovations *Aprile* (fn. 8), p. 367 et seq.

34 Revocation is not possible either, see *S. Ciani*, in: G. Lattanzi/E. Lupo (eds.), *Codice di Procedura Penale, Rassegna di Giurisprudenza e di Dottrina*, Vol. 9, 2012, Art. 673, margin no. 2 with references to jurisprudence.

35 *Santalucia* (fn. 23), Art. 630, margin no 3.

36 *Santalucia* (fn. 23), Art. 630, margin no 3.

d) False documents and other criminal acts

Art. 630 letter d C.p.p. allows the revision “if it is proven that the judgement of conviction has been delivered as a consequence of false documents or statements provided during the trial or any other criminal act deemed an offence by law”. The categories of false documents (“falsità in atti”) and false statements (“falsità in giudizio”) refer to specific crimes that are generally described by these terms.³⁷ Nonetheless, the referral to “any other criminal act deemed an offence by law” makes it superfluous to further define what false documents and statements are, because any type of crime can have led to the conviction.³⁸

The judgement of conviction must be based on the criminal act, i.e. the criminal act must have influenced the judgement. In order to prove the criminal act, the requestor must provide an authentic copy of the final judgement of conviction for the criminal act (Art. 633 para. 3 C.p.p.). This provision also clarifies that the conviction for the criminal act must itself be final and thus endowed with *res judicata*. It is thus not possible to claim that the conviction for the criminal act was wrongful and, therefore, cannot be regarded as sufficient proof.

e) Judgements by the ECtHR

Art. 630 C.p.p. contains only the four cases of revision that have been explained above. The text does not allow for revision after the ECtHR has found a violation of the ECHR. This has been severely criticized in Italian jurisprudence, culminating in the Italian Constitutional Court’s (“Corte Costituzionale”) judgement no. 113/2011, by which the Court declared Art. 630 C.p.p. to be in breach of the Constitution.³⁹

aa) Judgement no. 113/2011 of the Constitutional Court

This judgement of the Constitutional Court did not come out of the blue. In 2008, the Court had already been called to decide (in the same matter) whether Art. 630 lett. a C.p.p. was contrary to the Constitution because it did not apply to judgements by the ECtHR.⁴⁰ The Court rejected the argument, but nonetheless made clear that a change of legislation was in order.⁴¹ In the following years, there were indeed several propo-

37 However, the Italian criminal code (“Codice Penale”) does not use these terms as title for the respective group of criminal acts.

38 *Ranieri* (fn. 3), Art. 630, margin no 4.

39 *Corte Costituzionale*, no. 113/2011 (fn. 1). See also *L. Suraci*, Verso nuovi equilibri in tema di revisione (a proposito di Corte cost. n. 113 del 2011), *Archivio Penale* 2011, no. 2, available at <http://www.archiviopenale.it/> (last access on 24 October 2015).

40 *Corte Costituzionale*, no. 129/2008 (fn. 19), available at www.cortecostituzionale.it (last access on 24 October 2015).

41 *Corte Costituzionale*, no. 129/2008 (fn. 19), part 7. The reason for rejecting the argument was that the individual rights provisions of the Constitution that were challenged (Art. 3, 10, 27) were not infringed, see *Santalucia* (fn. 23), Art. 630, margin no 6.

sals directed at a change of legislation.⁴² However, none of these was adopted. When, in 2011, the Constitutional Court was again asked to decide on the issue, it seized the chance to take a stand on the matter.

It should be noted that the proceedings that gave rise to the decision of the Constitutional Court were, in fact, very well suited to illustrate the negative effects of the lack of a revision procedure. In 1994, the applicant, Paolo Dorigo, had been sentenced to thirteen and a half years of imprisonment.⁴³ In 1998, the European Commission of Human Rights found a violation of Art. 6 para. 3 lett. d ECHR because Dorigo had not had the chance to question all witnesses.⁴⁴ However, executing this decision proved to be difficult because Italian law did not allow for a revision of the case. This was the start of a lengthy period where the case alternated between Italian courts and bodies of the European Court of Human Rights.⁴⁵ Dorigo stayed imprisoned until 2005, when he was released to home arrest and later achieved a suspension of his sentence in 2006.⁴⁶ This means that he spent eight years under arrest although it was clear that the proceedings against him had been unfair. Small wonder that the Constitutional Court finally decided to resolve this issue once and for all, especially considering that the Italian legislator had failed to take action.⁴⁷

The question raised before the Constitutional Court was whether Art. 630 C.p.p. as a whole was compatible with the Italian Constitution, in particular Art. 117 para. 1 of the Constitution, which provides an obligation to respect international law. The Constitutional Court starts by summing up the ECtHR jurisprudence in order to find out how far the obligation to respect ECtHR judgements goes (Art. 46 ECHR). It comes to the same conclusion that has been drawn above – in cases of a grave violation of Art. 6 ECHR, it is hardly conceivable how to achieve fairness without going back on

42 See *Ranieri* (fn. 3), Art. 630, margin no 5.

43 See, for details, *G. Canzio*, *Giudicato “Europeo” e Giudicato Penale Italiano: La Svolta della Corte Costituzionale*, Associazione Italiana di Costituzionalisti, no. 2/2011, pp. 1, available at: <http://www.rivistaaic.it/download/zKfMtmsaVUUqMYaLDsM3fT0ujkVywhFy5-TYmDsH3K4k/canzio-kostoris-ruggeri.pdf> (last access on 24 October 2015); *Callari* (fn. 1), p. 283 fn. 50; *R. Greco*, *Dialogo tra Corti ed effetti nell’ordinamento interno. Le implicazioni della sentenza della Corte costituzionale del 7 aprile 2011*, n. 113, Consulta online, part 1, available at <http://www.giurcost.org/studi/greco.htm> (last access on 24 October 2015); *T. Guarnier*, *Consulta online*, part 1, available at <http://www.giurcost.org/studi/guarnier.htm> (last access on 24 October 2015).

44 *Rapport de la Commission, Requête N° 33286/96*. This decision was binding at that time, see further *Canzio*, *Associazione Italiana dei Costituzionalisti*, no. 2/2011 (supra fn. 43).

45 See *Canzio*, *Associazione Italiana dei Costituzionalisti*, no. 2/2011, pp. 1 (supra fn. 43).

46 “Paolo Dorigo, al via il processo di revisione”, in: *La Nuova di Venezia*, 15.6.2012, available at: http://ricerca.gelocal.it/nuovavenezia/archivio/nuovavenezia/2012/06/15/NZ_19_09.html (last access on 24 October 2015).

47 The inertia of the Italian legislator is severely criticized by Italian scholars. See, e.g., *L. Calò* in: *G. Canzio/G. Tranchina* (eds.), *Codice di Procedura Penale*, Vol. 2, 2012, Art. 630, margin no 6: „assolutamente non scusabile“ (absolutely unexcusable); *Callari* (fn. 1), p. 282: “grave inosservanza di obblighi” (grave disregard of obligations).

the unfair judgement.⁴⁸ The Court gives the example of a trial before a partial and dependent judge, a violation that can hardly be remedied without renewing the trial.⁴⁹ Moreover, the Court points to several Recommendations by the Committee of Ministers that clearly demand a reopening procedure, “[s]trongly urging the Italian authorities to complete, as rapidly as possible, the legislative action needed to make it possible, in Italian law, to reopen proceedings following judgements given by the Court”⁵⁰. The Court then goes on to examine the solutions developed in Italian law, e.g. by the Supreme Court (“Corte di Cassazione”), in order to deal with the problem, but finds them insufficient.⁵¹ As Art. 117 para. 1 of the Constitution obliges Italy to respect international law and thus the ECHR, the Court deems the impossibility to reopen criminal proceedings, if necessary, to be contrary to the Constitution.⁵²

Following this assessment, the Constitutional Court “declares Art. 630 C.p.p. to be contrary to the Constitution, insofar as it does not provide another case of revision of the judgement or the criminal decree of conviction, directed at the reopening of proceedings, when this is necessary according to Art. 46 para. 1 ECHR in order to comply with a final judgement of the ECtHR.”⁵³

What is the effect of this judgement? Generally, a declaration that the norm is against the Constitution renders the norm null and void (Art. 136 Italian Constitution). However, by directing the unconstitutionality at a specific omission, the Court has applied a special form of judgement, the so-called “additive judgement” (“sentenza additiva”). This type of judgement does not render the norm null and void, but adds a part to the law in order to make it conform to the Constitution.⁵⁴ This means that Art. 630 C.p.p. must now be read as including a fifth case of revision covering the situ-

48 *Corte Costituzionale*, no. 113/2011 (fn. 1), parts 4 and 5. See also *Greco*, Consulta online, part 3 (fn. 43).

49 *Corte Costituzionale*, no. 113/2011 (fn. 1), part. 5.

50 Final Resolution CM/ResDH(2007)83 with further references.

51 See a brief summary of different attempts of solving the problem in *Chiavario* (fn. 6), p. 673; *G. Sorrenti*, Crisi e tenuta del mito del giudicato nell’impatto con le condanne emesse a Strasburgo, *Rivista di Diritto Pubblico Italiano, Comparato, Europeo*, No. 2/2015, p. 1 et seq. (2 et seq.), available at: <http://www.federalismi.it/> (last access on 24 October 2015), p. 1 et seq. (7).

52 *Corte Costituzionale*, no. 113/2011 (fn. 1), part 8.

53 *Corte Costituzionale*, no. 113/2011 (fn. 1), operative part. Translation by the author. The original version is: “dichiara l’illegittimità costituzionale dell’art. 630 del codice di procedura penale, nella parte in cui non prevede un diverso caso di revisione della sentenza o del decreto penale di condanna al fine di conseguire la riapertura del processo, quando ciò sia necessario, ai sensi dell’art. 46, paragrafo 1, della Convenzione per la salvaguardia dei diritti dell’uomo e delle libertà fondamentali, per conformarsi ad una sentenza definitiva della Corte europea dei diritti dell’uomo”.

54 On this form of judgement, see *M. Belloci/T. Giovannetti*, Il quadro delle tipologie decisorie nelle pronunce della Corte costituzionale, part 2.4.1, available at http://www.cortecostituzionale.it/documenti/convegni_seminari/STU%20219_Tipologia_decisioni.pdf (last access on 24 October 2015).

ation described in the operative part of the decision of the Constitutional Court.⁵⁵ Indeed, published versions of the Italian Code of Criminal Procedure include a reference to judgement no. 113/2011 of the Constitutional Court.⁵⁶ The Constitutional Court has thus achieved the introduction of a new case of revision into the Code of Criminal Procedure – at least until the legislator takes action.

bb) Content of the new case of revision

The addition to Art. 630 C.p.p. is binding in the form of the operative part of the judgement. However, the operative part describes what is missing from Art. 630 C.p.p. It does not explicitly formulate what ought to be added. Nonetheless, it is possible to gather from the judgement in which situations a revision is possible: every time when Art. 46 ECHR demands a reopening of criminal proceedings.

Although it is clear from the reasoning of the Court why they chose this requirement as the basis for revision, it is not without problems because it requires an evaluation of the obligations under Art. 46 ECHR. This is easy if the ECtHR has suggested specific or general measures in the operative part of the judgement.⁵⁷ However, if the Court has not included these measures in the judgement, it is up to the judge dealing with the revision to decide whether or not the violation of the ECHR can only be remedied by renewing the trial. It has been suggested that the Constitutional Court chose such a vague description on purpose in order to maintain the legislator's and the trial judge's discretion.⁵⁸

Other problems derive from the fact that the revision is directed at a dismissal of the case while Art. 46 ECHR demands the execution of the judgement and thus a remedy of the violation of Human Rights. This is not necessarily the same: although there are violations that can only lead to a dismissal of the case (such as, e.g., active provocation of the defendant), many violations do not necessarily need to have affected the outcome of the case. If, for instance, the violation is caused by the fact that witnesses could not be questioned properly, this is remedied by granting the opportunity for questioning the witness in a reopening of the trial. Whether the cross-examination of the witnesses leads to a different outcome or not, is not foreseeable. Nor is it important in the context of Art. 46 ECHR. Accordingly, Art. 631 C.p.p., which provides that the revision must aim at a dismissal, is not applicable for revisions based on judgement no. 113/2011 of the Constitutional Court.⁵⁹ Nor do Art. 637 para. 1 and 2 C.p.p. ap-

55 See also *Scaparone* (fn. 7), p. 386; *Tonini*, *Manuale di Procedura Penale*, 2013, p. 926 et seq. See also Committee of Experts on the Reform of the Court (DH-GDR), *Compilation of written contributions on the provision in the domestic legal order for re-examination or reopening of cases following judgements of the Court*, DH-GDR(2015)002, p. 27.

56 See, e.g., *Gialuz/Lupária/Scarpa* (eds.) (fn. 12).

57 See, on the different measures available to the ECtHR, *A. Schneider*, *Res judicata in criminal matters and the European Courts – a comparison between Germany and Italy*, part I, *European Criminal Law Review* (EuCLR) 2016, p. 7 et seq. (11 ff.).

58 *Guarnier*, *Consulta Online*, part 3 (fn. 43).

59 *Corte Costituzionale*, no. 113/2011 (fn. 1), part 8; *Lozzi* (fn. 4), p. 775.

ply.⁶⁰ These provisions, again, refer to a dismissal of the case and, moreover, forbid a dismissal that is solely based on a new evaluation of the facts. There are also types of violations, such as over-long procedures, that are not helped at all by a revision.⁶¹

These examples show that revision as it is understood in Italy, that is to say, with its strict focus on facts and its limitation to the reopening of trials for the benefit of the defendant, might not be the best procedure for taking ECtHR judgements into account.⁶² The addition to Art. 630 C.p.p. has, subsequently, been called “strange”.⁶³ The Court itself points out that it chose to add a method of dealing with ECtHR judgements to Art. 630 C.p.p. because this – the compliance of Art. 630 C.p.p. with the Constitution – was the question that was put to it.⁶⁴ There are other procedures in Italian law that relate to final judgements that could have served as a model.⁶⁵ In contrast, the new case of revision leads to many new questions, such as whether *reformatio in peius* is possible or to what extent the sentence can be reduced.⁶⁶ Nonetheless, at the moment, the additive judgement of the Constitutional Court is what Italy has got. As long as the legislator does not change the law, it is this decision by the Constitutional Court that is legally binding.

2. ECJ and ECtHR decisions and going back on final criminal judgements

After this brief overview on the cases of revision that are nowadays recognized in Italy, it shall be analysed in how far decisions by the ECtHR and the ECJ allow going back on *res judicata* in the Italian criminal procedure.

a) ECtHR judgements

Italian legislation does not allow for a revision if the ECtHR has decided in the exact case. However, the Constitutional Court has introduced this possibility into the Code of Criminal Procedure in its additive judgement no. 113/2011. As has been explained above, the new case of revision applies in all cases in which Art. 46 ECHR requires the

60 *Corte Costituzionale*, no. 113/2011 (fn. 1), part 8.

61 *Chiavario* (fn. 6), p. 674.

62 *A. Ruggeri*, La Cedevolezza della Cosa Giudicata all’impato con la Convenzione Europea dei Diritti Umani... Ovverosia quando la Certezza del Diritto è obbligata a cedere il passo alla Certezza dei Diritti, Associazione Italiana di Costituzionalisti, no. 2/2011, p. 19, available at: <http://www.rivistaaic.it/download/zKfMtsaVUUqMYaLDsM3fT0ujkVywhFy5-TYmDsH3K4k/canzio-kostoris-ruggeri.pdf> (last access on 24 October 2015).

63 *Guarnier*, Consulta Online, part 2 (fn. 43).

64 *Corte Costituzionale*, no. 113/2011 (fn. 1), part 9.

65 *S. Quattrocchio*, Violazioni di Convenzioni Internazionali e Giudicato Penale Interno, *Rivista di Diritto Processuale* 2012, p. 647 et seq. (653); *A. Presutti*, in: G. Conso/V. Grevi (eds.), *Commentario Breve al Codice di Procedura Penale*, 2nd edition, Padova 2015, Art. 630, part 7. On the possibility of introducing a new procedure, see *Callari* (fn. 1), pp. 322.

66 *Quattrocchio*, *Rivista di Diritto Processuale* 2012, 647 (661 et seq.). See also the discussion in *Sorrenti* (fn. 51), p. 1 et seq. (9 et seq.).

reopening of criminal procedures.⁶⁷ There are three situations in which such an obligation can exist: if the Court has ordered specific measures, if it has rendered a pilot-judgement against the Contracting Party that orders general measures or if the violation is of such a nature that it can only be remedied by renewing the trial (e.g. in case of violations of Art. 6 ECHR).

All these situations are covered by the addition to Art. 630 C.p.p. that was made by the Constitutional Court because it explicitly refers to the obligation resulting from Art. 46 ECHR. The fact that the addition is the result of a decision by the Constitutional Court and not of a legislative process is not important. The Contracting Parties are free to use all possible means for providing a remedy to the violation. As long as it is effective, it does not matter whether the remedy is the result of legislative or jurisprudential initiative. Therefore, the judgement of the Constitutional Court complies with the requirements of the ECHR.⁶⁸

It should, moreover, be stressed that the addition to Art. 630 C.p.p. does not only apply in cases where the ECtHR has rendered a judgement on the exact matter, but also, under certain circumstances, in similar cases. This is because an obligation to reopen criminal proceedings in different matters can arise out of a pilot-judgement where general measures are required in order to deal with a systematic problem in national law. If that is the case, the obligation within Art. 46 ECHR, and thus the additional case of revision, entails the revision of any judgement that is based on the same systematic problem. However, the pilot-judgement procedure only binds the Contracting Party that is party to the judgement, not any other Contracting Party. Therefore, the Italian Supreme Court has rejected a request for revision that was based on the ECtHR judgement *Öcalan v. Turkey* because this judgement was not binding for Italy according to Art. 46 ECHR.⁶⁹

b) ECJ judgements

Italian law does not allow the reopening of criminal proceedings after an ECJ judgement. Art. 630 C.p.p. does not include ECJ judgements as a case of revision. Nor has the Constitutional Court rendered an additive judgement on ECJ decisions. In principle, the non-providing of a case of revision for ECJ decisions is not a problem because EU law does not oblige the Member States to go back on judgements with *res judicata*.⁷⁰ However, as has been explained above, Art. 4 para. 3 TEU does oblige the Member States to guarantee the equivalence and effectiveness of EU law.⁷¹ Accordingly,

67 See IV. 1. e).

68 See also *Sorrenti* (fn. 51), p. 1 et seq. (8).

69 *Corte di Cassazione*, sez. VI Penale, judgement of 23.9.2014, n. 46067, part 5, available at: <http://www.italgiure.giustizia.it/sncass/> (last access on 24 October 2015). The judgement refers to *European Court of Human Rights* (ECtHR), *Öcalan v. Turkey*, Application no. 46221/99, Judgement 12 May 2005.

70 See *Schneider*, EuCLR 2016, 7 et seq. (16 ff.).

71 See *Schneider*, EuCLR 2016, 7 et seq. (17 ff.).

Italian law ought to allow the revision in case of an ECJ judgement if it offers protection in equivalent situations. It is thus necessary to analyse whether ECJ decisions should be treated equivalently to ECtHR decisions and Constitutional Court decisions.

aa) Comparison with ECtHR judgements

After the decision no. 113/2011 of the Constitutional Court, judgements by the ECtHR can give rise to the revision of the proceedings if Art. 46 ECHR requires this. The question is whether an equivalent case of revision ought to be added to Art. 630 C.p.p. for EU law. The term “ought to” is used in this context because it is difficult to see how a mere interpretation of Art. 630 C.p.p. could lead to the inclusion of ECJ judgements.⁷²

In any case, ECJ judgements only have to be treated similarly to ECtHR judgements if the situation is, indeed, equivalent. As has already been pointed out, there is a crucial difference between judgements by the ECJ and the ECtHR: the latter generally concern an individual application in proceedings that have already been finally decided, while the former are generally important for different proceedings. Judgement no. 113/2011 mirrors this in its reference to Art. 46 ECHR, a provision that defines the obligations to the Contracting Parties that result from a judgement to which they are party (Art. 46 para. 1 ECHR). This means that the addition to Art. 630 C.p.p. is based on an international obligation to comply with the exact judgement and go back on a judgement with *res judicata*.

The situation with ECJ decisions is different. As has been explained above, ECJ decisions usually do not concern cases that have become final under national law.⁷³ Most decisions are preliminary rulings. Individual applications against EU law have to occur within a limited period of time and, therefore, generally at a time when there is not yet a final national decision.⁷⁴ Therefore, the revision of national final judgements as a consequence of ECJ judgements is mostly relevant in cases that were not part of the judgement. However, there is no obligation in EU law to go back on cases that have already been finally disposed of, at least not in criminal proceedings.⁷⁵ Accordingly, there is no obligation, concerning cases that were not part of the judgement of the ECJ, which is equivalent to Art. 46 ECHR. Therefore, the case of revision provided by the Constitutional Court does not need to be applied to ECJ decisions.⁷⁶

72 From the point of methodology, the only feasible way would be an analogous application of the addition to Art. 630 C.p.p. by the Constitutional Court. Although I cannot claim detailed knowledge of Italian legal methodology, this seems to me to go beyond the effects of an additive judgement. Being the result of a specific constitutional question, an additive judgement ought not to be interpreted in a way that includes different issues.

73 Schneider, EuCLR 2016, 7 et seq. (9f.).

74 See, nonetheless, IV. 2. b) bb) (1).

75 See the references in Schneider, EuCLR 2016, 7 et seq. (16 Fn. 54).

76 Cf. the similar result in German Law, Schneider, EuCLR 2016, 7 et seq. (35).

bb) Judgements of the Constitutional Court

The principles of effectiveness and equivalence that are founded in Art. 4 para. 3 TEU could, however, demand an equivalent treatment of EU law and Constitutional law. If the Italian Constitutional Court declares a norm to be contrary to the Constitution, the norm becomes ineffective from the day after the publication of the decision (Art. 136 para. 1 Italian Constitution). This means that decisions of the Constitutional Court have an *erga omnes* effect. In this respect, they are similar to decisions by the ECJ. Accordingly, EU law and Constitutional law can be regarded as equal.

(1) Art. 673 C.p.p.

Italian law does not provide a case of revision for decisions of the Constitutional Court. At first glance, it thus seems rather odd to raise the question of whether EU law should enjoy equivalent protection – if neither national law nor EU law gives rise to revision of criminal proceedings, both types of law are treated equally, so that the principle of equivalence is satisfied. However, the lack of a relevant case of revision does not mean that Italian law does not take note of judgements by the Constitutional Court. On the contrary, there is a special provision in the Code of Criminal Procedure, Art. 673 C.p.p.

According to Art. 673 para. 1 C.p.p., a judgement of conviction or a criminal decree of conviction is revoked if the provision defining the criminal offence, i.e. the substantive criminal law, is declared constitutionally illegitimate. This also applies if substantive criminal law refers to external law and it is this external law that is declared unconstitutional.⁷⁷ The consequence of such a judgement is thus not the revision of proceedings, but their revocation (“revoca”).

What are the effects of a revocation and in how far does it differ from a revision? The first obvious difference is the place of the respective rules: while a revision is part of the appellate remedies (book IX of the Code of Criminal Procedure), Art. 673 C.p.p. belongs to the rules on enforcement (book X). Therefore, it is the competence of the enforcement judge to revoke the judgement. The enforcement judge is the judge who took the decision to be enforced, thus, either the judge of first instance or, if there was an appeal, the judge of appeal (Art. 665 C.p.p.). Another difference is that Art. 673 C.p.p. does not give the judge discretion to decide on revocation – it simply states that the enforcement judge revokes the judgement. This is a difference to the revision procedure where the judge can either dismiss the request for revision or accept it (Art. 637 C.p.p.). The reason is probably that a long deliberation or a weighing of arguments is rather pointless in cases where the foundation for criminalization has been declared null and void. If the conviction encompasses several offences, of which only one is based on a legal foundation that is contrary to the constitution, the enforcement judge

77 F. P. Pitarresi, in: G. Canzio/G. Tranchina (eds.), *Codice di Procedura Penale*, Vol. 2, 2012, Art. 673, part 1.

must reassess the sentence, taking into account that the offence that has been declared void cannot have an impact on the sentence any longer.⁷⁸

As for the effects of the revocation, it is clear that the judgement cannot be enforced after it has been revoked. Nonetheless, this cannot be the only consequence of revocation. If so, there would be no need to draft a special provision for substantive criminal law in the Code of Criminal Procedure because of Art. 30 of the Law about the Constitution and the functioning of the Constitutional Court.⁷⁹ Art. 30 orders the unenforceability of convictions that were obtained by applying law that has been declared unconstitutional. Revocation must go beyond this.⁸⁰ Therefore, it must also remove the incriminating effects of the judgement.⁸¹ In fact, revocation also occurs after a successful revision: the judge revokes the judgement of conviction and orders the dismissal (Art. 637 para. 2 C.p.p.).⁸² However, in the case of Art. 673 C.p.p., no dismissal is ordered. This is probably because the enforcement judge should not have the competence to overturn decisions by the trial judge. In any case, this means that the revoked judgement as thus is still in existence. Therefore, the revoked judgement still triggers *ne bis in idem* (Art. 649 C.p.p.) and can have an effect in other, non-criminal trials (Art. 651 et seq. C.p.p.).⁸³ Nor does the revocation of a judgement have an effect on confiscation.⁸⁴ A compensation for judicial error (Art. 643 C.p.p.), which can be claimed in case of a revision, is also not possible for revoked judgements.⁸⁵

(2) Analogous application of Art. 673 C.p.p.

Considering that EU law demands the equivalent treatment of EU law and national law, it is clear that the rule on revocation in case of unconstitutionality, Art. 673 C.p.p., must also apply to cases where the ECJ has found that a national law does not conform to EU law. Although there is a difference between abolishment of law and its inapplicability, the effects of inapplicability are not much different for a single case – in both cases, the conviction is based on a rule that should not have had an effect.⁸⁶

78 *F. Caprioli/D. Vicoli*, *Procedura Penale Dell'Esecuzione*, 2009, p. 263 et seq.

79 *Norme sulla Costituzione e sul funzionamento della Corte Costituzionale*, Law of March 11, 1953, no. 87.

80 The exceptional character of Art. 673 C.p.p. in the light of Art. 30 of the law 87/1953 is also underlined by *C. Santinelli*, in: *G. Conso/V. Grevi* (eds.), *Commentario Breve al Codice di Procedura Penale*, 2nd edition, 2015, Art. 673, part 3.

81 *Pitarresi* (fn. 77), Art. 673, part 7; *Ciani* (fn. 34), Art. 673, margin no 6.

82 See, in detail, on the effects of revision *Callari* (fn. 1), pp. 445.

83 *G. Ranaldi*, in: *A. Gaito* (ed.), *Codice di Procedura Penale*, Commentato, 4th edition, 2012, Art. 673, parte. 2. On the consequences *B. Lavarini*, *Corte Europea dei Diritti Umani e “ne bis in idem”*: la Crisi del “Doppio Binario”, *Diritto penale e processo* 2014, Speciale Cedu, p. 82 et seq.

84 *Pitarresi* (fn. 77), Art. 673, part 7.

85 *Pitarresi* (fn. 77), Art. 673, part 9.

86 Different *M. Gambardella*, *Disapplicazione o abolitio criminis per i reati in materia di immigrazione che contrastano con la direttiva “rimpatri”*, *Cassazione Penale* 2012, 1230 (1234 ff.).

This has also been recognized by the Italian Supreme Court.⁸⁷ It remarked that it would be “manifestly illogical to have a norm that provides for revocation of the judgement of conviction in cases when the criminal law provision has ceased to be effective due to having been abolished or declared unconstitutional, but not when this happens [...] as the result of a judgement by the European Court of Justice”⁸⁸ Indeed, in the light of the principles set out in EU law that have been identified above, the assessment of the Supreme Court is absolutely correct. This means that Art. 673 C.p.p. must apply if substantive criminal law that is the foundation for the judgement is contrary to EU law, for instance, because it discriminates EU citizens.⁸⁹

The Supreme Court leaves open whether this “illogic” can be redeemed by an extensive interpretation or an analogous interpretation of Art. 673 C.p.p.⁹⁰ The precise wording of Art. 673 C.p.p. makes an analogous interpretation more likely.⁹¹ In any case, it should be noted that a clear provision stating the equivalent treatment of EU law and national law is needed. Otherwise, citizens of the European Union might not be able to find out that there is the possibility to request a revocation on grounds of incompatibility with EU law.⁹² A change of law is thus necessary.

The analogous application of Art. 673 C.p.p. has since then been applied in several cases of incompatibility of national law with an EU law.⁹³ In 2013, the Tribunal of Rimini (“Tribunale di Rimini”) revoked a criminal judgement because it was not compatible with an EU directive that had become binding after the period of time for implementation was over.⁹⁴ The decision of the Tribunal of Rimini does not refer to a judgement by the ECJ, but to a decision of the Italian Supreme Court that is, however, linked to issues in immigration law that had been decided by the ECJ.⁹⁵ The judge of

87 *Corte di Cassazione*, sez. VII penale, judgement of 6.3.2008, no. 21579, part 8, available at: <http://www.altalex.com/documents/altalex/news/2008/07/07/cassazione-penale-sez-vii-sentenza-29-05-2008-n-21579> (last access on 24 October 2015). See also *Caprioli/Vicoli* (fn. 78), p. 261; *Pitarresi* (fn. 77), Art. 673, part 1; *Vigoni*, Relatività del Giudicato ed Esecuzione della Pena Detentiva, Milano 2009, p. 192.

88 *Corte di Cassazione*, sez. VII, judgement no. 21579/2008 (fn. 87), part 8. The exact wording in the judgement is: “Sarebbe invero manifestamente illogica una norma che prevedesse la revoca della sentenza di condanna nel caso in cui la cessazione di efficacia della norma incriminatrice sopravvenga per abrogazione o per dichiarazione di incostituzionalità e non anche quando sopravvenga (come assume la tesi in esame) per effetto di una pronuncia della Corte di Giustizia.”

89 For other examples, see *Pitarresi* (fn. 77), Art. 673, part 1.

90 *Corte di Cassazione*, sez. VII penale, judgement no. 21579/2008 (fn. 87), part 8.

91 See *Tribunale di Rimini*, decision of February 19, 2013, available at http://www.naga.it/tl_files/naga/documenti/Sentenze%20interessanti/2013/Sentenze%20interessanti%20N.09-2013.pdf (last access on 24 October 2015); *Santinelli* (fn. 80), Art. 673, part 4.

92 According to Art. 666 C.p.p., the Public Prosecutor, the person concerned and his or her lawyer can make a request for an enforcement procedure.

93 See the references in *Santinelli* (fn. 80), Art. 673 part 4.

94 *Tribunale di Rimini*, decision of February 19, 2013 (fn. 91).

95 Namely to *European Court of Justice* (ECJ) 28.4.2011, case C-61/11 PPU (*El Dridi*), [2011] ECR I-3015. The case concerned illicit reentering of the country after removal and the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-

execution thus has to decide independently whether there are sufficient grounds to apply Art. 673 C.p.p. analogously. In complex cases, it might not be easy to find out whether the national law falls within the ambit of a decision of the ECJ. However, the judge of execution can, in any case, refer the case for a preliminary ruling to the ECJ if insecure. This example shows that Italian law has already accepted the notion of an analogous application of Art. 673 C.p.p.

c) Conclusion

As can be seen, the Italian jurisprudence has found ways to comply with obligations from international law. The additive judgement no. 113/2011 covers all cases in which a revision is required by the ECHR and is thus a sufficient solution. The Italian Supreme Court has also recognized the need for equal treatment of EU law and national law in the case of decisions by the Constitutional Court.

However, the principle of effectiveness requires a binding recognition of this equality. Therefore, the Italian legislator should follow the example of the Italian courts and address the problem by proposing a change of legislation. Whether the legislator supports the solution found in the additive judgement for ECtHR judgements or adopts a different solution, e.g. a special procedure for violation of the ECHR, is up to its discretion. Recent changes in legislation point in the latter direction. In 2014, the Italian legislator introduced Art. 625 *ter* C.p.p. as a new tool to address the problem of trials *in absentia*.⁹⁶ This provision allows under certain circumstances the rescission of the judgement (“*rescissione del giudicato*”). Rescission is a new form of attacking a final judgement and gaining a revocation of the sentence (Art. 625 *ter* para. 3 C.p.p.). Since then, it has been suggested that the tool of rescission could also be used to reopen proceedings after a decision by the ECtHR.⁹⁷ Nonetheless, an explicit reference to ECtHR decisions is still required. Time will tell whether Art. 630 C.p.p. or Art. 625 *ter* C.p.p. will be promoted to this role by the Italian legislator or whether a completely different solution will be found. In the case of ECJ judgements, the options are far more limited because EU law demands equal treatment. Subsequently, new legislation must not offer less protection than is offered to national law. In any case, it is the legislator’s turn now.

country nationals. The legal history of this conflict cannot be explained in detail here. See, for instance, the overview in *L. Maserà*, *Approda alla Corte di giustizia UE la controversa questione della compatibilità con la cd. direttiva rimpatri del delitto di illecito reingresso nel territorio dello Stato* (art. 13 co. 13 T.U. imm.), *Diritto penale contemporaneo*, July 2, 2014, available at http://www.penalecontemporaneo.it/tipologia/0/-/-/3165-approda_alla_corte_di_justizia_ue_la_controversa_questione_della_compatibilit__con_la_cd__direttiva_rimpatri_del_delitto_di_illecito_reingresso_nel_territorio_dello_stato__art_13_co_13_t_u_imm/ (last access on 24 October 2015); *Gambardella*, *Casazione Penale* 2012, 1230 (1230 ff.).

⁹⁶ Art. 11 of the Law of 28 April 2014, no. 67.

⁹⁷ See, e.g., *M. Bargas*, *La Rescissione del Giudicato ex Art. 625 ter c.p.p.: un Istituto da Rimeditare*, *Diritto Penale Contemporaneo* no. 1/2015, p. 160 et seq. (162) with further references.

V. Summary

The analysis has shown that the concept of *res judicata* is not untouchable in European Law. The ECtHR has more and more questioned the value of *res judicata* in case of violations of Human Rights, leading to a need to provide a reopening procedure in criminal cases where grave violations took place. In case of ECJ decisions, it is generally not necessary for the Member States to go back on judgements with *res judicata*. However, the principles of effectiveness and equivalence demand an equal treatment of national law and EU law in all aspects, including the reasons for reopening criminal proceedings.

A look at the German and Italian legal orders has revealed that both require changes of law. The German law on reopening criminal proceedings in case of an ECtHR decision, in its common interpretation, does not fully comply with the requirements that arise out of Art. 46 ECHR. The Italian additive judgement does comply with these requirements, but is only the second best solution after a legislative intervention. Both states lack legislation on the reopening of criminal proceedings after ECJ judgements, though. Italian jurisprudence, at least, recognizes the need to apply Art. 673 C.p.p. analogously to ECJ decisions, while German jurisprudence has so far rejected the possibility of an analogous application of § 79 para. 1 BVerfGG. In that respect, Italy seems to have a slightly better grasp of the problem than Germany at the moment.

In any case, the results are rather alarming. Considering that both Germany and Italy have a strong legal tradition based on the rule of law, it is surprising how reluctant the states are to recognize the impact of the judgements of the ECtHR and ECJ on final criminal judgements. This is particularly true for Italy where someone like Paolo Dorigo could remain under arrest for eight more years based on criminal proceedings that had violated Human Rights, just because the legislator would not take action. But Germany is also too slow in recognizing its obligations deriving from the ECHR and TFEU. Hopefully, this paper has served to clarify the issues and to show which changes to the law are necessary. It remains to be seen how the Member States will deal with the problem in the future, especially when the EU becomes Contracting Party to the ECHR.⁹⁸

98 See, on this, *Greco*, Consulta online, part 5 (fn. 43).