

**PROCEDURAL LAW AS AN EXERCISE IN RECONCILING PUBLIC INTEREST
AND INDIVIDUAL RIGHTS: THE EXAMPLE OF *RES JUDICATA***

*Araceli Turmo**

Abstract. *Res judicata* is a quasi-universal principle, present in every modern European legal system. Although it is understood in very different ways in Civil Law and Common Law traditions, it plays a remarkably similar role in both. This is notably due to the fact that *res judicata* is based on overarching aims present in all procedural legal systems: the public interest in ensuring the finality of litigation and the authority of courts, and the protection of litigants' rights. It is necessary to take into account both objectives in order to understand the doctrine of *res judicata*. These aims sometimes conflict and each legal system attempts to reconcile them within its specific rules concerning *res judicata*. A comparative analysis based on English, French, Italian, Spanish and European Union law shows how the choices made in each system express a balancing act between them.

A. INTRODUCTION

Procedural law is presented either as the set of rules by which individual parties rely on the justice system in order to defend their private interests, or as the means by which the justice system seeks to regulate itself to ensure the proper administration of justice or to achieve other aims related to the common good. In truth, these two conflicting aims influence procedural law and it is often the balancing of these rules that determines the specific rules applicable in any given case. *Res judicata* is one of the best examples of this balancing exercise.

The term *res judicata* refers both to a matter already adjudicated and to the rule that prevents the same issue from being raised in later proceedings between the same parties.¹ It operates as a quasi-rule of evidence in every legal system. This contribution, through a comparison between English, French, Italian, Spanish and European Union law, aims to explain how the rules relating to *res judicata* seek to reconcile competing interests. Without providing a comprehensive comparative study, we will seek to show the similarity of the competing policy objectives that underpin the rules concerning *res judicata*.

In Civil Law traditions, under the influence of a faulty translation from the Latin Digest,² *res judicata* was long characterised as a presumption of truth attached to judgments.

* Araceli Turmo is Senior Lecturer at the Université de Nantes, Laboratoire DCS.

¹ In English law, the rule is generally referred to as the 'doctrine of *res judicata*' in contrast to 'a *res judicata*', which is a specific judicial decision.

² Giovanni Pugliese, 'Res iudicata pro veritate accipitur,' (1967) 1-2 Rivista trimestrale di diritto e procedura civile 503, 510-12.

According to a position that, until recently, remained prevalent in French sources, the rule must be understood as a presumption which was rebuttable under certain circumstances, but generally ensured that no one could call into question statements on the law or the facts that had been made in a judicial ruling.³ A more recent view initially developed in Italian law,⁴ characterizes *res judicata* as an attribute of judgments. According to this definition, this attribute does not lead to a presumption concerning the contents of the ruling but is simply the basis for a number of procedural mechanisms that ensure courts do not contradict pre-existing rulings.⁵

In English law, the doctrine of *res judicata* is generally divided into cause of action estoppel and issue estoppel, respectively developed within the Equity and Common Law court systems.⁶ The former applies to litigation arising out of the same facts, between the same parties, litigating in the same capacity – the party is estopped from bringing another action for the same cause.⁷ The latter relates to the issues raised and determined between the parties – parties cannot revisit previously litigated issues in another suit involving a different cause of action.⁸

Although the rule is understood in very different ways by Civil and Common Law systems, its functions are remarkably similar. It always aims to prevent the parties and the courts from re-litigating issues that have already been determined, principally by barring the parties from raising certain issues, and also by allowing parties and courts to refer to points of law or fact that have already been decided, almost as if the previous ruling serves as proof of a certain characterization of the case.

The precise conditions under which a final ruling may be used to preclude further litigation vary in time and between legal systems. The general rule, however, remains based on two considerations expressed by Latin maxims *quia interest reipublicae ut sit finis litium* and *nemo debet bis vexari pro una et eadem causa*.⁹ The first relates to the interest of the

³ The origins of this position can be found in the writings of Domat from the 17th century. It explicitly appears in the 18th century: Robert J. Pothier, *Traité sur différentes matières de droit civil, appliquées à l'usage du barreau et de la jurisprudence française, t. 1* (Jean Debure 1773) para 886.

⁴ Daniel Tomasin, *Essai sur l'autorité de la chose jugée en matière civile* (L.G.D.J. 1975) 330.

⁵ Walter J. Habscheid, 'Quelques questions fondamentales concernant l'autorité de la chose jugée en droit comparé', in *Liber amicorum Adolf F. Schnitzer* (Georg 1979) 179, 181.

⁶ Robert W. Millar, 'The Historical Relation of Estoppel by Record to Res Judicata' (1940-1941) 35 *Illinois Law Review*, 41. In US law, these are referred to as 'claim preclusion' and 'issue preclusion'.

⁷ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 640, [1965] All ER 4 (per Lord Denning) at 8.

⁸ *ibid.*

⁹ 'For it is for the public good that there should be an end to litigation' and 'No one shall be troubled twice for the same cause'. See Lord Bridge in *Thrasivoulou v Secretary of State for the Environment* [1990] 2 AC 273, 289C-D.

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legal system as a whole in ensuring the finality of litigation. The second shows a different goal, that of protecting each party's rights through preventing further litigation on issues that have already been decided upon by a court.

The goals attributed to *res judicata* in these maxims may be linked to the principle of legal certainty, on the one hand, and to the principle of effective judicial protection on the other. These principles are present in a variety of forms in every modern legal system as they express concerns central to judicial institutions' very *raison d'être*. Legal communities within the European Union and its Member States generally perceive *res judicata* as being concerned with legal certainty and the good functioning of legal and judicial systems. However, a more balanced approach can be found in Common Law systems and in Spanish Constitutional Law, which also view *res judicata* as a tool that protects the subjective rights of the parties.

A theoretical analysis of the foundations of *res judicata* must therefore simultaneously rely upon aims relating to the general functioning of the legal system and the subjective rights of the parties. Although these aims coexist and can both serve as justifications for the doctrine of *res judicata*, they are often presented as being in conflict and leading to opposite solutions in specific cases. The rules deriving from *res judicata* can therefore be understood as the results of conciliation between these conflicting aims.

B. RES JUDICATA AS AN EXPRESSION OF CONFLICTING AIMS

Res judicata is a perfect example of the way in which procedural law seeks to respond to two very different, if not irreconcilable, objectives. The first is to ensure the stability of legal relations recognized or established by the courts, and thus the authority of the judicial system as a whole. This makes it possible for parties to trust the courts and the legal system. The rule of law relies upon the ability of the legal system to provide final rulings on the conflicts that arise within a society. Otherwise the state would be unable to comply with one of its most basic functions as described in social contract theory. Confidence in the court's ability to ensure compliance with the law and with its own rulings is therefore one of the main objectives of any procedural law.

The second objective concerns the protection of the subjective rights of individuals who resort to litigation in order to resolve disputes. Procedural rules should be set up so as to allow parties to make their positions heard during judicial proceedings, and to ensure that they comply with the resulting decision. Here, too, the ability to ensure that the court's

decision is final plays an essential part since it allows the parties to protect their rights. Both aims must be taken into account – procedural law as a whole, and the doctrine of *res judicata* in particular.

1. *Res judicata* as a requirement derived from the public interest

The prevailing view in Civil Law systems is that *res judicata* primarily serves the interests of the legal system as a whole. *Pro utilitate publica rebus judicata stare conveniat*,¹⁰ public utility requires us to abide by what has been judged. The social need for final decisions to be made by courts in order to resolve conflicts is notably expressed by the principle of legal certainty. This requirement may also be linked to the concepts of judicial economy, or the proper administration of justice; they all require litigation to lead to a final decision for reasons related to the adequate functioning of the legal system. No legal system can function without the irreversibility of judicial decisions. Without it, the authority of courts would be undermined; they would not be able to render final judgments and would therefore be unable to fulfil their role in ensuring the stability of legal relations.

The same view may be found in the Common Law tradition, in which the phrase *quia interest reipublicae ut sit finis litium*¹¹ is often used in judgments concerning *res judicata*. The adversarial nature of the Common Law system generally means that *res judicata* is characterized as an estoppel, making it a tool that allows each party to defend its own interests. But the courts are also well aware that this doctrine, perhaps chiefly, serves a more general purpose within the legal system. Lord Wilberforce wrote in 1977:

English law, and it is safe to say, all comparable legal systems, places high in the category of essential principles that which requires that limits be placed on the rights of citizens to [...] reopen disputes [...] Sometimes fresh material may be found which might perhaps lead to a different result, but in the interests of peace, certainty and security it prevents further enquiry.¹²

This ‘essential principle’ must indeed be understood as expressing a value that is central to any legal system, and it can be said that ‘the rule of *res judicata* [...] is dictated by a wisdom which is for all time’.¹³ A general concern for the stability of the legal system and the

¹⁰ Henri Roland et Laurent Boyer, ‘Res judicata pro veritate accipitur’ in *Adages du droit français* (4th edn, Litec 1999) 790.

¹¹ ‘Because it is for the public good that there should be an end to contention’: John W. Jones and William Blackstone, *A Translation of All the Greek, Latin, Italian and French Quotations which Occur in Blackstone’s Commentaries on the Laws of England* (T. & J.W. Johnson 1905) 241.

¹² *The Amphyll Peerage* [1977] AC 547, 569.

¹³ *Sheoparson Singh v Ramnandan Singh* (1916) LR 43 Ind App 91, 98, PC (Jenkins).

authority of the courts is undoubtedly one of the main justifications for the existence of the rule of *res judicata* in any legal system.

In terms of general principles known to Civil Law systems, legal certainty and judicial economy both serve as justifications for the existence of *res judicata* and play a significant part in guiding the courts towards the specific rules which determine its scope. Legal scholars refer to legal certainty more explicitly because it has been recognized as a general principle in a number of Civil Law traditions. Here, it serves as shorthand for the general interest of stability within the legal system.¹⁴ The European Court of Justice (ECJ) has called it a fundamental principle of European Union law.¹⁵ It is now accepted as a general principle of French administrative and constitutional law.¹⁶ Legal certainty was explicitly linked to *res judicata* by the ECJ in the *Eco Swiss* Case. The Court held that:

domestic procedural rules which [...] restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become *res judicata*, are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of *res judicata*, which is an expression of that principle.¹⁷

The *Eco Swiss* Case is one of the best examples of restriction of national procedural autonomy by the ECJ. According to this case, any national court that receives an application for the annulment of an arbitration award must grant that application if the agreement is contrary to Article 81 EC (now 101 TFEU),¹⁸ and where its domestic rules of procedure require it to grant an application for annulment founded on national rules of public policy. However, where domestic rules preclude the re-examination of a final arbitration award which has acquired the force of *res judicata*, EU law does not require national courts to examine whether the agreement upheld by the award was, in fact, contrary to Article 81 EC.

¹⁴ The issue of whether legal certainty may also be considered a right and not only an overriding principle guiding legal institutions is beyond the scope of this paper. EU law certainly offers a number of examples of fundamental rights being explicitly linked by the Courts to the general principle of legal certainty, see Jean-Pierre Puissech et Hubert Legal, 'Le principe de sécurité juridique dans la jurisprudence de la Cour de justice des Communautés européennes' (2001) 11 Cahiers du Conseil constitutionnel.

¹⁵ ECJ Case C-110/03, *Belgium v Commission* [2005] ECLI:EU:C:2005:223, 30. Case law concerning the general principle of legal certainty is much older, its starting point may be found in Case 13/61, *Bosch* [1962] ECLI:EU:C:1962:49.

¹⁶ Philippe Raimbault, *Recherche sur la sécurité juridique en droit administratif français* (L.G.D.J., 2009) 8.

¹⁷ ECJ Case C-126/97, *Eco Swiss* [1999] ECLI:EU:C:1999:269, para 46.

¹⁸ Article 101 TFEU prohibits agreements between undertakings, which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market.

The specific context of the case provides the best explanation for the introduction of an explicit link between legal certainty, a well-established general principle of EU law, and *res judicata*. The latter is characterized as an expression of legal certainty to reassure the national courts that the encroachment into domestic procedural law is limited and does not call into question national rules ensuring the finality of judicial decisions. The Court is defending its position in anticipation of possible negative reactions from Member States by affirming its commitment to *res judicata*. Legal certainty is used as a sort of ‘meta-principle’, whose importance has long been recognized in European Union law. The link established with the rule of *res judicata* is therefore meant to signify that the ECJ is acting in good faith, and will not undermine a rule that embodies an important principle.

This kind of reasoning has often appeared in rulings in which the Court restricted the procedural autonomy of Member States, especially in cases in which the *ratio decidendi* is in direct opposition to the domestic rules of *res judicata*, such as those concerning the *Köbler* principle. The *Köbler* ruling directly quotes *Eco Swiss*.¹⁹ But other examples such as the *Industry Masetto Schio Case*²⁰ also use this reference to legal certainty to reassure Member States as to the EU Courts’ respect for *res judicata* as a domestic principle.

However, the importance of the link established by the ECJ between *res judicata* and legal certainty must not be underestimated. The reference to the principle of legal certainty has found its way into cases that only concern EU procedural law. This probably started as a simple transfer from the reference for more obvious ‘diplomatic’ reasons in cases concerning domestic procedural rules. The success of the combined reference to *res judicata* and legal certainty is nevertheless the result of a common understanding that legal certainty expresses one of the main foundations for the existence of *res judicata*. In legal systems where the rule is set out in a civil code, such as France,²¹ the link may be restricted to the writings of legal scholars, whereas in European Union law the absence of statutory sources leads the courts to rely on it in order to justify certain decisions.

Absolute legal certainty is unattainable. By its very nature, legal certainty is an essential value in any legal system but cannot be fully realized.²² Its central role explains its use by the ECJ as a ‘meta-principle’ to which secondary principles may be attached. That it

¹⁹ ECJ Case C-224/01, *Köbler v Austria* [2003] ECLI:EU:C:2003:513, para 37.

²⁰ GC Case T-346/06 R, *Industry Masetto Schio v Commission* [2007] ECLI:EU:T:2007:164, para 81.

²¹ Article 1351 of the French Civil Code.

²² Ana María Lourido Rico, ‘La articulación de las relaciones entre la seguridad jurídica y la justicia: la cosa juzgada y algunos de los mecanismos procesales que permiten desconocerla’ (2003) 7 *Anuario da Facultade de Dereito da Universidade da Coruña* 493, 505.

can never be fully ensured means that it must be used as a constant reference point, a standard which procedural law must seek to respect but within the bounds of possibility. With regard to *res judicata*, this means that legal certainty serves both as its theoretical and legal justification, and as a general goal that comes into play whenever the courts or the legislature consider specific rules granting varying degrees of protection to the finality of judgments. This goal is not exclusive, however, and other concerns influence these decisions.

The same goes for judicial economy or the proper administration of justice, which are less often formulated in terms of enforceable general principles and instead derived from legal certainty.²³ There can be no doubt that one of the roles of *res judicata* is to ensure justice is adequately administered and organized.²⁴ By preventing parties from indefinitely raising the same issues, it plays a major part in ensuring that courts are not stalled by lengthy cases. The link between *res judicata* and the proper administration of justice has been established in the case law of the European Court of Human Rights,²⁵ which was quoted almost *verbatim* by the ECJ.²⁶ This case law also reflects a recent emphasis on judicial economy linked to the judicialization of modern society. The increase in the burden placed on the courts leads to changes that allow for the more effective dismissal of a growing number of cases through the application of *res judicata*. This doctrine can thus become a tool used by the courts in order to prevent the ‘floodgates’ of litigation from being opened. The House of Lords expressed the public interest underlying *res judicata* in similar terms, when Lord Bingham of Cornhill remarked that the interest in there being finality in litigation was ‘reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole’.²⁷

Here, too, the general standard is seen as one of the aims of the rules relating to *res judicata*, but it cannot – and should not – be the only guiding principle. A different approach might lead judges and lawmakers to distort *res judicata*.²⁸ Legal certainty and the proper administration of justice must therefore not be seen as the only justifications or foundations for the rule of *res judicata*.

²³ That is notably the case in EU law, cf. Elsa Bernard, *La spécificité du standard juridique en droit communautaire* (Bruylant 2010) 302.

²⁴ Puissechet et Legal (n 14).

²⁵ *Miragall Escolano v Spain*, App no 38366/97 (ECtHR, 25 January 2000) para 33.

²⁶ ECJ Case C-469/11 P, *Evropaiki Dynamiki* [2012] ECLI:EU:C:2012:705, para 50.

²⁷ *Johnson v Gore Wood & Co.* [2000] UKHL 65; [2001] 1 All ER 481, 31 (per Lord Bingham of Cornhill).

²⁸ Robert C. Casad and Kevin M. Clermont, *Res Judicata: A Handbook on its Theory, Doctrine and Practice* (Carolina Academic Pr. 2001) 30.

2. *Res judicata* as a doctrine derived from fundamental rights

The doctrines of legal certainty and judicial economy tend to lead the courts to expand the scope of *res judicata*, thus preventing a greater amount of issues from being re-litigated. However, other policies tend to justify the opposite approach. These other policies are linked to the subjective understanding of *res judicata*, which as a rule must take into account the rights of the parties. *Res judicata* serves the public interest but it also serves the rights of parties who have a vested interest in the finality of litigation. In terms of legal principles, concerns obviously appear in the characterization of *ne bis in idem* as a fundamental right, but they are also expressed as a more general right to a fair trial or effective judicial protection. It is imperative to understand such fundamental rights not as principles that prevent the proper application of *res judicata*, but instead as its foundations.

Ne bis in idem has long been recognized as a fundamental right in Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR)²⁹ and, more recently, in Article 50 of the European Charter of Fundamental Rights. Although it is sometimes considered to be an expression of *res judicata* in criminal law, and the European and national legal systems do not all draw this distinction along identical lines, the consensus seems to be that they constitute two separate legal norms.³⁰ *Ne bis in idem* aims to prevent a double trial but also a double punishment, and is clearly more focused on the protection of human rights than *res judicata*, whose primary purpose is to prevent courts from making two separate and incompatible rulings on the same issue.

However, it seems impossible to characterize *ne bis in idem* as a fundamental right and not also take into account the impact of *res judicata* on the protection of individual rights. Both norms appear to derive from the same combination of aims related to the public interest and legal certainty, and more subjective aims expressed through fundamental rights.³¹ The proximity between them certainly must be taken into account when making the case for the subjective foundations of *res judicata*.

The ‘subjective’ approach to *res judicata* is very familiar to lawyers trained in Common Law systems. Latin maxims *nemo debet bis vexari pro una et eadem causa* and *nemo debet bis vexari pro uno et eodem delicto* are quoted just as often as *interest reipublicae*

²⁹ Article 4 of Protocol No 7 to the ECHR reads as follows: ‘No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law of and penal procedure of that State.’

³⁰ See discussion of this issue in the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-187/01 and C-385/01, *Hüseyin Güzütok and Klaus Brügge* [2002] ECLI:EU:C:2003:87, paras 114-117.

³¹ *ibid*, para. 49.

ut sit finis litium in discussions of the origins of the modern doctrine of *res judicata*.³² They convey the idea that no one must be tried twice for the same cause. The finality of litigation is, in a sense, a right conferred to each person, which prevents the adverse party from reopening the suit. This approach was already visible in the words of Lord Coke in 1599:

otherwise great oppression might be done under colour and pretence of law; for if there should not be an end of suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions; and in the end (because he cannot come to an end) compel him (to redeem his charge and vexation) to leave and relinquish his right.³³

This perspective also explains why, instead of only characterizing *res judicata* as a rule of public interest, Common Law courts tend to think of it as an estoppel, ie a rule that prevents a party from making assertions contrary to what has previously been established. In the words of the High Court of Australia, the doctrines related to *res judicata* ‘prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding’.³⁴

Thinking of *res judicata* as a form of estoppel is a very specific trait of Common Law systems. However, the fact that it is also treated as a quasi-rule of evidence in the Civil Law traditions shows that although its foundations may be perceived as related to the public interest, it functions as a tool placed at the disposal of the parties. The premise always seems to be that each party has a vested interest in the finality of litigation, and that defence of their own interests will be enough to ensure *res judicata* is respected. One legal system is known for attributing a constitutional foundation to *res judicata*. Article 24.1 of the Spanish Constitution recognises the right to effective judicial protection (*tutela judicial efectiva*)³⁵ in terms close to those employed in other European countries such as Germany³⁶ or Italy.³⁷ The

³² George Spencer Bower and Alexander K. Turner, *The Doctrine of Res Judicata* (Butterworths 1969) 11.

³³ *Ferrer v Arden* (1599) 6 Co. Rep. 7a, 9a, 77 Eng Rep. 263, 266.

³⁴ *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.

³⁵ Article 24.1 of the Spanish Constitution: 1. Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión. 2. Asimismo, todos tienen derecho al Juez ordinario predeterminado por la ley, a la defensa y a la asistencia de letrado, a ser informados de la acusación formulada contra ellos, a un proceso público sin dilaciones indebidas y con todas las garantías, a utilizar los medios de prueba pertinentes para su defensa, a no declarar contra sí mismos, a no confesarse culpables y a la presunción de inocencia. La ley regulará los casos en que, por razón de parentesco o de secreto profesional, no se estará obligado a declarar sobre hechos presuntamente delictivos.

³⁶ Article 19 §4 of the German Basic Law, 1st sentence: ‘Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen.’

³⁷ Article 24 of the Italian Constitution: ‘Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi.’

originality of Spanish law rather lies in the case law constructed by the Constitutional Court (Tribunal Constitucional) on the basis of Article 24.1. According to case law, the rule of *res judicata* is ‘included’ in the right to an effective judicial protection.³⁸ The Spanish Constitutional Court has explicitly made this fundamental right one of the foundations of *res judicata*. This case law started as early as 1985, when the Court held that a violation of *res judicata* constituted a violation of constitutional law.³⁹ This link is even more explicit in the judgment of 26 October 1987⁴⁰ in which the Court firmly stated that the right of access to a judge would be deprived of its *raison d’être* if constitutional law did not ensure that judicial decisions attain inherent effectiveness, which is attributed to them by the legal system.⁴¹

The requirement for a fair trial to be effective was also affirmed by the ECtHR in the *Golder* case.⁴² This necessarily includes mechanisms that ensure compliance with final judicial decisions. The Spanish Constitutional Court has often reiterated that *res judicata* is one of the rules derived from the right to effective judicial protection. Legal certainty is not, however, excluded as a foundation of *res judicata*. Both general principles are combined, as other rulings show.⁴³ Spanish constitutional case law nevertheless illustrates an essential aspect of this rule, which is all too often forgotten in view of the more obvious or traditional public interest foundation.

Spanish law presents a convincing case for the subjective side of *res judicata*. Effectiveness is one of the most important requirements of judicial protection in any legal system, and that this effectiveness cannot exist if the finality of judicial decisions cannot be ensured. *Res judicata* is a *sine qua non* requirement of effective judicial protection because it ensures the authority of the courts. The rights recognized or denied to a party by a judgment cannot be called into question indefinitely if recourse to judicial institutions is to have any meaning. *Res judicata* cannot be properly understood without reference to this subjective approach. Litigation is, at its heart, a search for justice and an effective solution to social conflicts. Answering the parties’ questions and concerns remains the goal of any trial, and

³⁸ Tomás Rubio Garrido, ‘Cosa juzgada y tutela judicial efectiva’ (2002) 16 Derecho Privado y Constitución 259, 264.

³⁹ STC 43/85, 22 March 1985, BOE no 94, 19/4/1985.

⁴⁰ STC 159/1987, 26 October 1987, BOE no 271, 1/11/1987.

⁴¹ Para 2 of the legal foundations of the ruling: ‘No es dudoso que este derecho constitucional garantiza, en una de sus diversas proyecciones, el derecho a que las resoluciones judiciales alcancen la eficacia propia que el ordenamiento les reconoce, pues, si así no fuera, el derecho mismo a la jurisdicción, en todo su complejo contenido, quedaría, sin más, privado de sentido.’

⁴² *Golder v United Kingdom*, App no 4451/70 (ECtHR, 21 February 1975).

⁴³ STC 142/1992, 13 October 1992, BOE no 276, 17/11/1992. See also José Carlos Tomé Tamame, ‘La cosa juzgada formal y la cosa juzgada material’ (2004) 1 La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía 1175, 1176.

litigants must be able to rely upon these answers. A judgment provides the parties with rights to a particular kind of protection within the legal system. *Res judicata* must therefore be perceived through the rights of the parties, and not just as a tool serving the public interest through judicial economy, or a general goal of stability of the legal system.

Characterizing effective judicial protection as a foundation of *res judicata* can be useful. It provides courts and parties with a standard by which to evaluate specific rules applicable to claims based on *res judicata*. The issue of extension of the scope of *res judicata* to cover elements not previously debated before the court illustrates the importance of the ‘subjective’ approach. In many legal systems, *res judicata* is extended to cover the elements that should have been brought up during the trial, even if they were not. However, an excessive extension will lead to a violation of the right to effective judicial protection. If *res judicata* also covers elements of a ruling such as *obiter dicta*, which the court has not given the parties a chance to discuss, the adversarial principle mandating that both parties must be heard will have been violated. Therefore, in EU law, the right to effective judicial protection prevents the inclusion of such issues within the scope of *res judicata*.⁴⁴

Conceiving of *res judicata* as emanating, *inter alia*, from the fundamental right to effective judicial protection, and taking into account its links with *ne bis in idem*, contributes to a more complete understanding of *res judicata*. This is not only useful in a theoretical study of procedural rules ensuring compliance with judicial decisions, but it is also crucial to understanding specific rules and decisions made by the courts, which are influenced by the need for legal certainty and finality, and by fundamental rights.

C. RES JUDICATA AS A BALANCING ACT BETWEEN CONFLICTING AIMS

The coexistence of public interest and fundamental rights in the foundations of *res judicata* not only justifies the existence of the doctrine in any legal system, but also has a tangible impact on the rules created to ensure its effectiveness. These principles, when applied to the precise questions arising from *res judicata*, do not necessarily lead to the same answers. The protection of the rights of the successful plaintiff and the public interest related to the stability of the legal system will lead to the same preoccupation with the finality of litigation. However, this subjective approach is not sufficient to explain the rules that force parties to consolidate their claims in a single trial. Moreover, in some cases, litigants’ right to effective

⁴⁴ ECJ Case C-352/09 P, *ThyssenKrupp v Commission* [2011] ECLI:EU:C:2010:635, para 132. See also the Opinion of Advocate General Bot in the same case, [2010] ECLI:EU:C:2010:635, para 127 et seq.

judicial protection goes directly against the public interest goals expressed through *res judicata*. Where *res judicata* prevents new elements from being presented to the courts, the goal of stability can sometimes prevent a complete protection of the litigants' rights. In contrast, emphasizing the requirement of effective judicial protection will lead courts to restrict the reach of rules in order to provide stability. Where there is a conflict between the two general aims of *res judicata*, the precise rule applied in each case will depend on the balance struck by each legal system.

The Common Law's estoppel and the Civil Law's objection of inadmissibility, both of which give effect to *res judicata*, rely on other rules regarding its scope. Which parts of the ruling should be considered irreversible; how should the criterion of similarity between the previous ruling and the current suit be interpreted; can objections based on *res judicata* be raised in suits involving different parties; in which cases should there be an exception to *res judicata*? These issues are all determined by balancing the aims of stability and legal certainty, on the one hand, and the effective judicial protection of the litigant on the other. The remainder of this paper will examine the impact of this normative balancing act on both the material and personal scope of *res judicata*, and the exceptions to the rule.

1. The impact of the balancing act on the material scope of *res judicata*

The question of scope gives rise to some of the most problematic issues arising out of *res judicata*. This doctrine forces parties and courts to comply with what has already been determined in a previous decision. Initially this general rule seems simple, but it cannot be applied without a number of precise criteria that determine the similarity between the case at hand and the previous case, and which parts of the previous ruling are to be considered part of *res judicata*. The choices made regarding these criteria are direct results of balancing the conflicting interests.

The material scope of *res judicata* is determined by the similarities between the issues that were decided in the previous ruling, and those disputed in the current suit. The basic rule is that *res judicata* applies *inter easdem personas eadem quaestio*,⁴⁵ ie between the same parties and on the same issue. Thus, the way in which the subject matter of the claim is defined, and the manner in which the identity of the parties is determined, are essential to the application of the rules derived from *res judicata*.

Most legal systems make a distinction between subject matter and cause of action with regard to the material similarities between the previous judgment and the current case.

⁴⁵ Charles Demangeat, Cours élémentaire de droit romain, (Marescq aîné 1866) 680.

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Here, subject matter may be understood as the factual basis for the suit, the situation that gave rise to the previous case, and to the final judgment being invoked. In most systems, subject matter is traditionally defined according to the facts and their legal characterization. Cause of action refers more specifically to the legal basis for the suit, ie legal reasoning based on the facts that support the party's claim, as well as the remedy it seeks. The distinction between cause of action and subject matter appears in French law, which refers to identity in 'cause' and 'object' respectively,⁴⁶ and has, once again, influenced European Union law.⁴⁷ Italian law does not seem to rely on such a neat distinction between factual subject matter and cause of action, although both concepts do appear.⁴⁸ The distinction itself has, at any rate, been the source of heated debate, especially among French authors.⁴⁹

Common Law terminology does not lend itself to such a characterization. Nevertheless, while the cause of action is at the heart of a specific estoppel-based claim, an issue estoppel may arise even in the absence of an identical cause of action. This is why issue estoppel has been called an 'extension' of cause of action estoppel,⁵⁰ which may arise wherever 'a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue'.⁵¹

These general rules may be considered an expression of the search for balance between legal certainty and the protection of the individual rights of litigants. The latter is revealed in writings or case law, according to which one of the primary aims of *res judicata* is to protect litigants from vexatious litigation.⁵² If this is the overriding purpose, then these rules should be applicable only among the same parties, and where the new suit clearly forms part of the litigious matter that has already been decided. This would effectively protect successful parties from a reiteration of previously decided cases, without barring other

⁴⁶ Tomasin (n 4) pp 270-73.

⁴⁷ This terminology first appeared in GC Case T-162/94, *NMB France SARL et al. v Commission* [1996] ECLI:EU:T:1996:71, para 37. The terms 'same purpose' and 'same submissions' also used to appear in the case law and are actually based on an older precedent: ECJ Joined Cases 159/84, 267/84, 12/85 and 264/85, *Ainsworth et al. v Commission* [1987] ECLI:EU:C:1987:172, para 3.

⁴⁸ Frédérique Ferrand (coord.), 'L'étendue de l'autorité de chose jugée en droit comparé', Etude annexée au rapport de M. le conseiller rapporteur Charrault, pour l'arrêt de la Cour de cassation, Assemblée plénière, du 7 juillet 2006, 46.

⁴⁹ See, among others, Henri Motulsky, 'Pour une délimitation plus précise de l'autorité de la chose jugée en matière civile' 1968 *Daloz Chron.* 1, 7.

⁵⁰ Colin Tapper, *Cross and Tapper on Evidence*, (12th edn, Butterworth 2010) 92-93.

⁵¹ *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 105E (per Lord Keith of Kinkel).

⁵² Edward W. Cleary, 'Res Judicata Reexamined' (1948) 57(3) *Yale L.J.*, 339, 346.

litigants from accessing the courts. On the other hand, if stability or judicial economy is the primary objective, a wider understanding of what makes two claims sufficiently similar should be upheld.

This is precisely how recent developments in several legal systems should be interpreted. In 2006, the French Cour de Cassation decided to overrule its previous case law and define ‘cause’, or subject matter, in a purely factual manner.⁵³ This ruling was widely criticized since it leads to a much larger understanding of what is covered by *res judicata*. Instead of being able to raise new claims arising from a different legal characterization of the facts, litigants now must present all possible legal characterizations during the first suit. The aim of this position is clearly to ensure judicial economy and, more generally, the proper administration of justice. A legislative reform having similar effects was introduced in Spain in 2000.⁵⁴ These developments may be linked to the Common Law issue estoppel, which extends to ‘every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time’.⁵⁵

In all of these cases, criticisms arise from the notion that the rights of litigants, particularly the right to effective judicial protection, are being infringed. However it is hoped that, by encouraging the parties to concentrate a litigious matter in a single case, litigation can be better managed and the courts’ caseload reduced. *Res judicata* does not in itself require the courts to define subject matter or identity between subject matters in a more or less restrictive manner. These choices are made according to a balance between broader principles and concerns that influence the rules governing *res judicata*.

2. The impact of the balancing act on the personal scope of *res judicata*

The similarity between the case at hand and the one invoked as *res judicata* relies upon two major criteria: the parties and the subject matter. The identity of the parties involved in both suits does not usually present a problem. According to some sources, the effects of *res judicata* extend to the parties’ privies.⁵⁶ The limitation of the effects of *res judicata* is clearly linked to a concern of fairness to third parties, whose access to justice would be thwarted if

⁵³ Cass., Ass. plén., 7 July 2006, no 4-10.672, rapp. Charruault, avis Benmakhlouf. On this issue, see Roger Perrot, ‘Chose jugée. Sa relativité quant à la cause: qu’en reste-t-il?’ (2006) 4 RTDCiv. 825; and Georges Wiederkehr, ‘Etendue de l’autorité de la chose jugée en matière civile: notion d’identité de cause’ (2007) 17 JCP II 10070.

⁵⁴ According to Article 400.2 of the Ley de Enjuiciamiento Civil, courts may hold facts and legal claims to be identical to those in a case that has already been decided, during which they could have been raised. On this issue, see Sonia Calaza López, ‘La cosa juzgada en el proceso civil y penal’ (2004) 24 Boletín de la Facultad de Derecho de la UNED 131, 142.

⁵⁵ *Henderson v Henderson* (1843) 3 Hare 100, 115 (per Wigram V-C).

⁵⁶ John K. Morris, ‘Nonparties and Preclusion by Judgment: The Privy Rule Reconsidered’ (1968) 56 Cal. L. Rev. 1098.

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the only requirement were stability.⁵⁷ There are however a number of exceptions to the privity rule, which can only be explained by the goal of ensuring legal certainty.

The general rule dates back to Roman law and the maxim *res inter alios judicata aliis neque nocet neque prodest*; simply put, what has been judged cannot harm or benefit others.⁵⁸ It is common to all legal systems, an indication of the influence of Roman law and of a general concern for fairness and access to justice. Allowing *res judicata* to take effect among non-parties will prevent them from presenting their claims before the courts, since they did not have the chance to do so in the previous suit.⁵⁹ This rule according to which *res judicata* only takes effect *inter partes* appears in Article 1351 of the French Civil Code, and similarly in all Civil Law traditions.⁶⁰ It also applies in English law, in both cause of action estoppel and issue estoppel.⁶¹

The privity rule is contrary to the general aim of stability and legal certainty. Allowing a non-party to call into question issues on which a final judgment has already been made could lead to complicated legal situations. However, insofar as the right to effective judicial protection must also be taken into account, preventing non-parties from arguing their case before the courts seems to cause greater harm than the possible problems that might result from allowing several suits to arise between different parties from a single factual situation. This is a typical balancing act between conflicting interests within a legal system.

The existence of such a balancing act appears even more clearly in the *erga omnes* effects of *res judicata* in cases where a ruling declares an act void. This characterization of the effects of judicial review is largely absent from Common Law systems,⁶² but it appears in Civil Law traditions. The French administrative law concept of '*autorité absolue de chose jugée*',⁶³ or absolute *res judicata*, has notably influenced Spanish law⁶⁴ and European Union

⁵⁷ *ibid*, at 1099-1100.

⁵⁸ Georges Wiederkehr, 'Sens, signification et signification de l'autorité de chose jugée', in *Justice et droits fondamentaux: Etudes offertes à Jacques Normand* (Litec 2003) 507, 516.

⁵⁹ Raymond Guillien, *L'acte juridictionnel et l'autorité de la chose jugée* (Université de Bordeaux 1931) 272 et seq.

⁶⁰ For a comparative study of Italian, German and Spanish law, cf. Ferrand (n 48).

⁶¹ See the general review of the doctrine in Common Law in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* UKSC 46, [2014] AC 160, 17 et seq (per Lord Sumption). In the US however, issue preclusion may apply even when the parties are different: cf. Tapper (n 50).

⁶² English law nevertheless does allow nonparties to benefit from the consequences the court draws from the fact that the act is void: Kenneth R. Handley, *Spencer Bower and Handley: Res Judicata*, (4th edn, LexisNexis 2009) 241.

⁶³ Prosper Weil, *Les conséquences de l'annulation d'un acte administratif pour excès de pouvoir* (Jouvet 1952) 88.

⁶⁴ Jesús González Pérez, 'La cosa juzgada en lo contencioso-administrativo', (1952) 8 *Revista de administración pública* 67, 87.

law.⁶⁵ The effect of rulings that lead to the annulment of a legal act, or one of its provisions, is that any such ruling benefits from ‘absolute’ or *erga omnes res judicata*, and thus extends beyond the initial parties. Such a judgment can constitute sufficient grounds for inadmissibility even in cases involving third parties.

The justification for this extended *res judicata* is simple. The act or provision cannot be void or voided, and be still applicable in a different case. All members of the legal system must comply with the court’s finding, otherwise the effectiveness of judicial review would be undermined if its effects were limited to the parties to the initial suit.⁶⁶ If an act is void, it can never again be relied upon before the courts. Absolute *res judicata* must be understood as one of the ways in which the legal order protects the first court’s findings. It nevertheless clearly goes against the maxim *res inter alios judicata aliis neque nocet neque prodest*. In French law, the traditional justification for the exception to the *inter partes* scope of *res judicata* is the supposedly objective nature of judicial review. The aim of the suit is not supposed to be the defence of the claimant’s rights, but that of legality.⁶⁷ When exercising the power of judicial review, courts are in search of an objective truth as to the validity of the legal norm.

Although the reality of this distinction between ‘objective’ and ‘subjective’ litigation has been questioned in recent years,⁶⁸ it provides a theoretical basis for the specific, ‘absolute’ *res judicata* granted in rulings where courts find an administrative or legislative act void in certain legal systems. The justification for this clearly lies in the same effort to reconcile legal certainty and effective judicial protection, as that which warrants the general rule. Here, the balance shifts in favour of legal certainty because there is a greater public interest in the stability of rulings concerning the validity of administrative and legislative acts than in that of rulings that only deal with private interests.

The specific balance struck between the need to provide access to effective judicial protection, and the aim of ensuring legal certainty within the legal system, thus plays a major role in establishing the personal scope of *res judicata*. This scope can vary within a single legal system according to the balance deemed appropriate for the specific contents of judicial decisions.

⁶⁵ ECJ Joined Cases C-442/03 and 471/03, *P & O European Ferries (Vizcaya), SA and Diputación Foral de Vizcaya v Commission* [2006] ECLI:EU:C:2006:356, para 41.

⁶⁶ Andrés de la Oliva Santos, *Sobre la cosa juzgada civil, contencioso-administrativa y penal, con examen de la jurisprudencia del Tribunal Constitucional* (Ed. Centro de estudios Ramón Areces 1991) 128.

⁶⁷ Jean Waline, *Droit administratif* (25th edn, Dalloz 2014) 643.

⁶⁸ In relation to French law, see *ibid* 645-47. In relation to European Union law, see Angela Ward, *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn, OUP 2007) 258.

3. *The impact of the balancing act on the exceptions to res judicata*

The reconciliation of legal certainty and judicial economy, and the right to effective judicial protection, is also manifest in the exceptions to the general rule of *res judicata*. The extension of the personal scope of *res judicata* may itself be considered an exception. However, more problematic consequences arise from the exceptions that lead to a limitation of the scope or effects of *res judicata*. These are rare occurrences due to the essential contribution of *res judicata* to the proper functioning of any modern judicial system. Legal systems, however, do provide exceptions. Furthermore, the inclusion of national courts in the European judicial system, which was required to ensure the effectiveness of EU law, has created another type of exception to the application of domestic rules concerning *res judicata*. All these exceptions have one criterion in common: *res judicata* does not apply where its application would lead to a serious encroachment on the litigants' rights.

Exceptions to the normal application of *res judicata* are clearly based on the idea that justice was not served during the first suit. At least one of the party's rights was violated, and the need to provide effective judicial protection justifies re-litigating the same matter. In English law, although the bar on re-litigation resulting from cause of action estoppel is deemed absolute, exceptions exist in cases of fraud or collusion.⁶⁹ The discovery of new material does not permit the reopening of the case where that rule applies, however it does constitute an exception to issue estoppel.⁷⁰ Although its precise reach has been widely discussed, its description by Lord Sumption in *Virgin Atlantic* illustrates the policy aims behind this exception: issue estoppel bars the raising of certain points in subsequent proceedings 'except in special circumstances where this would cause injustice'.⁷¹

The same concerns justify revision and third party proceedings. Contrary to appeal, which may only be filed before the judicial decision is final, both of these proceedings are generally subject to much broader time limits. Revision is the clearest exception to the maxim which supports the irreversibility of final judgments, *res judicata pro veritate habetur*. Instead of the fiction of truth, here the search for actual truth prevails. Faced with facts which, had they been known to the trial court and the parties, would have led to a different decision, courts must allow the case to be reopened in order to reach a decision based on a

⁶⁹ *Arnold v National Westminster Bank plc*, 104D-E (per Lord Keith of Kinkel).

⁷⁰ *ibid*, 109 (Lord Keith of Kinkel). The precise scope of this exception has been widely discussed, however this debate goes beyond the scope of this contribution.

⁷¹ *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* at 22.

more accurate representation of the facts.⁷² In Civil Law systems such as France,⁷³ or under European Union law,⁷⁴ parties are thus able to institute revision proceedings asking a court to modify an earlier decision.

This exception's very existence is an illustration of the search for balance between stability, and the goals of effective judicial protection and fairness. In cases where litigants were genuinely unaware of the facts that proved decisive, revising an earlier ruling appears necessary in order to adequately protect their rights. However, the need to ensure the stability of the legal system remains a major concern, which translates into very strict admissibility criteria. For instance, in EU law, revision proceedings may only be introduced when a fact has been discovered, the fact is a decisive factor for the ruling to be made, and the fact was unknown to the court and to the party claiming the revision when the case was decided.⁷⁵ To this day, no revision procedure has managed to pass the admissibility criteria applied by EU Courts. Even when the fact brought forward by the applicant is indeed new, the Courts hold that it would not have been a decisive factor in the initial decision.⁷⁶

The high standards applied in the admissibility test are direct consequences of the public interest issues at stake in any exception to *res judicata*. Only exceptional circumstances could justify revising a final judicial decision because this entails a serious encroachment on stability and legal certainty. The same may be said of the lesser exception created by third party proceedings, which allow a third party otherwise unable to take part in the initial proceedings to ask the courts to review a judgment prejudicial to it.⁷⁷ Although not introduced by the parties, these constitute an exception to *res judicata* insofar as their aim is to lead a court to revise its initial judgment. Here, too, the balance between judicial protection and stability largely determines legal standards. By way of example, EU Courts require third parties to have exercised a form of due diligence; for instance, they must be able to prove that a 'diligent litigant' would have had reason to think that the judgment in the initial proceedings would not encroach upon their rights.⁷⁸ Fairness and access to justice justify review of the initial judgment only where the violation of the third party's rights is such as to warrant jeopardizing the stability of the legal system.

⁷² Renaud Colson, 'Recours en révision' (2013) Rép. proc. civ. §1.

⁷³ Article 593 of the French Code of Civil Procedure.

⁷⁴ Article 44 §1 of the Statute of the European Court of Justice.

⁷⁵ Henry G. Schermers and Denis Waelbroeck, *Judicial Protection in the European Union* (Kluwer 2001) 748.

⁷⁶ See, for instance, ECJ Cases 28/64 REV, *Richard Müller* [1967] ECLI:EU:C:1967:20, ECR p 187; C-267/80 REV, *Riseria Modenese* [1985] ECLI:EU:C:1985:427, para 12.

⁷⁷ Article 582 of the French Code of Civil Procedure and Article 42 of the Statute of the European Court of Justice.

⁷⁸ GC Case T-35/89 TO1, *Zubizarreta et al.* [1992] ECLI:EU:T:1992:47, para 33.

Lastly, the exceptions imposed upon domestic rules concerning *res judicata* by the European Court of Justice can also be understood in light of the need to balance the public interest with the rights of litigants. National procedural autonomy is supposed to shield Member States' procedural law from interference by EU institutions. However, in a number of cases, EU law does place requirements on domestic rules of procedure, notably regarding *res judicata*. For instance, the *Kühne & Heitz Case*⁷⁹ creates an obligation for national authorities to re-examine administrative acts covered by *res judicata* if they appear contrary to EU law, where such a procedure exists in domestic law. Although this rule does not apply when domestic law does not allow for such a revision, the heated debate that followed revolved mainly around the need to respect national rules protecting *res judicata*.⁸⁰

Similarly, the ECJ has ruled that when national courts consider, *proprio motu*, the compatibility of an arbitral award with public order, they also have an obligation to raise compatibility issues with rules of European public order, such as the prohibition of unfair terms in consumer contracts.⁸¹ In these cases, EU law restricts the normal application of domestic rules concerning *res judicata*, although it only requires an expansion of exceptions that already exist. More significant restrictions arise from the case law dealing with the use of *res judicata* as a justification for violations of EU law, especially of state aid rules. In these cases, the ECJ has firmly stated that domestic rules prohibiting courts from calling into question a decision which was contrary to EU law must be set aside.⁸² It has also required Member States to adjust long-standing rules concerning State liability for judicial decisions in order to comply with an EU legal principle that was introduced⁸³ notwithstanding States' objections that it went against national rules concerning *res judicata*.⁸⁴

In all these cases, EU law goes against the normal application of *res judicata* under national law in order to ensure its own effectiveness. This can be seen as an expression of a form of European public interest in the functioning of the EU legal system. However, the

⁷⁹ ECJ Case C-453/00 *Kühne & Heitz* [2004] ECLI:EU:C:2004:17, paras 24-26.

⁸⁰ Jan Komárek, 'Federal Elements in the Community Legal System: Building Coherence in the Community Legal Order' (2005) 42 CMLRev. 9, 27; Eleanora Rinaldi, 'Miracoli dei polli olandesi: la primauté del diritto comunitario va "oltre" il giudicato nazionale "anticomunitario". E all'Amministrazione spetta il compito di rimediare...', (2005) Rivista italiana di diritto comunitario 651.

⁸¹ ECJ Case C-40/08, *Asturcom Telecomunicaciones* [2009] ECLI:EU:C:2009:615.

⁸² ECJ Case C-119/05, *Lucchini SpA* [2007] ECLI:EU:C:2007:434; see also Case C-505/14, *Klausner Holz Niedersachsen* [2015] ECLI:EU:C:2015:742.

⁸³ ECJ Case C-224/01, *Köbler v Republic of Austria* [2003] ECLI:EU:C:2003:513.

⁸⁴ Adelina Adinolfi, 'The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case Law: Is Judicial Activism Still Necessary?' in Hans-W. Micklitz and Bruno De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 281; Peter J. Wattel, 'Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This' (2004) 41 CMLRev. 177; Petr Bříza, 'Lucchini SpA – Is There Anything Left of Res Judicata Principle?' (2008) 27 C.J.Q. 40.

Court has often linked it to the protection of the rights that private parties derive from EU law. These rights indeed depend on the use of Member States' institutions as enforcers of EU rules, sometimes against their own domestic legal norms. In this sense, the adjustments required of domestic rules concerning *res judicata* are justified by the need to make sure that they do not prevent access to the proper enforcement of EU law, which is necessary in order to protect the rights of private parties.

The general policy debate at issue is apparent in the ECJ's reasoning itself. In these cases, the ECJ does not frame the debate in terms of exceptions to *res judicata* justified by the efficiency of EU law. Instead, it chooses to present the adjustments made to *res judicata* as justified by a specific balance between effectiveness and legal certainty as a legitimate principle within national legal systems. As these issues are essential to the proper functioning of the EU legal system, EU law must set the balance rather than Member States. Opposing two general principles, which express core values of any legal system, seems to be an attempt to alleviate concerns about interference with domestic *res judicata* rules. The debate is thus framed not in terms of encroachment upon national procedural autonomy, but of general policy orientations.

All of the exceptions to general rules protecting *res judicata* are justified by a shift in the balance between legal certainty and the protection of individual rights. Once again, these policy concerns appear quite clearly – although not always explicitly – in the grounds for these procedural rules, whether they form an integral part of a system's procedural law or answer the specific needs created by the European Union's judicial system.

D. CONCLUSION

Public interest concerns and fundamental rights both contribute to the legal foundations for *res judicata*. They serve as justifications for the general rule that litigation should lead to final decisions, and often they both lead to the same answer on a specific question. However, they can also constitute opposing forces that influence the rules and solutions chosen by lawmakers and judges who determine how *res judicata* should be applied. This overview of select European legal systems illustrates the way in which procedural law is created through a constant search for balance between the competing goals of efficiency and stability on the one hand, and proper access to justice and fairness on the other. Although this search leads to different results in every time period and legal system, the decisive aims remain the same. The universality of these policy issues also explains why, despite having been constructed

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from vastly different historical contexts, the rules governing *res judicata* in fact lead to surprisingly similar solutions in all these legal systems.